



**Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER PO-2847

Appeals PA08-196, PA08-197 and PA08-198

Ministry of Community Safety and Correctional Services



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NATURE OF THE APPEAL:

In early 2008, the Ministry of Community Safety and Correctional Services (the Ministry) received three requests under the *Freedom of Information and Protection of Privacy Act* for information relating to three individuals, a husband and wife and their daughter. One of the parents signed the requests on the child's behalf.

First Request

The Ministry issued an interim access decision and fee estimate in the amount of \$160.00 representing photocopying costs, and requested a deposit of \$80 to begin processing the request.

Second Request

The Ministry issued an interim access decision and fee estimate in the amount of \$800.00 representing photocopying costs, and requested a deposit of \$400 to begin processing the request.

Third Request

The Ministry issued an interim access decision and a fee estimate in the amount of \$420.00 representing photocopying costs, and requested a deposit of \$210 to begin processing the request.

The Requesters Fee Waiver Application

Upon receipt of the Ministry's decisions, the requesters requested that the Ministry waive its fees, totalling \$1380.00, relating to the three requests pursuant to section 57(4)(b) of the *Act* on the basis that paying the fee would cause the requesters financial hardship.

In support of their application, the requesters provided a two page narrative of the financial difficulties the family has experienced as a result of the loss of their family home due to a fire and the father's ongoing legal issues. The requesters attached two bank account summary slips to their application.

The Ministry's Fee Waiver Decision

After considering the information provided by the requesters, the Ministry denied the request for a fee waiver. The Ministry's denial letter stated:

Based on the information you have provided to date, the Ministry is not satisfied that payment of the requested fees would cause your family financial hardship. As a result, the Ministry does not believe it would be fair and equitable to waive the required request processing fees.

The Ministry also advised the requesters in writing that:

...one avenue to reduce the amount of the fees would be to narrow the scope of [the] requests...a very large number of the responsive records in relation to your access requests consist of copies of correspondence between yourselves and various Ministry staff. If you were willing to exclude or reduce this correspondence, the applicable processing fees would be greatly reduced.

... the Ministry is willing to accept payment for the required processing fees in instalments of \$50.00. For example, [records responsive to the first request] could be paid for in two instalments of \$50.00 and one instalment of \$60.00. For each payment received, the Ministry would issue a decision letter for the applicable number of pages of records.

The Ministry's letter to the requesters also referred to conversations between the Ministry and the husband about viewing the records for the purpose of identifying specific records to be photocopied. The Ministry responded that "due to the very large number of records involved, this arrangement is not practical in the circumstances of your requests".

The Requesters' Appeal to this Office

Upon receipt of the Ministry's fee waiver denial, the requesters (now appellants) appealed the Ministry's decision to this office.

Mediation and Adjudication

During mediation, the father requested that the appeal continue in his and his daughter's name alone. Up until that time, all of the correspondence the appellants' sent to this office was signed by the mother and father. The father notified this office and the Ministry that his wife was removing her name as one of the requesters in these appeals. The wife subsequently provided the Ministry with a written consent form authorizing her husband to access any of her personal information that might be contained in the responsive records.

The husband subsequently provided the Ministry with the following additional information relating to his financial status:

- Affidavit, dated November 4, 2008
- Printouts from Canada Revenue Agency dated December 15, 2008 for the appellant's income tax returns for taxation years 2006 and 2007

The Ministry reviewed the additional information provided by the appellant but continued to deny the fee waiver application. The Ministry's second denial letter stated:

The Ministry has given careful consideration to the documentation you have supplied and the provision in [the *Act*] relating to the potential waiving of processing fees.

The Ministry continues to be of the view that you must provide significantly more evidence and details about your family's total financial situation which may include additional information about family income, family assets (including financial settlements) and family expenses. As a result of the foregoing, the Ministry does not believe that it would be fair and equitable in the circumstances to waive the required requested processing fees.

At the end of mediation, the appellant confirmed that he was not appealing the reasonableness of the Ministry's fee. The fee waiver issue remained in dispute and the appeal was transferred to the adjudication stage of the appeals process, in which an adjudicator conducts an inquiry under the *Act*. I decided to commence my inquiry by sending a Notice of Inquiry, addressing all three appeals, and seeking the representations of the Ministry, initially. The Notice of Inquiry sent to the Ministry asked it to provide particulars about its request to the appellant for "significantly more evidence", including documentation regarding the appellant's daughter's financial situation.

A copy of the Ministry's representations was provided to the appellant with a Notice of Inquiry. The appellant made representations but asked that his representations to be withheld due to confidentiality concerns. I sent a letter to the Ministry summarizing the appellant's position and provided the Ministry with an opportunity to provide reply representations. My letter to the Ministry stated:

... you are asked to respond to the appellant's representations that he has provided your office sufficient documentation regarding his financial situation. The appellant submits that he has already provided you with financial documentation about his income, assets and expenses. The appellant also submits that the financial circumstances of his wife is not a relevant consideration in these appeals as she is not one of the requesters. Finally, the appellant submits that it is "fair and equitable" to waive the fees in the circumstances of these appeals having regard to the spirit and purposes of the *Act*.

The Ministry provided reply representations in response.

This order is being issued concurrently with Order PO-2848, which addresses issues arising from the appellant's fee waiver request to the Ministry of the Attorney General.

DISCUSSION:

PRELIMINARY ISSUE

Who is the requester?

The appellant submits that he is the sole adult requester and thus the Ministry should only consider his financial circumstances to determine whether he qualifies for a fee waiver.

The Ministry argues that the appellant's wife and daughter are also requesters. Accordingly, the Ministry takes the position that, in addition to the appellant's financial circumstances, the financial circumstances of his wife and child should be taken into account in determining whether it should waive its fee. The Ministry states:

The requests were submitted by the appellant, his wife and daughter as a family unit and were responded to on that basis. The fact that the appellant's wife has supplied a personal information disclosure authorization directing the Ministry to release her personal information to her husband indicates to the Ministry that she continues to be an involved an interested party for the purposes of the requests.

The Ministry states that it treated the three requests as "personal information" requests "for access to information relating to all three original requesters." It appears that the Ministry's position is that its estimated fee was calculated on the basis that the three requesters were seeking access to their own information. Accordingly, fees that could be charged if a portion of the request was treated as a request for general records were not charged. For example, the fee provisions of the *Act* allow institutions to charge a fee for manually searching general records but are prevented from charging the same fee for records containing the requester's personal information.

The appellant argues that his fee waiver request should be based solely on his financial circumstances, as his wife is no longer a requester. He also argues that his daughter's financial circumstances should not be considered as she is a young child. Finally, the appellant submits that the Ministry's requests for documentation relating to his wife's and child's financial circumstances is not in the spirit of the *Act*.

As noted above, the Ministry was given an opportunity to respond to the appellant's position. The Ministry's reply representations restated the position set out in its original representations.

Decision and Analysis

I have carefully reviewed the representations of the parties and note that there is no evidence that the daughter made an access request independently from her custodial parents. It appears that the appellant's daughter was ten years old when the requests were filed. Section 66(c) provides that an individual's right of access may be exercised by a person who has lawful custody of that individual. There is no evidence before me suggesting that the appellant or his wife do not have

or share lawful custody of their daughter. Accordingly, either of them can jointly or severally submit and pursue an access request on their daughter's behalf.

Section 57(1) of the *Act* indicates that institutions "shall require the person who makes the request for access to a record to pay fees in the amounts prescribed by the regulations..." Accordingly, in my view, this clearly indicates that the fee provisions apply only to the individual who is the requester and not to other individuals. The requests were made initially by the appellant and his wife. In my view, the user-pay principle contemplated by the *Act* cannot apply to the daughter in the circumstances of these appeals. The daughter is not one of the requesters. As the daughter did not make a request for records relating to her, she cannot be held responsible for the payment of any fees calculated to respond to the request. Similarly, her financial circumstances is not a relevant consideration as to whether the fee should be waived. Accordingly, I find that the daughter's financial circumstances is not a relevant consideration in the circumstances of these appeals.

Turning now to the question as to whether the appellant's wife is a requester; I have carefully reviewed the representations of the parties and note that the parties are not in dispute that the appellant's wife removed her name from the request during the mediation stage of the appeal. In fact, after the Ministry received the wife's authorization, it stopped addressing correspondence relating to the appeals to the wife, instead, it addressed its correspondence only to the appellant and his daughter.

In my view, there is nothing in the *Act* which prevents the wife from abandoning the access requests she previously filed with her husband. Similarly, there is nothing in the *Act* preventing the appellant from pursuing access to the same information in his and his daughter's name.

The Ministry argues that the wife continues to be an "involved and interested party". I agree, the wife is now an affected party as contemplated by section 28 of the *Act*. In my view, upon its receipt of the wife's authorization, the Ministry was properly notified that the wife had changed her status from a requester to an affected party. The fee provisions of the *Act* do not apply to affected parties. As the wife is no longer seeking access to the records, she can not be described as an individual who is making the request and thus is not responsible for the payment of any fees calculated to respond to the request. Accordingly, I find that her financial circumstance is not relevant in the circumstances of this appeal.

In the alternative, the Ministry argues that its estimated fee no longer reflects its actual processing costs, given that a portion of the requests now seeks access to general records (the wife's information). Though, I recognize that there may be differences as to how the Ministry would have calculated its fee had it known that the request for personal information did not contain the personal information of the requester, I do not share the Ministry's view that the appellant and his wife should continue to be treated as joint requesters to avoid this consequence. If the Ministry was concerned that its fee no longer reflects its actual processing costs, it should have issued a revised fee estimate upon its receipt of the wife's authorization. However, the Ministry did not do so.

Having regard to the above, I find that the appellant is the sole requester. Accordingly, I will only consider his financial information in determining whether or not he qualifies for a fee waiver.

FEE WAIVER

Section 57(4) of the *Act* requires an institution to waive fees, in whole or in part, in certain circumstances. The appellant claims that payment of the \$1380.00 estimated fee will cause him a financial hardship. Section 57(4)(b) states:

A head shall waive the payment of all or any part of an amount required to be paid under subsection (1) if, in the head's opinion, it is fair and equitable to do so after considering whether the payment will cause a financial hardship for the person requesting the record;

The fee provisions in the *Act* establish a user-pay principle which is founded on the premise that requesters should be expected to carry at least a portion of the cost of processing a request unless it is fair and equitable that they not do so. The fees referred to in section 57(1) and outlined in section 6 of Regulation 460 are mandatory unless the requester can present a persuasive argument that a fee waiver is justified on the basis that it is fair and equitable to grant it or the *Act* requires the institution to waive the fees [Order PO-2726].

A requester must first ask the institution for a fee waiver, and provide detailed information to support the request, before this office will consider whether a fee waiver should be granted. This office may review the institution's decision to deny a request for a fee waiver, in whole or in part, and may uphold or modify the institution's decision [Orders M-914, P-474, P-1393, PO-1953-F].

The institution or this office may decide that only a portion of the fee should be waived [Order MO-1243].

Part 1: basis for fee waiver

Section 57(4)(b): financial hardship

The fact that the fee is large does not necessarily mean that payment of the fee will cause financial hardship [Order P-1402].

For section 57(4)(b) to apply, the requester must provide some evidence regarding his or her financial situation, including information about income, expenses, assets and liabilities [Orders M-914, P-591, P-700, P-1142, P-1365 and P-1393].

Representations of the parties

As noted above, the Ministry's total estimated fee is \$1380.00, representing the following photocopying charges:

- \$160.00 for 999 pages responsive to the first request
- \$800.00 for 7674 pages responsive to the second request
- \$420.00 for 2304 pages responsive to the third request

The appellant provided the Ministry with the following additional documentation after his wife's name was removed from the request:

- Affidavit sworn by the appellant on November 4, 2008 to the Ministry of the Attorney General
- Printouts from Canada Revenue Agency dated December 15, 2008 for the appellant's income tax returns for taxation years 2006 and 2007

In his affidavit, the appellant advises that he has suffered financial difficulties since June 2000 as a result of the loss of his family's home and his ongoing legal issues. The Canada Revenue Agency printouts show that the appellant's income in 2006 and 2007 was nil.

Throughout the mediation and adjudication stages of the appeals, the appellant provided this office with extensive documentation in support of his position. Most of the documentation consists of the appellant's narrative of his lifestyle before and after the house fire. The only asset identified by the appellant is "a high mileage 8 year old 2001 Oldsmobile".

As noted above, the Ministry takes the position that the financial circumstances of the appellant's wife and daughter should be taken into consideration in determining whether the appellant qualifies for a fee waiver. However, I found that the appellant is the only individual responsible for the payment of the Ministry's fees pursuant to section 57(1).

In the alternative, the Ministry argues that the appellant has failed to provide sufficient evidence demonstrating financial hardship. The Ministry also argues that the evidence the appellant has provided is self-serving. The Ministry states:

The appellant has asked the Ministry to waive the fees under the *Act* associated with his family's [*Freedom of Information and Protection of Privacy Act*] requests as it is his position that payment of the fee will cause him financial hardship. The appellant has provided a limited amount of information, previously described, in support of this circumstance. The appellant has also indicated to the Ministry that he is not employed, he does not receive social assistance and that he relies upon his elderly parents for the necessities of life. [Emphasis in Original]

Would payment of the fee cause the appellant financial hardship?

For section 57(4)(b) to apply, the requester must provide some evidence regarding his or her financial situation, including information about income, expenses, assets and liabilities [Orders M-914, P-591, P-700, P-1142, P-1365 and P-1393]. In Orders M-914, P-700, P-1142, P-1365 and P-1393, this office found that the appellants failed to tender sufficient evidence regarding

their financial situation since *no information* regarding their financial situation was provided to the institutions or this office. In Order P-591, Adjudicator Holly Big Canoe was provided with evidence of the appellant's modest income and monthly expenses and accepted that payment of the \$7,219 fee would cause the appellant financial hardship.

I am satisfied that the appellant has provided myself and the Ministry with sufficient evidence to make a finding as to whether payment of the fee would result in financial hardship. In particular, I am satisfied that the appellant has provided sufficiently detailed information about his assets and income. The appellant's evidence is that the only asset he owns is "a high mileage 8 year old 2001 Oldsmobile" and there is no evidence before me which suggests that the appellant has other assets. With respect to his income, I am satisfied that the Canada Revenue Agency printouts for 2006-2007 demonstrate that at the time the appellant applied for a fee waiver, he had not declared income for the previous two tax years. Having regard to the asset and income information provided by the appellant, I am satisfied that payment of the \$1380.00 fee would cause him financial hardship.

As noted above, Orders M-914, P-591, P-700, P-1142, P-1365 and P-1393 found that section 57(4)(b) requires that requesters provide *some* evidence regarding their financial situation. Though I agree with the Ministry that the evidence the appellant has provided is somewhat limited, I am satisfied that the appellant provided sufficient evidence for the purposes of section 57(4)(b), given that there is no evidence that he is employed or receives a monthly income.

I will now go on to consider whether it is "fair and equitable" in the circumstances of this appeal to grant the fee waiver.

Is it "fair and equitable" to waive the fee?

For a fee waiver to be granted under section 57(4), it must be "fair and equitable" in the circumstances. Relevant factors in deciding whether or not a fee waiver is "fair and equitable" may include:

- the manner in which the institution responded to the request;
- whether the institution worked constructively with the requester to narrow and/or clarify the request;
- whether the institution provided any records to the requester free of charge;
- whether the requester worked constructively with the institution to narrow the scope of the request;
- whether the request involves a large number of records;
- whether the requester has advanced a compromise solution which would reduce costs; and
- whether the waiver of the fee would shift an unreasonable burden of the cost from the appellant to the institution.

[Orders M-166, M-408 and PO-1953-F]

The Ministry submits that it would not be fair and equitable in the circumstances of this appeal to grant the fee waiver. In support of this position, the Ministry made the following arguments:

- The Ministry responded to the requests in a timely manner and identified options which would significantly reduce the photocopying charges, though the appellant's suggestion that he view the records was deemed impractical given the number of records involved and staff time it would take to supervise the appellant. The Ministry also advises that it advised the appellant that he could pay the fee in instalments.
- The Ministry provided the appellant with access to approximately 93 pages of records from the Office of the Fire Marshal "free of charge". In addition, the Ministry has not charged the appellant shipping fees to deliver the approximately 11,000 pages of responsive records.
- The records involve a large number of records which mostly consist of correspondence between the Ministry and the appellant and his family, including correspondence from the appellant. In particular, this type of correspondence makes up over 80% of the records responsive to the first request, approximately 50% of the records responsive to the second request and over 95% of the records responsive to the third request.
- Waiving the photocopying charges would shift an unreasonable burden of cost from the appellant to the Ministry. Normally, individuals requiring photocopies of correspondence to or from themselves are required to pay for photocopying services by either investing in home photocopying equipment or by engaging a service provider.

The appellant submits that the Ministry has "acted in extreme bad faith and in a manner that is anything but fair, reasonable and equitable". In support of his position, the appellant advises that throughout the request and mediation stage of the appeals, he responded to the Ministry's request for additional documentation, and that the Ministry in turn, continued to deny his fee waiver application. The appellant indicates that this occurred on many occasions.

The appellant also submits that he worked constructively with the Ministry to narrow the scope of the requests. In this regard, the appellant explains he considered the options identified with the Ministry and in turn, offered to attend the Ministry's office to review the records and "select only what is needed", but that the Ministry refused.

Finally, the appellant argues that it is "fair and equitable" to waive the fees in the circumstances of this appeal given that he can not afford to pay the \$1380 fee.

I have carefully reviewed the factors the parties claim weigh in favour and against a fee waiver and conclude that it is fair and equitable in the circumstances of this appeal to grant the fee waiver.

I note that in responding to the appellant's requests the Ministry and the appellant both worked constructively with each other to narrow the scope of the requests and/or advance a compromise solution in an effort to reduce the fees. Unfortunately, their efforts did not result in a reduced fee, as the Ministry was unable to meet the appellant's request to view the records for what I agree are sound administrative reasons. As a consequence, the only options left for the appellant was to pursue a fee waiver, pay the fee in instalments or abandon his requests. In my view, the fact that the parties worked constructively with each other and/or advanced a compromise solution neither weighs in favour or against a fee waiver.

I also considered the fact that the request was for a large number of records and the Ministry's evidence that it provided the appellant with 93 pages of Fire Marshal records. In my view, the Ministry's evidence that it provided the appellant with these records free of charge is not a significant factor weighing against a fee waiver, given that these records represent a small portion of the request, which total approximately 11,000 pages. In any event, it appears that these records may not have been provided to the appellant in response to the three requests addressed in this Order. However, I am satisfied that the Ministry's decision to waive its shipping costs moderately weighs against granting a fee waiver.

Finally, I considered whether granting the fee waiver would shift an unreasonable burden of the costs from the appellant to the Ministry. In considering this factor, a key consideration was the amount of the fee. Had the fee been for a larger amount, I may have been inclined to find that requiring the Ministry to absorb the costs associated with providing the appellant with photocopies of the records would shift an unreasonable burden of cost from the appellant to the Ministry. In my view, the fact that most of the records consist of records the appellant exchanged with the Ministry weighs heavily against granting a fee waiver. However, given that the fee is \$1380.00 and the particular circumstances in this appeal, I find that granting the fee waiver would not shift an unreasonable burden of the cost from the appellant to the Ministry. In making this decision, I contrasted the appellant's ability to pay the fee with the manner in which the Ministry responded to his request. In my view, there are aspects to the Ministry's response which is not reflective of the spirit or purpose of the *Act*.

In particular, I note that the Ministry made repeated requests to the appellant to provide documentation relating to his daughter's financial circumstances. Given that the *Act* contemplates an access regime in which custodial parents may request information which contains their children's information and those experiencing financial hardship may apply for a fee waiver, I find that the Ministry's decision to focus on questions regarding the appellant's daughter's financial circumstance was not in the spirit or purpose of the *Act*.

In addition, I note that the Ministry did not avail itself of remedies available under the *Act* to address its concerns about the appellant seeking access to records that were previously in his possession or the fact that its fee no longer reflects its actual processing costs. In my view, the Ministry could have issued a revised fee estimate or claim that the request was frivolous or vexatious to address such concerns. Instead, it appears that the Ministry sought to rely on the fee waiver provisions in the *Act*. In my view, it is not appropriate for institutions to rely upon the fee waiver provisions of the *Act* to address concerns about revised or expanded requests.

In summary, I find that as both of the parties worked constructively with each other to narrow the scope of the requests and/or advance a compromise solution that this factor weighs neither for or against a fee waiver. I find that the Ministry's evidence that it provided the appellant with some records free of charge was not a significant factor weighing against a fee waiver but attribute some weight to the Ministry's decision to waive its shipping costs. I find that the fact that most of the records consist of records the appellant exchanged with the Ministry weighs heavily against granting a fee waiver. However, having regard to the circumstances of the appeal, including the manner the Ministry responded to the request and amount of the fee, I attributed greater weight to my conclusion that granting a fee waiver would not result in a shift of an unreasonable burden of the costs from the appellant to the institution.

Having regard to the above, I find that it is fair and equitable in the circumstances to grant a fee waiver to the appellant.

ORDER:

1. I order the Ministry to grant a fee waiver in the amount of \$1380.00 to the appellant.
2. In order to verify compliance with this Order, I reserve the right to require the Ministry to provide me with a copy of its cover letter to the appellant enclosing the records.

Original signed by: _____

Jennifer James
Adjudicator

November 24, 2009