

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3383

Appeals PA13-370-2, PA13-370-3, PA13-370-5

Ministry of Transportation

August 21, 2014

Summary: The Ministry of Transportation received a multi-part request for access to records about a transit fare card. The parts were treated as separate requests and the ministry issued fee estimates for each and denied a request for a fee waiver. In this order, the ministry's decision to deny a 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] Since these three appeals arise out of the same original request, and involve the same requester, institution and issue, I have decided to issue one decision for all of them.

[2] On July 24, 2013, the appellant submitted a multi-part request to the Ministry of Transportation (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for information relating to the sourcing of a transit fare card system.

[3] The ministry contacted the requester to clarify the request which was subsequently broken down into four separate requests. The parts of the original request which are the subject of these appeals read as follows:

Appeal 13-370-2:

1. All non-technical Presto-related communications in 2010 and 2011 between [the ministry] management and [Toronto Transit Commission (TTC)] management.
2. All non-technical Presto-related communications in 2010 and 2011 between [the ministry] and the City of Toronto.
3. All non-technical Presto-TTC-City of Toronto-related communications in 2010 and 2011 between [the ministry] management and Metrolinx management.
4. All non-technical Presto-TTC-City of Toronto-related communications in 2010 and 2011 between [the ministry] management and [named company].

Appeal PA13-370-3:

1. All 2010/2011 Municipal Gas Tax Agreement/Ottawa Light Rail Funding/TTC [Toronto Transit Commission] Funding contingent on Presto [the ministry] internal communications between any staff from 2009 to 2013. Minister is also included under the word staff.
2. All 2010/2011 Municipal Gas Tax Agreement/Ottawa Light Rail funding/TTC Funding contingent on Presto communications between [the ministry] staff and Department of Attorney General from 2009 to 2013.

Appeal PA13-370-5:

All 2012 to 2013 communications between [ministry] staff discussing the findings of the December 2012 Auditor General/December 2011 [named company]/December 2012 [named judge] reports that made the following findings about the Presto file:

[22 enumerated findings]

...

[4] With respect to Appeal PA13-370-2, the ministry issued a fee estimate on August 22, 2013, in the amount of \$588.00, and requested a deposit of \$294.00 prior to proceeding with the request. The ministry advised that it is likely the exemptions in sections 13(1) (advice or recommendations), 18(1) (economic interests) and 19(1) (solicitor-client privilege) of the *Act* may apply to some of the information contained in the records, and a time extension will be required.

[5] In its letter the ministry provided the following fee breakdown:

Estimated Search time =	17 hrs @ \$30.00/hr	\$510.00
Photocopying=	390 pages @\$0.20/copy	\$ 78.00
Total =		\$588.00

[6] The ministry also provided the appellant with a detailed fee breakdown pertaining to the four specific offices to be searched.

[7] With respect to Appeal PA13-370-3, the ministry issued a fee estimate in the amount of \$3,786.00, and requested a deposit of \$1,893.00 prior to proceeding with the request. The ministry advised that it is likely a time extension will be required, and the exemptions in sections 13(1) (advice or recommendations), 18(1) (economic interests) and 19(1) (solicitor-client privilege) of the *Act* may apply to some of the information contained in the records.

[8] In its letter the ministry provided the following fee breakdown:

Estimated Search time=	94 hrs @ \$30.00/hr	\$2,820.00
Photocopying=	4830 pages @\$0.20/copy	\$ 966.00
Total=		\$3,786.00

[9] The ministry also provided the appellant with a detailed fee breakdown pertaining to the five following areas of search:

Transit Policy Office
Finance Branch
Policy and Planning Assistant Deputy Minister Office (ADM)
Deputy Minister's Office (DMO)
Minister's Office (MO)

[10] With respect to Appeal PA13-370-5, the ministry issued a fee estimate in the amount of \$8,617.00 requesting a deposit of \$4,308.50 prior to proceeding with the request. The ministry advised that it is likely a time extension will be required, and the exemptions in sections 13(1) (advice or recommendations), 18(1) (economic interests) and 19(1) (solicitor-client privilege) of the *Act* may apply to some of the information contained in the records.

[11] In its letter the ministry provided the following fee breakdown:

Estimated Search time =	190 hrs @ \$30.00/hr	\$5700.00
Photocopying =	14585 pages @\$0.20/copy	\$2917.00
Total =		\$8617.00

[12] The ministry also provided the appellant with a detailed fee breakdown pertaining to the five following areas of search:

Transit Policy Office
Finance Branch
Communications Branch
Policy and Planning Assistant Deputy Minister Office (ADM)
Deputy Minister's Office (DMO)

[13] The appellant appealed the ministry's fee estimates and these appeals were opened to deal with this issue. During the mediation stage of the appeals, the appellant submitted a fee waiver request to the ministry in each appeal, on the basis that the estimated fee would cause him financial hardship. In support of his claim, the appellant provided the ministry with copies of his income tax returns for the years 2011 and 2012 and his latest credit card statement. Upon reviewing the submitted documentation, the ministry advised that additional information pertaining to the appellant's current income, expenses, assets, and liabilities were required before making a decision on the fee waiver request. In turn, the appellant submitted a Consumer Credit report to the ministry.

[14] The ministry subsequently wrote to the appellant advising that the submitted documentation is not sufficient to grant a full fee waiver based on financial hardship. It stated that due to the broad nature of the request and the amount of effort required to fulfil it, the ministry believes that granting a full waiver of fees would shift an unreasonable burden of the cost to the public, and it does not believe it would be fair and equitable to do so. However, the ministry decided to grant a partial fee waiver in each appeal. In appeal PA13-370-2, it reduced the fee to \$235.00. In Appeal PA13-370-3, it reduced the fee to \$1514.00 and in Appeal PA13-370-5, to \$3446.80.

[15] The appellant indicated that he wished to pursue the denial of a full fee waiver to the adjudication stage of the appeal process.

[16] The adjudicator previously assigned to this appeal decided to seek representations from the appellant, initially. She noted that the appellant has indicated during his discussions with the mediator that he is not appealing the amount of the fee estimate; rather, he is only appealing the denial of a fee waiver.

[17] The appellant submitted one set of representations for all of these appeals. The adjudicator shared the representations with the ministry and invited it to respond. The ministry submitted representations on the fee waiver issue. It also issued revised fee estimates, based on the appellant's advice that he was seeking access to the records in electronic format. In Appeal PA13-370-2, the fee was reduced to \$520.00 and, after the partial waiver, to \$208.00. In Appeal PA13-370-3, the fee was reduced to \$2830.00 and, after partial waiver, to \$1132.00. In Appeal PA13-370-5, the fee was reduced to \$5710.00 and, after partial waiver, to \$2284.00.

[18] These appeals were re-assigned to me. The sole issue before me is whether the fees in these appeals should be waived under section 45(4). For the reasons below, I uphold the ministry's decision not to waive the fees.

FEE WAIVER

General principles

[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 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.

[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 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

[22] 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 a 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. In this appeal, 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

[23] 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

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

[25] 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

¹¹ 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

[26] The appellant takes the position that even with the reductions in the estimates and partial fee waivers, the payment of the fees will cause him financial hardship. In support of his claim the appellant provided the ministry 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.

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

[28] The ministry submitted representations but it is not necessary for me to rely on them.

Analysis

[29] On my review of the material before me, I have insufficient evidence that payment of the fees, as partially waived, 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. While I appreciate the difficulty this may cause the appellant, nonetheless I must make my decision on the evidence before me. 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.

[30] I have reviewed the material regarding a waiver of fees from the courts, and from the TTC. I do not find those circumstances helpful to my determinations. 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.

[31] 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

[32] In these appeals, the appellant also relies on section 57(4)(c).

[33] 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

[34] 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

[35] 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

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

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

⁹ Order PO-1909.

- 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

[36] 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

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

[38] 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.

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.

Whether it would be fair and equitable to waive the fee

[39] 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
- cost from the appellant to the institution.

Representations

[40] 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.

Analysis

[41] On my review of the circumstances surrounding the appellant's request, I am not satisfied that it would be fair and equitable to waive the remainder of the fees. The appellant's requests are broad in nature and his proposal to receive the records in electronic format, while eliminating photocopying costs, does not substantially reduce the work required to respond to the requests. The ministry alerted the appellant to the type of information it required to support his claim of financial hardship. It made efforts to narrow and clarify the scope and type of responsive records, providing

breakdowns of the various searches required to assist in assessing the usefulness of the request as framed.

[42] While the appellant claims that he made efforts to reduce costs by proposing a narrowed request, in one instance, he imposed an arbitrary time limit and then reverted to his original request when the ministry made it clear it would not be able to conduct the extensive search required within that time. In another instance, he suggested that since the ministry had agreed to a waiver of about 60% of the fees, he would narrow the scope of the request in order to receive 60% of the records originally sought, free of charge. The ministry explained that its agreement to waive 60% of the fees did not amount to a decision to give him access to 60% of the records without a fee, but to perform the work required to respond to the request, at 40% of the cost to the ministry. I find that the appellant's proposals cannot be taken as an indication of a constructive effort to narrow the scope of his requests.

[43] As indicated, the ministry has agreed to waive a significant amount of the fees in these appeals. Having reduced the original fees very substantially, I find that the user-pay principle of the *Act* and circumstances of these appeals do not support the granting of full waivers. The ministry has expended considerable time and resources already in responding to the requests and appeals, and it is not fair and equitable to require it to waive the remainder of the fees.

[44] I conclude that waiver of the fees would shift an unreasonable burden of the cost from the appellant to the ministry and ultimately the public.

ORDER:

I uphold the ministry's decisions to deny a waiver of the fees.

Original Signed by: _____
Sherry Liang
Senior Adjudicator

_____ August 21, 2014