

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER PO-3047

Appeal PA10-337

Ministry of the Environment

January 31, 2012

Summary:

The appellant sought information relating to the impact of wind turbines placed near her property. The Ministry issued a fee estimate in the amount of \$177.00. The appellant sought a waiver of that fee pursuant to section 57(4) of the *Freedom of Information and Protection of Privacy Act*. The Ministry denied the fee waiver request and the appellant appealed. During the inquiry, the appellant asserted that disclosure of the information sought would benefit public health or safety pursuant to section 57(4)(c). The adjudicator rejected the appellant's argument under section 57(4)(c), finding that the appellant's interest in the information was primarily private in nature, and dismissed the appellant's appeal.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 57(4)(b) and (c).

OVERVIEW:

[1] The appellant sought access to information relating to the impact of a wind farm situated in the vicinity of Harrow, Ontario on her residence located at a specified address (the address). The appellant submitted her request to the Ministry of Environment (the Ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for the following specific information:

...

This is a continuous access request to be forwarded for the records for the Noise Complaint Protocol pertinent to [the address]; **and**

a continuing access request to be forwarded for the records of the certificate of approval for “the project” impacting [the address] showing the calculated SPL values expected at the point of reception from the noise assessment used to obtain the certificate of approval; **and**

a continuing access request to be forwarded for the confirming records of the Sound Pressure Level measurements taken at the point of reception (*or if currently unavailable – once the turbines are brought into operation – within the two year period of this continuing access request*) at [the address] by the MOE or a qualified acoustician acting for the MOE at the time of site initiation confirming with measured data any differences between any calculated noise values used for the noise assessment upon which the certificate of approval application was based and the measured values at the time the project was placed into operation; **and**

a continuing access request to be forwarded for the records of the permitted noise levels allowed under the Green Energy Act or any governmentally approved act at any point of reception at [the address] together with the wind speeds and measurement definitions for each series of wind speed/electrical output/noise criteria; **and**

a continuing access request to be forwarded for the records of the names and registration information for the Professional Engineer who signed off under the liability and responsibilities of the Professional Engineers Act, on the approval of “the project” affecting [the address] and on the noise assessment prior to issuance of the final certificate of approval and the measured noise values (*once the turbines are brought into operation*) confirming the accuracy of the calculated values taken at the time of final project certification; **and**

a continuing access request to be forwarded TO BOTH Ontario government repositories and MUNICIPAL government repositories for the records of

the permits issued by the Ministry of the Environment or other government entity with judicial rights over the proponent (IPC) which allowed for the installation of the noted devices in the photos following on the property of [two named individuals] @ [a second specified address]. **These devices would appear to be pointed at my home and I am concerned that it is some form of eavesdropping device being used to breach my privacy, record my private conversations or some other form of recording of my personal private information.**

In the event that this is a recording device authorized by judicial right and approved by the Ontario government or the municipal government, I am hereby requesting full unedited copies of the all data/audio RECORDS recorded by this device during the four weeks it has been in place to allow me to have experts and the Privacy Commissioner ensure that my privacy has not been compromised.

...

[appellant's emphasis]

[2] The appellant and the Ministry participated in a number of discussions and written communications to further clarify the request.

[3] The Ministry issued a fee estimate in the amount of \$177.00 and an interim access decision. With regard to access, the Ministry advised that it would provide partial access to the requested information, denying access to the withheld portions pursuant to sections 17(1)(a), (c) (third party information) and 21(1) (personal privacy) of the *Act*. The Ministry further advised that the proposed disclosure of any third party related information would first require notice to the third party under section 28 of the *Act*.

[4] In its decision letter, the Ministry provided the appellant with the following breakdown of the fee estimate:

• Search time 1 hour @ \$30.00/hour	\$30.00
• Copying approximately 495 pages @ \$0.20/page	\$99.00
• Preparation time 1.5 hours @ \$30/hour	\$45.00
• Delivery	<u>\$ 3.00</u>
Total	\$177.00

[5] The Ministry goes on to state in its decision letter that upon payment of the above-stated amount, it will continue to process the request, and that a \$30.00 fee will apply for the work already undertaken, should the appellant no longer require the records.

[6] Finally, the Ministry advised in its letter that the time to respond to the request had been extended for an additional 30 days after receipt of the \$177.00 payment, due to the extremely large volume of responsive records.

[7] The appellant appealed the Ministry's fee estimate.

[8] Shortly after appealing the Ministry's fee estimate, the appellant wrote to the Ministry by email to request a fee waiver.

[9] At the start of the mediation stage of the appeal process, the appellant appointed an agent to represent her in the appeal.

[10] During mediation, the appellant provided the mediator with a copy of her fee waiver request. In support of her claim for a fee waiver, the appellant states:

...

I believe the information I am requesting is a matter of public health since noise issues surrounding industrial wind turbines are affecting many residents presently in Ontario and with whom I have contacted and my intent is to share this information with all of these affected residents.

...

[11] In an effort to resolve the fee waiver issue, the parties participated in a teleconference. During the teleconference, the parties also discussed the \$30.00 fee that the Ministry proposed to charge in the event the request was withdrawn. The appellant asked that the Ministry provide supporting documentation to justify this fee. The Ministry agreed to remove the \$30.00 fee in the event that the request was withdrawn, and committed to issuing a fee waiver decision by a specified date.

[12] Subsequently, the Ministry issued a decision advising that the fee waiver request had been denied, as it considers that the criteria in sections 57(4)(b) and (c) of the *Act* had not been met. With respect to its authority to charge \$30.00 for work undertaken to date, the Ministry provided information on the relevant section of the *Act*, and confirmed that it had elected to not charge any fee should the appellant decide not to proceed with the request.

[13] The parties were unable to resolve the appeal during the course of mediation and the file was moved to the adjudication stage for a written inquiry. As the appointed adjudicator, I decided to first seek representations from the appellant on the fee waiver issue. I invited the appellant to respond to a Notice of Inquiry and submit written representations in response to the fee waiver issue. I acknowledge that the appellant had also expressed concerns to the mediator after the issuance of the Mediator's Report about the Ministry's authority to charge the \$30.00 fee. However, as the Ministry had withdrawn this request, I concluded that this issue had been resolved and, accordingly, I did not seek representations from the appellant on it. The appellant provided representations in response to my Notice of Inquiry. In her representations, she comments on the fee waiver issue. The appellant also addresses three other issues, which I discuss below as preliminary matters.

[14] Based on the representations received from the appellant, I chose to not seek representations from the Ministry.

[15] For the reasons that follow, I dismiss the appellant's appeal for a fee waiver.

[16] As a preliminary matter, I note that the appellant provided rather detailed representations on the authority of the Ministry to charge the \$30.00 fee. While I acknowledge the appellant's interest in this issue, I note again that the Ministry retracted its position on the charging of this fee at mediation. Accordingly, while this issue may remain of interest to the appellant I do not see it as a live issue in this appeal and I will not address it further.

[17] As a further preliminary matter, in the appellant's representations she challenges the Ministry's fee estimate in the amount of \$177.00. I note that the amount of the fee estimate is not set out as an issue in the Mediator's Report and was raised as an issue for the first time at the inquiry stage. In the cover letter to the Mediator's Report, the appellant was provided with an opportunity to advise the mediator of any errors or omissions in the Report by February 22, 2011. I have no record of the appellant advising the mediator by the February 22, 2011 deadline of the fee estimate issue being omitted from the Report. Accordingly, I conclude that the quantum of the Ministry's fee estimate is not an issue before me in this inquiry and I will not address it in this appeal.

[18] Finally, as a further preliminary matter, the appellant has appeared to raise in her representations, again for the first time, reasonable search, requesting that I "instruct the [Ministry] to meet with the appellant" to enable the Ministry to "gain a full understanding of the information requested" and to order the Ministry to undertake a search for the "re-defined" information sought. Once again, this was not an issue reported in the Mediator's Report and I have no evidence that the appellant advised the mediator that it was an issue at the conclusion of mediation that was omitted from the Report. Accordingly, the reasonableness of the Ministry's search is not properly before me as an issue in this appeal and I will not address it further.

DISCUSSION:

Should the Ministry's fee be waived?

[19] Section 57(4) of the *Act* requires an institution to waive fees, in whole or in part, in certain circumstances. That section 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,

- (a) the extent to which the actual cost of processing, collecting and copying the record varies from the amount of the payment required by subsection (1);
- (b) whether the payment will cause a financial hardship for the person requesting the record;
- (c) whether dissemination of the record will benefit public health or safety; and
- (d) any other matter prescribed by the regulations.

[20] Section 8 of Regulation 460 sets out additional matters for a head to consider in deciding whether to waive a fee:

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.

[21] 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

decision¹. The standard of review applicable to an institution's decision under this section is "correctness".²

Whether the payment will cause a financial hardship for the person requesting the record

[22] 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.³

[23] In this case, the appellant has not provided any evidence that paying the \$177.00 fee would cause her financial hardship. Accordingly, I find that the criteria for fee waiver in section 57(4)(b) are not relevant in the circumstances of this case.

Whether dissemination will benefit public health or safety

[24] In this appeal, the appellant relies on section 57(4)(c) (benefit to public health or safety). In prior orders of this office, the following factors have been found relevant in determining whether dissemination of a record will benefit public health or safety:

- 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 disclosing a public health or safety concern, or 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 record⁴

Representations

[25] The appellant takes the position that the records she seeks relate to public health and safety. In her representations, the appellant makes reference to a report issued by Dr. Arlene King, Chief Medical Officer of Health (CMOH), in May 2010 titled

¹ Orders M-914, P-474, P-1393, PO-1953-F.

² Order P-474.

³ Orders M-914, P-591, P-700, P-1142, P-1365 and P-1393.

⁴ Orders P-2, P-474, PO-1953-F, PO-1962.

"The Potential Health Impact of Wind Turbines" (the King Report).⁵ The appellant notes that the Ministry alludes to the King Report in its decision letter, in which it states:

The records in this case would not meet the criteria in section 57(4)(c) as the Provincial Medical Officer of Health has already provided the public with the information that wind turbines do not create a health or safety hazard to the public.

[26] In the appellant's view, by citing the King Report as a basis for rejecting the request for a fee waiver, the Ministry "is confirming that the request meets both the health and public interest requirements for a fee waiver since that report is quite specific in its content related to the health impacts of wind turbines on the health and welfare of Ontarians."

[27] In particular, the appellant identifies two passages from the King Report that she views as lending support for her position that the information she seeks will benefit public health and safety, to the extent that this information will help her evaluate the province's "[noise] standards] and any measured values for her specific residence location."

[28] The appellant quotes section 2.2.2 of the King Report on the issue of "Sound Exposure Assessment", which states:

Little information is available on actual measurements of sound levels generated from wind turbines and other environmental sources. Since there is no widely accepted protocol for the measurement of noise from wind turbines, current regulatory requirements are based on modeling.

[29] In response to that passage, the appellant states that sound models are used to determine what distance a wind turbine needs to be from nearby homes in order to meet local statutory noise limits, which stand at 40 decibels in Ontario.

[30] The appellant also quotes the concluding paragraph of the King Report as support for her view that there is a need for sound measurements in residential areas around wind turbines to assess the health impacts of wind turbines. The appellant states that she is interested in the "objective [sound measurement] values allowed at [her residence]". She adds that she is trying to obtain this information in order to "start the monitoring that the [King Report] acknowledges needs to occur." The concluding paragraph of the King Report states:

⁵ www.health.gov.on.ca/en/...reports/wind_turbine/wind_turbine.pdf

The review also identified that sound measurements at residential areas around wind turbines and comparisons with sound levels around other rural and urban areas, to assess actual ambient noise levels prevalent in Ontario, is a key data gap that could be addressed. An assessment of noise levels around wind power developments and other residential environments, including monitoring for sound compliance, is an important prerequisite to making an informed decision on whether epidemiological studies looking at health outcomes will be useful.

[31] The appellant submits that while the King Report concludes that wind turbines do not have health impacts for Ontarians, that premise is "dependent on the requirement that the noise levels to which Ontarians are subject fall within the approval standards for the *Green Energy Act*⁶ and its supporting standards, guidelines and protocols." The appellant reiterates that it is the "objective values prevailing and approved for the appellant's residence that she is trying to obtain in this FOI process in order to start the monitoring specified within the King Report." Further, she hopes that by having this information about noise levels at her residence she will be able to determine whether they fall within the healthy levels as discussed in the King Report.

[32] The appellant acknowledges that while her request is for information unique to her residence, the information she seeks is of greater public interest with the potential to provide information to other Ontarians who suffer from the health impacts of the noise generated by wind turbines.

Analysis and findings

[33] I have reached the conclusion that the appellant is not entitled to a fee waiver in this case. In reaching this conclusion, I have carefully reviewed and considered the appellant's representations, the Ministry's decision letter and the contents of the King Report.

[34] I acknowledge the appellant's interest in the information requested and her view that acquiring this information will benefit public health or safety. Clearly, the potential health impacts of wind turbines and, in particular, the impact of noise generated by these turbines is a health and safety concern. The Ministry has acknowledged as much by providing a wealth of information on its website on health related topics pertaining to wind energy, including "measuring wind turbine noise", "developing noise setbacks for wind farms" and "scientific research".⁷ In addition, as set out in the introduction to her report, Dr. King makes it clear that concerns about public health relating to the

⁶ *Green Energy Act, 2009*, S.O. 2009, c. 12, Schedule A.
(<http://www.canlii.org/en/on/laws/stat/so-2009-c-12-schedule-a/latest/>).

⁷ http://www.ene.gov.on.ca/environment/en/subject/wind_energy/index.htm

deployment of wind turbines has captured her attention and the attention of other Ontario health organizations. In Dr. King's introduction to her report, she states:

In response to public health concerns about wind turbines, the CMOH conducted a review of existing scientific evidence on the potential health impact of wind turbines in collaboration and consultation with a technical working group composed of members from the OAHPP [Ontario Agency for Health Protection and Promotion], MOHLTC [Ministry of Health and Long-Term Care] and COMO H [Council of Ontario Medical Officers of Health].

[35] In addition, a quick search of the internet reveals a multitude of organizations, both local and international, dedicated to exploring the possible health issues related to wind turbines.

[36] Based on all of this publicly available information, I readily accept that the impact of noise generated by the deployment of wind turbines is a health and safety concern.

[37] However, that is not, in my view, the issue in this fee waiver appeal. The issue in this appeal is whether the dissemination of the information sought by the appellant would benefit public health or safety. In my view, based on the evidence before me, I am not satisfied that disclosure of the information sought by the appellant would benefit public health or safety.

[38] In this case, the appellant has framed a rather detailed request for information relating to a specific property, her home. Based on my reading of the request, the appellant is primarily seeking detailed technical information relating to the development of a wind farm in the vicinity of her home and, in particular, wind noise testing data in relation to this project. While this information is clearly of significant interest to the appellant, I have not been provided with sufficient evidence to persuade me that this information would be of interest to the public or benefit public health or safety. A further purpose of the appellant's request seems also to be focused on information relating to the placement of "noted devices" on an adjacent property that the appellant alleges are pointed at her home and which she suggests may be used for "some form of eavesdropping" to "breach her privacy, record [her] private conversations or some other form of recording [her] personal private information." Once again, I am not convinced on the evidence before me that disclosure of this information would be of interest to the public or benefit public health or safety. To conclude, I view the subject matter of the appellant's request as revealing more of a private than a public concern.

[39] To summarize, I am satisfied that in the circumstances of this case the dissemination of the information sought by the appellant would not benefit public health or safety. Accordingly, I reject the appellant's claim for a fee waiver and dismiss her appeal.

ORDER:

I uphold the Ministry's decision to deny a fee waiver in this case and dismiss the appellant's appeal.

Original Signed By: _____ January 31, 2012
Bernard Morrow
Adjudicator