

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3381

Appeal PA13-376-2

Metrolinx

August 20, 2014

Summary: Metrolinx received a request for access to communications about a transit fare card. It issued a fee estimate and denied a request for a fee waiver. In this decision, the institution's decision to deny the fee waiver is upheld.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 57(4), Regulation 460, section 8.

OVERVIEW:

[1] Metrolinx received a multi-part request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for information relating to Presto, a transit fare card. In an email dated August 21, 2013, the request was revised as follows:

...

Non-technical information pertaining to Presto:

1. Presto: All communication with the Ministry of Transportation in 2010/2011
2. Presto: All communication with TTC/City of Toronto in 2010/2011
3. Presto: All communication with [named law firm] in 2011-2013
4. Presto: All communication with [named

- judge] in 2011-2013
5. Presto: All communication with [named third party] related to TTC in 2010 - April 30, 2013
 6. Presto: All communication with [above-stated third party] related to OC Transpo in March 2012 – April 30, 2013
 7. Presto: All communication with the Ontario Auditor General 2012-April 30, 2013
 8. Presto: All communication with City of Ottawa/OC Transpo in March 2012- April 30, 2013

[2] Before Metrolinx issued a decision, the requester made a request for a waiver of the fees, sending Metrolinx two Canada Revenue Notices of Assessment, credit card information and a credit report.

[3] By letter dated September 5, 2013, Metrolinx issued a fee estimate and interim access decision. The fee was estimated to be \$15,342.00 and the requester was advised that a deposit of \$7,671.00 was required prior to processing the request. In its letter, Metrolinx also provided a fee breakdown related to each of the eight parts of the request and stated that it was likely the exemptions in sections 17(1), 18(1), 19 and 21(1) would apply to some of the information. Metrolinx also advised the requester that in order to consider a fee waiver, it required an income/expense statement and a balance sheet setting out his finances.

[4] The requester (now the appellant) appealed the fee estimate. He also reiterated his request for a fee waiver to Metrolinx, but did not submit additional documentation. Metrolinx responded by reiterating and detailing the type of evidence it required to support the request for a waiver, including information about all sources of income, the appellant's expenses, assets and liabilities. The appellant responded by providing a credit report and stating that he could provide no other documentation without authorization from a third party who has denied permission.

[5] During mediation of the appeal, the appellant withdrew his request for information related to parts #2 and #8 of the request, and indicated that the records could be stored on a CD rather than photocopied.

[6] Metrolinx agreed to the request to send the records on a CD to eliminate photocopying charges and issued a revised fee estimate of \$10,102.00 related to the remaining six parts of the request. With respect to the fee waiver request, Metrolinx confirmed having received some financial documentation from the appellant but stated that without understanding his 2013 income, assets (including bank account information), expenses and liabilities, it did not have sufficient information to grant a fee waiver. Furthermore, it stated that waiving the fee would shift an unreasonable burden of the cost to the institution.

[7] The appellant subsequently indicated that he wished to pursue the denial of the fee waiver to adjudication. As no further mediation was possible, the appeal was referred to adjudication. The adjudicator previously assigned to this appeal decided to seek representations from the appellant and Metrolinx, initially, and both provided their representations. She then sent Metrolinx's representations to the appellant and invited him to respond to them, which he did by email correspondence.

[8] This appeal has been re-assigned to me. The sole issue before me is whether the fee for responding to the request should be waived under section 57(4). For the reasons below, I uphold the institution's decision not to waive the fee.

FEE WAIVER

General principles

[9] 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.

[10] 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.

[11] 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

[12] 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 8 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

[13] 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 the payment will cause a financial hardship for the person requesting the record

[14] In this appeal, the appellant has requested that the fee be waived based on financial hardship in section 57(4)(b) of the *Act*.

[15] 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.⁵ The fact that the fee is large does not necessarily mean that payment of the fee will cause financial hardship.⁶

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

² Order MO-1243.

³ Order PO-2726.

⁴ Order MO-1243.

⁵ Orders M-914, P-591, P-700, P-1142, P-1365 and P-1393.

⁶ Order P-1402.

Representations

[16] The appellant takes the position that even with the reduction in the estimate, the payment of the fee will cause him financial hardship. In support of his claim the appellant has provided Metrolinx with some information regarding his financial situation. This included Canada Revenue Agency Notice of Reassessments for the 2011 and 2012 tax year and credit card statements and reports. With his representations, the appellant also sent bank statements to show that his self-employed consulting business was no longer operating or “functional” and that he is in financial need. The appellant submits that he has no liquid assets, survives on credit, has no car and is limited in providing documentary proof of his financial situation because a third party has denied him use of certain records. He states that he owes \$6000 in court costs regarding a matter in Divisional Court.

[17] The appellant also asserts that he has obtained fee waivers based on financial need in Divisional Court and from the TTC.

[18] Metrolinx reviewed the history of this request, its communications with the appellant, and its requests for information to support the request for a fee waiver. It asserts that it asked the appellant on two occasions to provide evidence of his financial circumstances, providing a specific list of the information it required. Metrolinx submits that it does not have a picture of the appellant’s overall financial situation, which is required to make an informed decision about a fee waiver. Although the appellant provided some documentation, he did so without any explanation of its meaning or implications. Metrolinx states it could not verify his claim that his expenses exceeded his income, for instance. It could not likewise verify other claims made by the appellant about financial hardship. The fact that the appellant referred to his inability to obtain authorization from a third party to disclose additional documentation suggests that Merolinx does not have a full overview of his financial circumstances, and no clear indication of what assets he may or may not have.

[19] In reply, the appellant provided statements from a business account, covering approximately seven months, showing minimal balances.

Analysis

[20] On my review of the material before me, I have insufficient evidence that payment of the fees would constitute financial hardship for the appellant as contemplated by section 57(4)(b) of the *Act*. I accept that on the basis of the evidence submitted, the appellant has a very limited income. However, the documentation he submitted in support of his waiver request is incomplete. The appellant has referred to his inability to provide all the information requested because of the refusal of a third party to consent to release of relevant information. He provides no detail about the nature of the information he would otherwise submit. I agree with Metrolinx’s

submission that a reasonable inference is that the picture of the appellant's circumstances is incomplete, particularly with respect to assets. The appellant has made little effort to provide the information specifically requested by Metrolinx to support his fee waiver request. I am unable, based on the incomplete picture of the appellant's financial situation, to conclude that payment of the fee would constitute a financial hardship.

[21] I have reviewed the appellant's material regarding a waiver of fees from the Divisional Court, and from the TTC. I do not find those circumstances helpful to my determination. The document confirming the waiver of court fees suggests that the waiver is extremely limited in scope. Further, there is no basis or reason given for the waiver and I therefore have no assistance in understanding whether the court's reasons for granting the waiver have any bearing on the issue before me. The fee waiver granted by the TTC is also of limited relevance as it merely indicates that the TTC decided to grant a fee waiver, without giving specific reasons.

[22] I conclude that I do not have sufficient evidence to support a finding that payment of the fee would impose a financial hardship on the appellant.

Whether dissemination will benefit public health and safety

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

[24] 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
- the probability that the requester will disseminate the contents of the record.⁷

⁷ Orders P-2, P-474, PO-1953-F and PO-1962.

[25] 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.⁸

[26] 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 standards⁹
- a proposed landfill site¹⁰
- a certificate of approval to discharge air emissions into the natural environment at a specified location¹¹
- environmental concerns associated with the issue of extending cottage leases in provincial parks¹²
- safety of nuclear generating stations¹³
- quality of care and services at group or nursing homes¹⁴

Representations

[27] The appellant asserts that “health and safety concerns” justify a fee waiver. These concerns include the risks associated with the City of Toronto’s decision to use new transit payment cards rather than adopting an open payment system. The appellant lists as examples of these risks the susceptibility of personal information to hackers, environmental damage from disposal and the risk of theft from seniors due to transferability of the cards. Thus, the appellant alleges that dissemination of the records requested would benefit public health and safety by providing information as to why and how the government rendered this decision.

Analysis

[28] On review of the representations and material before me, I conclude that dissemination of the information contained in the responsive records would not benefit

⁸ Orders MO-1336, MO-2071, PO-2592 and PO-2726.

⁹ Order PO-1909.

¹⁰ Order-M-408.

¹¹ Order PO-1688.

¹² Order PO-1953-I.

¹³ Order PO-1953-I.

¹⁴ Orders PO-1962 and PO-2278.

public health or safety for the purposes of section 57(4)(c). The evidence before me does not suggest that any of the responsive records could relate to public health or safety in any way that supports a fee waiver. The connections made by the appellant between government communications about a transit payment project and public health or safety concerns are tenuous at best.

[29] As I have found that the appellant has not provided sufficient evidence to establish a basis for a fee waiver due to financial hardship or public health and safety, it is not necessary for me to consider whether it would be fair and equitable to waive the fee. However, for the sake of completeness, I will go on to do so.

Whether it would be fair and equitable to waive the fee

[30] 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.

Representations

[31] The appellant asserts in his representations that it would be fair and equitable to waive the fees associated with his request. He cites various factors in support of his position including proposals he made during mediation to narrow the scope of the request. The appellant also asserts that the fee waiver would not shift an unreasonable burden of the cost from the requester to the institution given the disparity in income between the two. The appellant maintains that charging him anything over \$100 is

inherently unfair, particularly as his financial situation would require him to charge the fees thereby incurring 18% credit card interest.

[32] Metrolinx submits that it would not be fair and equitable to grant a fee waiver in the circumstances. It states that it has been communicative, thorough and constructive in its response. It has sought to work constructively with the appellant to narrow the request. It refers to three occasions on which it offered to assist the appellant in revising his request in order to reduce the fees, without a response. The appellant has not advanced any compromise solution that would reduce costs. Metrolinx refers to the extremely large volume of records responsive to the request and submits that, in all the circumstances, it is not reasonable for Metrolinx and ultimately the Ontario taxpayers, to bear the full cost of responding to the request.

Analysis

[33] On my review of the circumstances surrounding the appellant's request, I find that it would not be fair and equitable to waive the fee.

[34] Metrolinx has expended a considerable effort in responding to the request thus far, researching the nature of the records and the work required to locate them, review them and provide an access decision. It has communicated with the appellant from the beginning in an effort to identify opportunities to narrow the request to what is most essential, and reduce costs accordingly. I find that the appellant has not worked constructively with Metrolinx in return. The volume of responsive records remains, therefore, considerable. There is no denying the work that Metrolinx will have to undertake to respond to the request and, in all these circumstances, I find it would not be reasonable to shift the cost of this work to Metrolinx and ultimately the public.

ORDER:

I uphold the institution's decision not to waive the fee.

Original Signed By: _____
Sherry Liang
Senior Adjudicator

August 20, 2014 _____