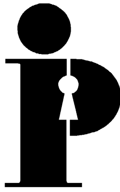
Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-2851

Appeal PA08-255

Ministry of Natural Resources

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BACKGROUND OF APPEAL:

In its representations, the Ministry of Natural Resources (the Ministry) describes an alvar as a "globally rare ecosystem that develops on flat limestone or dolostone bedrock where soils are very shallow and include open habitates that support a distinctive set of flora and fauna."

A local newspaper has reported that the company which owns the Braeside Quarry (the quarry) is proposing to triple its size and add an asphalt plant. The quarry is located in close proximity of the Braeside alvar (the alvar).

This appeal deals with a volunteer community organization's request under the *Freedom of Information and Protection of Privacy Act* (the Act) for records relating to the alvar. The community organization opposes the proposed expansion to the quarry.

NATURE OF THE APPEAL:

The Ministry received an access request under the *Act* for all information in the Ministry's possession regarding the alvar and its immediate surrounding area.

Ministry's Interim Access Decision & Fee Estimate

In response, the Ministry issued an interim access decision, together with a fee estimate of $1042.50 for search time, preparation time and photocopies. The Ministry advised that it was prepared to provide the requester partial access to the records but that the remaining portions qualified for exemption under the *Act*. The request was filed by a legal clinic on behalf of a community organization.

The Ministry also advised the requester that the records could be obtained on CD for $10, thus eliminating the $60 photocopy fee and reducing the overall fee to $982.50.

The Ministry requested a deposit of $521.25 or $491.25 (for copies of the records on CD-ROM) to process the request.

Fee Waiver Request & Payment of Fee Deposit

The requester wrote to the Ministry and sought a fee waiver pursuant to section 57(4)(c) of the *Act* (dissemination of the record would benefit public health or safety). In its fee waiver request, the requester raised concerns about the Ministry's advice to it that the District Ecologist would not be available to conduct the search for responsive records in his files. In particular, the requester questioned whether the other Ministry employees conducting the search would increase the search time. Attached to the letter was a cheque in the amount of $491.25 representing the fee deposit for records on CD-ROM.

Fee Waiver Decision

The Ministry denied the requester's fee waiver request. The Ministry's denial letter indicated that the $982.50 estimated fee could be reduced if the appellant was willing to narrow the scope of the request.

Letter of Appeal & Payment of the Remainder of the Fee

The requester (now the appellant) appealed the reasonableness of the Ministry's fee and its decision to not grant a fee waiver to this office. The appeal letter states that the community organization seeks the return of the monies it paid to the Ministry to process the request, so that the monies can be used for other public interest activities. The appeal letter also states:

> The information sought will clearly benefit the entire population of Braeside/McNabb which depends on the Braeside Alvar to filter and purify their water. The information is sought in order to contribute to current and future debates as the best land uses for the alvar. Without a full understanding of all of the ecological functions served by the alvar, the public is not in a position to accurately assess alternative land use proposals for the site. The information is being sought in digital format so as to expedite the dissemination of the information received pursuant to this [freedom of information] request.

On the same day, the appellant sent a cheque to the Ministry in the amount of $491.25, representing the balance owed to the Ministry. In subsequent correspondence to this office, the appellant advised that the community organization made a decision to pay the full fee to expedite its access to the responsive records given its concerns about the limited time available to protect the alvar.

Mediation & the Final Access Decision

During mediation, the Ministry issued its final access decision to the appellant. The Ministry also provided the appellant with a breakdown of its search time but the parties were unable to resolve any of the issues in dispute.

The appeal was transferred to the adjudication stage of the appeals process, in which an adjudicator conducts an inquiry under the *Act*. I commenced my inquiry by sending a Notice of Inquiry setting out the facts and issues in this appeal and seeking the written representations of the Ministry, initially. I provided a copy of the Ministry's representations to the legal clinic with a Notice of Inquiry.

The community organization provided representations in response. For the remainder of this order the term "appellant" will be used to refer to the legal clinic and the community organization and their submissions.

DISCUSSION:

FEES

Where the fee exceeds $25, an institution must provide the requester with a fee estimate [Section 57(3)].

Where the fee is $100 or more, the fee estimate may be based on either

- the actual work done by the institution to respond to the request, or
- a review of a representative sample of the records and/or the advice of an individual who is familiar with the type and content of the records [Order MO-1699].

The purpose of a fee estimate is to give the requester sufficient information to make an informed decision on whether or not to pay the fee and pursue access [Orders P-81, MO-1367, MO-1479, MO-1614 and MO-1699].

The fee estimate also assists requesters to decide whether to narrow the scope of a request in order to reduce the fees [Order MO-1520-I].

In all cases, the institution must include a detailed breakdown of the fee, and a detailed statement as to how the fee was calculated [Orders P-81 and MO-1614].

This office may review an institution's fee and determine whether it complies with the fee provisions in the *Act* and Regulation 460, as set out below.

Representations of the parties

The Ministry claims that it calculated its fee, as follows:

Search time (32 hours x $30.00 per hour)	$960.00
Record preparation (0.75 hours x $30.00 per hour)	22.50
Total	$982.50

As noted above, the appellant takes the position that by not requiring the District Ecologist, himself, to search his e-mail and paper files the Ministry "grossly inflated [its] search times and expenses" to locate the District Ecologist's records. The appellant did not address this issue in its representations but, in its appeal letter, stated that "… having an employee other than [the District Ecologist] review [his] files in relation to the Braeside Alvar is not an acceptable option" for the following reasons:

- The District Ecologist remains an employee of the Ministry and remains on its payroll.

- The District Ecologist maintains an office at the Ministry's Pembroke office and though is currently working away from the office, does return to the office periodically.

- The District Ecologist is working on a peer review project related to the alvar and thus is required to have access to his paper and electronic files.

The Ministry argues that it conducted its search for responsive records in a timely and efficient manner. In support of its position, the Ministry made the following arguments:

- The Ministry does not maintain a file specifically on the alvar, nor is a single employee responsible for monitoring the alvar. Instead, records related to the alvar are located in a variety of locations within the Ministry's offices of Pembroke District and Southern Region.

- In response to the request, the Ministry conducted a search of the paper and electronic records in the possession of 13 Ministry employees from the district office and 1 from the regional office.

- During the time period of the Ministry's search, two employees who were believed to have responsive records were on extended leaves of absence. One of these employees was the District Ecologist. Accordingly, other Ministry staff conducted paper and electronic searches for responsive records in this individual's files.

- A former employee was also believed to have responsive records and other Ministry staff conducted paper and electronic searches for responsive records in this individual's files.

- The Ministry is not required, nor able, to compel employees on extended leaves of absence to return to work to conduct a search for records responsive to access requests filed under the *Act*.

- Where an employee is on an extended leave of absence (or is no longer employed by the Ministry), the most reasonable and efficient means of search for responsive records is to have another Ministry employee(s), with the appropriate skill and expertise and familiarity with the absent (or former) employee's work and filing systems, conduct the search.

- The Ministry's search took 30.75 hours, 18 hours were expended searching for absent and former employees records.

- With respect to the District Ecologist's records, two Ministry employees searched his electronic and paper files, including his field notes, expending 11 hours though one of the employees also used some of the time to search her own e-mail records.

- Having regard to the broad nature of the appellant's request, the amount of time required to undertake to locate responsive records which included searching through archived e-mails dating back more than 15 years, was reasonable.

- The fee is comprised of costs for the manual search and reproduction of the records only, and is consistent with the fee provisions of the *Act*.

Decision and Analysis

Section 57(1) requires an institution to charge fees for requests under the *Act*. That section reads:

> A head shall require the person who makes a request for access to a record to pay fees in the amounts prescribed by the regulations for,
>
> (a) the costs of every hour of manual search required to locate a record;
>
> (b) the costs of preparing the record for disclosure;
>
> (c) computer and other costs incurred in locating, retrieving, processing and copying a record;
>
> (d) shipping costs; and
>
> (e) any other costs incurred in responding to a request for access to a record.

a) Manual search time

The Ministry submits that it charged the appellant $960.00 at a rate of $7.50 per 15 minutes as prescribed by Regulation 460, section 6.3 to manually search its paper and electronic files to locate responsive records (section 57(1)(a)).

I have carefully reviewed the representations of the parties and am satisfied that the Ministry's search fee of $960.00 was calculated in accordance to the *Act*. Having regard to the Ministry's evidence, I am satisfied that it conducted its search for responsive records in a timely and efficient manner. In particular, I accept the Ministry's evidence that it took a total of 30.75 to search through the paper and electronic files of 14 employees. I also accept the Ministry's evidence that its search was conducted by experienced employees knowledgeable in the subject matter of the request. Accordingly, I do not accept the appellant's evidence that the Ministry's

search times were inflated as a result of the District Ecologist not being available to search his paper and electronic records. In any event, even if the District Ecologist was available to conduct the search there is nothing in the *Act* requiring institutions to ensure that the individual who created the record be the same individual who searches for this record. Instead, previous decisions from this office have found that a reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request [Orders M-909, PO-2469, PO-2592].

Having regard to the above, I find that the Ministry's $960.00 manual search time fee is reasonable.

b) Record preparation

The Ministry advises that it charged the appellant $22.50 at a rate of $7.50 per 15 minutes to prepare the responsive records for disclosure, which includes time spent severing records (section 57(1)(b)). This charge is prescribed by Regulation 460, section 6.4.

The appellant did not provide submissions challenging the reasonableness of this fee. In my view, the Ministry's evidence that it took 45 minutes to manually prepare the records is reasonable given that severed copies of the records was provided to the appellant. Accordingly, I find that the $22.50 record preparation fee is reasonable.

Summary

As I have found that the fees charged by the Ministry are reasonable, the appellant is responsible to pay these fees unless I find that in the circumstances of this appeal the Ministry's fees should be waived.

FEE WAIVER

Section 57(4) of the *Act* requires an institution to waive fees, in whole or in part, in certain circumstances. Section 8 of Regulation 460 sets out additional matters for a head to consider in deciding whether to waive a fee. The appellant claims that fee in this appeal should be waived pursuant to section 57(4)(c). This section states:

> 57. (4) 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,
>
> > (c) whether dissemination of the record will benefit public health or safety; and

> 8. The following are prescribed as matters for a head to consider in deciding whether to waive all or part of a payment required to be made under the Act:
>
> 1. Whether the person requesting access to the record is given access to it.
>
> 2. If the amount of a payment would be $5 or less, whether the amount of the payment is too small to justify requiring payment.

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)(c): public health or safety

The following factors may be relevant in determining whether dissemination of a record will benefit public health or safety under section 57(4)(c):

- whether the subject matter of the record is a matter of public rather than private interest

- whether the subject matter of the record relates directly to a public health or safety issue

- whether the dissemination of the record would yield a public benefit by

  (a) disclosing a public health or safety concern, or

  (b) contributing meaningfully to the development of understanding of an important public health or safety issue

- the probability that the requester will disseminate the contents of the record

[Orders P-2, P-474, PO-1953-F, PO-1962]

The focus of section 57(4)(c) is "public health or safety". It is not sufficient that there be only a "public interest" in the records or that the public has a "right to know". There must be some connection between the public interest and a public health and safety issue [Orders MO-1336, MO-2071, PO-2592 and PO-2726].

Representations of the parties

The appellant takes the position that dissemination of the responsive records would benefit the public health or safety. In support of its position, the appellant argues that the community it represents depends on the alvar to filter and purify its water and that the dissemination of the records contributes to current and future debates about the alvar. As previously mentioned, the appellant opposes the proposed expansion of the quarry. In particular, the appellant argues that the proposed expansion of the quarry could lead to the following potential health or safety risks:

- The removal of limestone would drain the alvar's wetlands, deplete residential wells and destroy the alvar's water source.

- Storage of large quantities of petroleum based fuels and asphalt or concrete components on the quarry floor may result in spills and polluted water.

- Limestome dust will destroy the delicate balance of the alvar and is also a health hazard to individuals residing downwind of the quarries blasting and crushing operations.

- Airbourne emissions from the permanent asphalt plant may have negative effects on both the alvar and individuals residing in surrounding lands.

- Blasting accidents could have visible effects on the water and physical safety of the surrounding community.

The Ministry takes the position that there is no connection between the records, public interest in alvars and public health or safety concerns. The Ministry states:

> … that, while the records at issue in this appeal pertain to a matter of public interest [for example, alvars], they do not directly relate to a public health or safety issues, nor would their dissemination yield a public benefits by either disclosing a public health or safety concern or contributing meaningfully to the development of understanding of an important public health or safety issue. The public interest, in and of itself, is not one of the criteria in the exhaustive list of matters to be considered by a head in determining if waiver of all or any part of the fee is appropriate.
> …

> While the [Information Privacy Commissioner of Ontario] has found in some appeals that the dissemination of a record containing environmental information will benefit public health or safety under [section] 57(4)(c), the records at issue in this appeal, unlike those other appeals, lack direct connection to a public health or safety matter. Rather, the records at issue contain information relating primarily to species habitat and inventory, and general policy and intergovernmental discussion regarding the natural heritage features.

In support of its position, the Ministry refers to Orders M-408, P-1190, PO-1688, PO-1805, PO-1909, PO-1953-I and PO-1962. In these orders, this office found that dissemination of the record will benefit public health or safety under section 57(4)(c) where, for example, the records relate to:

- compliance with air and water discharge standards [Order PO-1909]
- a proposed landfill site [Order M-408]
- a certificate of approval to discharge air emissions into the natural environment at a specified location [Order PO-1688]
- environmental concerns associated with the issue of extending cottage leases in provincial parks [Order PO-1953-I]
- safety of nuclear generating stations [Orders P-1190, PO-1805]
- quality of care and service at group homes [Order PO-1962]

The Ministry also refers to specific records the appellant posted on its website. In this regard, the Ministry argues that the records the appellant identified on its website as having the most relevance and importance do not appear to directly relate to matters of public health or safety. The Ministry claims that these records instead concern "matters involving natural heritage values, such as plants and animal species and their habitat, as well as wetlands". The Ministry argues that the appellant has failed to demonstrate that the subject matter of the records relates directly to a public health or safety issue. Finally, the Ministry argues that dissemination of the records would not yield a public benefit by disclosing a public health or safety concern, or contributing meaningfully to the development of understanding of an important public health or safety issue.

Decision and Analysis

I have carefully reviewed the evidence provided by the parties and am satisfied that dissemination of the responsive records will not benefit public health and safety.

As noted above, The following factors may be relevant in determining whether dissemination of a record will benefit public health or safety under section 57(4)(c):

- whether the subject matter of the record is a matter of public rather than private interest

- whether the subject matter of the record relates directly to a public health or safety issue

- whether the dissemination of the record would yield a public benefit by

  (a) disclosing a public health or safety concern, or

  (b) contributing meaningfully to the development of understanding of an important public health or safety issue

- the probability that the requester will disseminate the contents of the record

[Orders P-2, P-474, PO-1953-F, PO-1962]

As previously stated, the appellant has already posted most of the responsive records on its website. Accordingly, it is not necessary to make a finding as to the probability that the requester will disseminate the contents of the records.

I find that the subject-matter of the request is a public rather than private interest. The Ministry does not dispute that the responsive records relate to a public interest. In fact, the Ministry's evidence is that the responsive records relate to measures identified by the Ministry to protect the alvar, such investigating whether the alvar could be designated as a heritage site.

However, the Ministry's submission that it is not sufficient that there be only a "public interest" in the records or that the public has a "right to know" is correct. There must be some connection between the public interest and a public health and safety issue [Orders MO-1336, MO-2071, PO-2592 and PO-2726].

The Ministry argues that there is no connection between the records, public interest in alvars and the public health or safety issues identified by the appellant. The Ministry also submits that the actual content of the released records would not yield a public benefit as the records do not disclose a public health or safety concern or contribute meaningfully to the development of understanding of an important public health or safety issue.

The appellant argues and I agree that dissemination of the records would yield a public benefit by encouraging public debate about health and safety issues relating to the alvar and the proposed expansion of the existing quarry. In particular, I note that dissemination of the responsive records would contribute meaningfully to the development of understanding of the Ministry's investigation of protection measures involving designating the alvar as a heritage site. However, the records do not contain specific information which identifies an actual public health or safety concern concerning the alvar, such as expert reports addressing compliance or contamination issues. Accordingly, in my view, there is insufficient evidence demonstrating a clear connection between the information contained in the responsive records and a public health

or safety issue identified by the appellant – the potential public health and safety risks associated related to the proposed expansion of the quarry.

As a sufficient connection between the records and a public health or safety concern has not been established, the appellant is not entitled to a fee waiver. Accordingly, part 1 of the test has not been met. However, for the sake of completeness I will consider the appellant's submission that it is fair and equitable to waive the fee in the circumstances of this appeal.

Part 2: fair and equitable

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]

Representations of the parties

The appellant takes issue with the manner that the Ministry initially responded to its request. Based on the appellant's representations, it appears that the community organization wrote to an individual at the Ministry but that its request was not made under the *Act*. It appears that a request under the *Act* was made months later. The appellant advises that without the assistance of the legal clinic, which filed its request under the *Act*, it would not have received a response and ultimately the records. As a result its experience, the appellant advises that it was left with the impression that the Ministry was working against them at every turn. In my view, this factor raised by the appellant carries insignificant weight given that the appellant's concerns do not relate to the manner the Ministry responded to a request under the *Act*. Accordingly, I attribute little weight to this factor which the appellant claims weighs in favour of granting a fee waiver.

The Ministry submits that it attempted to work cooperatively and constructively with the appellant on several occasions but that the appellant refused to narrow the scope of the request. The Ministry advises that during its initial phone conversation with the appellant, it suggested that narrowing the scope of the request might expedite the search and reduce processing fees. The Ministry advises that, since it appeared that the appellant's focus was the District Ecologist's records, it suggested that if the appellant narrowed the request to "Alvar-related documents in the possession of the [named Ministry employee], District Ecologist", then the amount of search time would be estimated at approximately eight hours. The Ministry advises that the appellant refused to narrow the scope of the request on this basis and also refused to consider its final suggestion of not seeking access to records that had been sent to, and received from, the appellant.

The appellant responded:

> Much has been made of this issue. But it was <u>impossible</u> to limit the search as we knew nothing of what information, policies, research data, maps etc. might be eliminated if we were to specify that the search was to be in just one office or one department. We were simply blindfolded and could only ask for everything, as we had NO knowledge on which to base a specific, limited search. If we had known the names of employees involved, the dates of the research, meetings etc., we could and would have been very specific. [Emphasis in Original]

Having regard to the evidence of the parties, I am satisfied that the Ministry worked constructively with the requester to narrow and/or clarify the request. In particular, it appears that the Ministry at three separate occasions identified options to the appellant which may have resulted in reducing the scope of the request which may have resulted in reducing the Ministry's fee. The appellant declined, which it is entitled to do, but the consequence is that the Ministry's efforts to narrow the scope of the request amounts to a factor which weighs against a fee waiver. In addition, I note that the appellant did not adduce evidence demonstrating that it advanced a compromise solution which would reduce costs.

With respect to the issue as to whether the Ministry provided the appellant any records free of charge, the appellant asserts that the Ministry did not. As the Ministry did not dispute the appellant's evidence, I am satisfied that the Ministry did not provide the appellant with any records free of charge and that this amounts to a moderate factor weighing in favour of a fee waiver.

Finally, I considered whether waiving the fee in the circumstances of this appeal would shift an unreasonable burden of the cost from the appellant to the institution. The parties did not provide specific representations on this issue. However, the Ministry states that the access request was "broadly worded" and the search yielded approximately 180 responsive records consisting of 843 pages. The appellant submits that it would be fair and equitable to waive the fees on the basis that payment caused the organization financial hardship.

The appellant's representations mark the first time that it takes the position that payment of the fee would cause the organization "financial hardship". The appellant did not apply to the Ministry for a fee waiver pursuant to section 57(4)(b)(financial hardship) or raise section 57(4)(b) in its appeal letter. As noted above, requesters 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. In the circumstances of this appeal, this step did not take place.

In my view, the appellant's argument is simply another reason it submits the community organization should not have had to pay the fee. Accordingly, the issue I must determine is whether waiving the fee would shift an unreasonable burden of the cost from the appellant to the Ministry taking into consideration the appellant's position that it should not have to pay fees to access the responsive records given its other expenses. In making this decision, I must also take into consideration the Ministry's position that the request involves a large volume of records.

The appellant submits that the monies it paid to the Ministry to obtain the responsive records would have been better allocated to fund the organization's future public interest activities. The appellant advises that the organization recently retained the services of a hydro geologist, whose initial fee was almost $4000.00 and that this expert's final fee will be substantially more. The appellant also advises that its website, incorporation, printing and meeting fees are presently being paid by volunteer members and the payment of the $982.50 fee was achieved by collecting donations from volunteer members. The appellant argues that the community organization will require a large budget in the short future for public awareness campaigns and research activities if it is "to achieve our goal of saving the community and the alvar". The appellant also states:

> We have spent these funds on obtaining data that we should have been given freely when we asked for it, as it was essential to the protection of a PUBLIC resource. It may not seem like a large amount, but since our needs will be so great if we are to protect this natural history for future generations we must consider it an undue hardship if we are pay for what the government should be doing itself, namely, protecting a globally rare resource.

I have carefully reviewed the representations of the parties and find that waiving the fee in the circumstances would shift an unreasonable burden of the cost from the appellant to the institution.

In my view, the fact that the request was for a large volume of records combined with the fact that the community organization already paid the fee weighs heavily against a fee waiver. I took into account the appellant's position that the organization's monies are better allocated funding its present and future public interest activities, such as the hydro geologist's report, public awareness campaigns and research activities but attribute no weight to this argument as the expenses identified by the appellant post-date the Ministry's request for its fee. I also find the fact that the community organization has already posted the records on its website weighs heavily against a fee waiver. In my view, waiving the fee for responsive records already disseminated to the public would shift an unreasonable burden of the cost from the appellant to

the Ministry given that the community organization already has reaped the benefits of the monies it paid to the Ministry obtain the records.

In summary, I attribute insignificant weight to the appellant's concerns about the manner the Ministry handled the request. I find that the Ministry worked constructively with the appellant to narrow the scope of the request and find that this factor weighs against a fee waiver. I attributed some weight in favour of a fee waiver given that it appears that the Ministry did not provide the appellant with any records free of charge. However, in considering whether payment of the fee would result in an unreasonable burden of the costs from the appellant to the Ministry, I find that the fact that the request was for a large volume of records combined with the fact that the organization already paid the fee and posted the records obtained on its website weighs heavily against a fee waiver.

Having regard to the above, I find that it is not fair and equitable in the circumstances to grant a fee waiver.

ORDER:

I dismiss the appeal.

Original Signed by: November 30, 2009
Jennifer James
Adjudicator