

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3351

Appeal PA13-137

Ministry of Transportation

June 13, 2014

Summary: The requester, a newspaper reporter, sought a waiver of all fees associated with his request for all complaints made to the Ministry of Transportation about both ministry-approved and non-ministry approved driving schools, since 2007. In this order the adjudicator concludes that a partial waiver of fees is appropriate.

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

Orders and Investigation Reports Considered: Orders MO-1243 and PO-2278.

BACKGROUND:

[1] Since September 2007, the Ministry of Transportation (the ministry) has been regulating all driving schools offering Beginner Driver Education (BDE). Before 2007, the industry was not regulated. As of 2007, only driving instructors that are under contract with a licensed BDE driving school can teach beginner drivers (holders of a G1 licence).

[2] Further, beginning in September 2009, all ministry-approved BDE driving schools must use ministry-approved curricula. Novice drivers taking an approved BDE course can advance to a G2 licence in eight months, as opposed to the one-year otherwise required.

[3] The ministry does not regulate all driving schools in Ontario, but does regulate all schools that offer the BDE program as well as all driving instructors who teach class G, G1 and G2 drivers. The ministry investigates complaints from the public about driving schools, and may revoke the licences of driving schools and instructors if complaints are substantiated. If a complaint is made that a school is offering BDE instruction without the required licence, the ministry can revoke the licence of any driving instructor involved in the school. If a complaint is made about the improper issuance of a BDE certificate by a school with a BDE licence, the ministry may revoke the licences of both the school and any instructor.

[4] This appeal arises out of a request submitted to the Ministry of Transportation (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

All complaints about both ministry-approved and non-ministry approved driving schools received by the MTO since 2007.

[5] The requester is a reporter with a daily newspaper who has published stories on public complaints about driving schools.

[6] The ministry issued an interim decision containing a fee estimate of \$7,526.40 based on 162 hours of search time and 63.5 hours of preparation time. After discussion, and in an effort to reduce the cost, the requester explored the fee for a narrowed request, limited to complaints received by the ministry in 2012. The ministry issued a revised fee estimate based on the narrowed request of \$6,500.90, encompassing 135 hours of search time and 58.45 hours of preparation time.

[7] The requester submitted a fee waiver request to the ministry, based on the scope of his original request, relying on the benefit to public health and safety. The Ministry denied the fee waiver request.

[8] The requester, now the appellant, appealed the ministry's decision.

[9] During mediation, the ministry explained that limiting the scope of the complaints requested to only one calendar year would not result in a significant reduction in the fee because a search through 985 hard copy and database files is required regardless of the time frame. The appellant confirmed that he is pursuing access to all complaints received by the ministry since 2007.

[10] I sent a Notice of Inquiry to the ministry, initially, inviting it to submit representations on the issues in the appeal. The ministry sent representations, which were shared with the appellant. The appellant's representations were then shared with the ministry, which submitted reply representations on the issue of a fee waiver.

[11] In his representations, the appellant confirmed that he was not appealing the amount of the fee estimate of \$7,526.40, nor the amount of time estimated for search and preparation of the records. The only issue before me is whether the original fee estimate of \$7,526.40 should be waived.

FEE WAIVER

General principles

[12] 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.

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

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.

[14] 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.¹ In reviewing a decision by an institution denying a fee waiver, this office may decide that only a portion of the fee should be waived.²

[15] 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. The appellant bears the onus of establishing the basis for the fee waiver under section 57(4) and must justify the waiver request by demonstrating that the criteria for a fee waiver are present in the circumstances.³

[16] There are two parts to my review of the ministry's decision under section 57(4) of the *Act*. I must first determine whether the appellant has established the basis for a fee waiver under the criteria listed in subsection (4). If I find that a basis has been established, I must then determine whether it would be fair and equitable for the fee, or part of it, to be waived.⁴

Whether dissemination will benefit public health and safety

[17] In this appeal, the appellant relies on section 57(4)(c). 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 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

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

² Order MO-1243.

³ Order PO-2726.

⁴ Order MO-1243.

- the probability that the requester will disseminate the contents of the record.⁵

[18] 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.⁶

[19] This office has found that dissemination of records will benefit public health and safety under section 57(4)(c) where they related, for example, to:

- compliance with air and water discharge standards⁷
- a proposed landfill site⁸
- a certificate of approval to discharge air emissions into the natural environment at a specified location⁹
- environmental concerns associated with the issue of extending cottage leases in provincial parks¹⁰
- safety of nuclear generating stations¹¹
- quality of care and services at group or nursing homes¹²

Representations

[20] The ministry submits that it exercised its discretion not to grant the fee waiver because the appellant did not meet the onus of demonstrating why this is an appropriate case for departing from the user-pay principle enshrined in the *Act*.

[21] While agreeing that the licensing of driving schools relates to issues of public safety, the ministry submits that it also relates to business regulation and consumer protection. Further, the ministry asserts that although the records may relate to public health or safety, their dissemination would not be of benefit because it would not disclose a health or safety concern or contribute to understanding a health or safety issue. It refers to Order MO-2756 which dealt with a request for information regarding

⁵ Orders P-2, P-474, PO-1953-F and PO-1962.

⁶ Orders MO-1336, MO-2071, PO-2592 and PO-2726.

⁷ Order PO-1909.

⁸ Order M-408.

⁹ Order PO-1688.

¹⁰ Order PO-1953-I.

¹¹ Order PO-1953-I.

¹² Orders PO-1962 and PO-2278.

breathalyzers used by a police force. The adjudicator in that appeal found that even though drunk driving was a public safety issue, dissemination of the records in question would not benefit public health or safety.¹³

[22] The Ministry submits that in this case, many of the complaints sought by the requester have no direct relationship to public safety, nor would their dissemination be of any benefit to public safety. The ministry characterizes the majority of the complaints received as relating more to issues of consumer dissatisfaction rather than public safety. The ministry provides a list of typical complaints that included:

- students requesting an exemption from the deadline for completing the BDE course
- instructor not calling student back
- owner not certifying student for lack of payment
- student not getting certification because school was closed/revoked
- student lost certificate and needs proof of completion
- instructor was rude to student.

[23] The ministry submits that the list demonstrates that there is no real public interest in this type of information, nor any meaningful benefit in wholesale access to all of the complaints in the ministry's files. Furthermore, the ministry states that its practice is to make public the names of schools whose provincial licenses have been revoked. It does not believe that the public interest is served by also making public (and at no cost to the requester) every complaint against licensed or non-licensed schools, irrespective of the subject matter or validity. The ministry submits that the appellant may have access to these complaints, but he should be required to pay the applicable fees under the *Act*.

[24] The ministry questions whether the appellant has shown that the concerns he raises regarding driving schools have any impact on public safety, particularly road safety in Ontario. In the ministry's submission, the news articles written by the requester highlight issues of consumer protection, such as student complaints about the quality of instruction received. They also highlight issues of unfair business competition from unlicensed schools that offer beginner driver education at less cost. The ministry states that, despite the fact that such a practice is illegal, the appellant has not shown that these problems have had any direct impact on public safety, much less that the records for which a fee waiver is sought by the appellant directly relate to public or road

¹³ Orders M0-2756 and P0-2458.

safety. The ministry states that the result of a student taking beginner driver education from an unlicensed school is that he or she may qualify for a road test for a G1 licence four months earlier than would otherwise be the case; however, the student must still pass the road test, as well as a second road test to obtain a G2 licence.

[25] The appellant submits that the dissemination of complaints made by the public about ministry-approved and non-ministry approved driving schools will benefit public safety.

[26] The appellant asserts that complaints about driving schools made by members of the public to the oversight body of this regulated industry are a matter of public interest and relate directly to a public health and safety issue. He submits that when members of the public who have had bad experiences with driving schools complain to the public body responsible for overseeing the industry, these complaints are a matter of public interest. The appellant referred to the large number of phone calls and emails he received from members of the public who claimed to have had negative experiences with licensed and unlicensed driving schools, following the publication of his news stories. He states that this feedback, which was amongst the largest he has received for any news story, demonstrates that this subject resonated greatly with the public.

[27] The appellant also states that dissemination of all the complaints received by the ministry against driving schools would yield public benefits by disclosing a public safety concern. He submits that because many people are unaware of how provincial licensing of driving schools and instructors works, beginner drivers could unwittingly enrol in unlicensed schools and put themselves into unsafe situations. This could also have an impact on other members of the public should road accidents ensue. It would also be in the interest of public safety to disseminate complaints if they pertain, for example, to unsafe practices while providing lessons on public roads.

[28] The appellant further submits that the dissemination of the information would assist the public in choosing reliable driving schools and by consequence improve beginner drivers and road safety. In his news articles, the appellant refers to interviews with non-profit traffic safety organizations and to provincial statistics about teenage driver collisions, to support his claim that better oversight and good instruction are key to road safety.

[29] The appellant relies on Order PO-2278, which deals with complaints made to the Ministry of Health and Long-Term Care about long-term care facilities. In this order, I found that there is a public benefit in shining a "spotlight" on the conditions inside nursing homes, which can be a positive influence in compelling improvements in care. The appellant submits that much like the circumstances described in PO-2278, release of the information in this appeal would not only allow a light to be shone on any pervasive issues identified by the public with respect to driving schools, but also allow for public scrutiny of the ministry's response to those concerns.

[30] In its reply representations, the ministry reiterates that the appellant's own journalism on the issues of driving schools is concerned with consumer and business regulation issues. Although the appellant attempts to make a connection, in his representations, between the complaints about driving schools and public safety, his news stories do not demonstrate a connection to public safety.

[31] The ministry also reiterates that it maintains a list of approved BDE schools on its website, as well as a list of schools whose licences to provide BDE have been revoked. While there may also be some public benefit in presenting a list of schools against which complaints (substantiated or not) have been made, the connection to public safety is tenuous. The ministry stresses that the majority of the complaints received do not directly relate to public safety.

[32] The appellant intends to publish the information he seeks through his employer, a large daily newspaper.

Analysis

[33] On review of the representations and material before me, I conclude that dissemination of the information contained in the responsive records would benefit public health or safety for the purposes of section 57(4)(c), but only to a modest degree.

[34] While the evidence before me (both the ministry's and the appellant's) suggests that complaints about driving schools are primarily about consumer protection and unfair business issues, the ministry by implication acknowledges that some complaints relate to public safety. The ministry's regulation of this industry, and particularly beginner driver education, through a system of government-approved driving schools and curricula, reflects both consumer protection and safety goals. I find that dissemination of complaints made about driving schools relating to safety will benefit public health or safety. It would help student drivers choose an appropriate driving school, taking into account safety concerns about driving schools or their instructors. It would also enable citizens to understand any safety problems in the industry and scrutinize the effectiveness of the government's regulation of this industry for safety.

[35] I find a parallel between the circumstances of this appeal and those in Order PO-2278, referred to above, in which I found a benefit to public health and safety in the dissemination of complaints about conditions at nursing homes. As well, the circumstances are similar to those discussed in Order MO-2432 in which the adjudicator found that the dissemination of charges laid against individuals who own or operate "non-stationary" businesses as driving school and taxi cabs will enable citizens to scrutinize "the effectiveness of the City's licensing and enforcement regime and put pressure on their elected officials if it is determined that corrective action is needed."

Whether it would be fair and equitable to waive the fee

[36] 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.¹⁴

Representations

[37] It is not in dispute that the ministry responded promptly to the request, providing the appellant with a fee estimate based on a search of a representative sample of records. The ministry states that it discussed the fee estimate with the appellant, and advised him of the basis for it. The appellant was told that the ministry receives complaints through different channels, including emails, the Minister’s Correspondence Tracking Information System, hard copy files for each driving school location and the BDE Database. Staff would be required to search each of these sources of records to ensure that all responsive records would be located. The ministry estimates that there will be about 3000 pages of responsive records, based on a search of a considerably larger number of pages, including the files of 985 driving school locations.

[38] The ministry states that it suggested to the appellant that he consider narrowing the scope of his request, by time frame, specific driving schools, or having the ministry search only one of the four sources noted above.

¹⁴ Orders M-166, M-408 and PO-1953-F.

[39] Once the appellant decided to narrow the request to focus only on one year, the ministry issued a revised fee estimate. The estimate was not significantly different from the original one, however, as the search still required a review of the hard copy files for each driving school location and the BDE database.

[40] The ministry also states that before the appellant made this FOI request, he obtained information relating to BDE through the ministry's Media Lin, on at least 17 separate occasions free of charge over the course of three months. Finally, the ministry submits that the appellant is asking the public purse to subsidize his employer's access requests. Such a result would shift an unreasonable burden from a powerful private sector organization to the public, and would be a significant departure from the user-pay principle of the *Act*.

[41] The appellant asserts that while he did, for example, suggest reducing the timeframe of his search in an effort to reduce the fee estimate, the ministry did not devise any internal arrangements to try to reduce the cost of the request. In his submission, it shifted the burden exclusively to the appellant, suggesting restrictions on the scope of the request that undermine the very purpose of the request and research. He states that asking him, for instance, to specify particular driving schools misses the point of his request.

[42] The appellant does not dispute the fact that the ministry's staff provided information free of charge during his research, but asserts it is irrelevant to his request for a fee waiver.

[43] The appellant disagrees that waiver of the fee would shift an unreasonable burden of cost from the appellant to the ministry. He refers to the total operating budget of the ministry, against which the cost of his request is "miniscule". He also submits that his employer pays corporate tax in Ontario, and those taxes are used by the government to maintain the data he seeks. Finally, he submits that the data is the property of the public and it is reasonable for the government to provide the public with the data because it paid to collect and maintain the data.

[44] In its reply representations, the ministry states that the logical extension of the appellant's position would be a permanent departure from the user-pay provisions of the *Act* where the appellant's employer is concerned. The ministry relies on the following discussion from Order PO-2278, in which I discussed the relationship between the fee waiver provisions and the user-pay principles in the *Act*:

In assessing whether waiver of the remaining fee would shift an unreasonable burden of the cost from the appellant to the Ministry, I also acknowledge the Ministry's concern about the broad scope of its mandate, and the possibility that almost all Ministry records might arguably relate to the health of the people of Ontario. It is not intended that the fee waiver

provisions undermine the user-pay principles of the *Act*. The circumstances of this appeal are not extraordinary. They involve, in essence, a request by a member of the media for records kept by the Ministry in the ordinary course of its monitoring responsibilities over one sector of its mandate. I accept that a waiver of fees in this case would make it difficult for the Ministry to deny a waiver of fees in many other cases.

Analysis

[45] After considering the relevant factors and all the circumstances, I find that a partial waiver of fees is appropriate.

[46] The factors do not clearly favour one or the other parties' position. Both have attempted to find ways to reduce the fees by narrowing the scope of the request, and have worked co-operatively to that end. The ministry has provided information about how the search would be conducted, to help the appellant understand both the reason for the large fee and ways in which it could be reduced. The appellant was willing to narrow the request to one year of complaints, which did not result in any substantial reduction.

[47] The obstacle standing in the way of lowering the fees can be found in the intersection of the request, as framed, with the manner in which the ministry collects and stores the responsive records. The appellant has explained in his representations why a differently framed request, such as for complaints about specific driving schools, would not be useful. The ministry has explained why searching for the records would require a considerable effort, which the appellant does not dispute.

[48] Ultimately, the most reasonable way to approach this appeal is to ask whether waiving the fee would shift an unreasonable burden of the cost from the appellant to the ministry. In this case, although I have found that dissemination of the records would benefit public health or safety, I have also described the benefit as a modest one. A fee waiver would require the ministry (and by extension, the public) to absorb the cost of an onerous search for records, in order to produce this modest benefit. In making this observation, I do not diminish the benefit to the public in knowing about complaints about driving schools. I simply make the point that the benefit is much more about consumer protection than about public health or safety.

[49] I also have regard to the comments I made in Order PO-2278, set out above, which I find relevant to this appeal. As stated there and in many other decisions of this office, it is not intended that the fee waiver provisions undermine the user-pay principles of the *Act*.

[50] Although the appellant did not (and probably could not be reasonably expected to) present any concrete suggestions on how the ministry could re-configure its internal tracking systems to reduce the cost of his request, I take his point as an expression of some frustration about the manner in which the ministry has chosen to maintain the information. The *Act* does not require institutions to keep records in a manner that could accommodate the myriad of ways in which a request for information may be framed.¹⁵ Nevertheless, in considering whether it would be fair and equitable to waive the fee or part of the fee, I observe that the ministry's system of maintaining this information, connected directly to its role in overseeing this industry, is hardly conducive to transparency. I find it fair and equitable that the ministry bear some measure of the burden of searching for the information, given its choice to maintain it in this manner.

[51] In the circumstances, I direct a partial waiver of the fees and order that the ministry charge the appellant no more than \$6,000 for search and preparation of the records.

ORDER:

I partially uphold the ministry's decision not to waive the fee, and direct that it charge the requester no more than \$6,000 for access to the records.

Original Signed By:
Sherry Liang
Senior Adjudicator

June 13, 2014

¹⁵ Order 31.