

Information and Privacy Commissioner,  
Ontario, Canada



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

---

## ORDER PO-3471

Appeal PA14-188-2

Ministry of the Environment and Climate Change

March 23, 2015

**Summary:** The ministry received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for copies of records relating to a wind turbine project. The ministry issued a fee estimate and the requester requested a fee waiver, which was denied. This order upholds the ministry's fee estimate and its decision to deny the appellant's fee waiver request. The appeal is, therefore, dismissed.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 57(1) and 57(4)(c).

**Orders and Investigation Reports Considered:** PO-3074.

### OVERVIEW:

[1] An individual submitted a request to the Ministry of the Environment and Climate Change (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to all correspondence relating to a wind installation project covering a specified time period. The ministry issued an interim fee decision requesting a 50% deposit of its estimated \$1,623.00 fee. The requester's request for a fee waiver was denied and the requester (now the appellant) appealed the ministry's fee and fee waiver decisions to this office.

[2] A mediator was assigned to the appeal to explore settlement with the parties. As a result of settlement discussions between the parties, the appellant agreed to narrow the scope of her request and the ministry issued a revised fee estimate in the amount of \$374.00, representing 10 hours of search time and 1 hour of preparation time.

[3] At the end of mediation, the appellant advised that she was not satisfied with the revised fee estimate or the ministry's decision about her fee waiver request. Accordingly, the issues remaining in dispute were transferred to the adjudication stage of the appeals process, in which an adjudicator conducts an inquiry under the *Act*.

[4] During the inquiry stage, the parties had an opportunity to exchange representations. The ministry provided representations and the appellant requested that her fee waiver request and appeal letter be adopted as her submissions.

[5] In this order, I uphold the ministry's fee and decision to deny the appellant's fee waiver request.

## **ISSUES:**

- A. Is the ministry's \$374.00 fee estimate reasonable?
- B. Should the ministry waive its fee?

## **DISCUSSION:**

### **A. Is the ministry's \$374.00 fee estimate reasonable?**

[6] An institution must advise the requester of the applicable fee where the fee is \$25 or less.

[7] Where the fee exceeds \$25, an institution must provide the requester with a fee estimate [Section 45(3)].

[8] 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.<sup>1</sup>

---

<sup>1</sup> Order MO-1699.

[9] 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.<sup>2</sup>

[10] The fee estimate also assists requesters to decide whether to narrow the scope of a request in order to reduce the fees.<sup>3</sup>

[11] In all cases, the institution must include a detailed breakdown of the fee, and a detailed statement as to how the fee was calculated.<sup>4</sup> Initially, the ministry issued an interim fee decision requesting a 50% deposit of its estimated \$1,623.00 fee. During mediation, the appellant narrowed the scope of her request and the ministry issued a revised fee estimate. The ministry's revised fee estimate in the amount of \$374.00 was calculated as follows:

Search time (approximately 10 hours @ \$30.00 per hour)	= 300.00
Photocopying (205 pages @ .20 per page)	= 41.00
Preparation time (1 hour @ \$30.00 per hour)	= 30.00
Shipping/Delivery	= <u>3.00</u>
Total estimated cost	\$ 374.00

[12] This office may review an institution's fee and determine whether it complies with the fee provisions in the *Act* and Regulation 823, as set out below.

[13] 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.

---

<sup>2</sup> Orders P-81, MO-1367, MO-1479, MO-1614 and MO-1699.

<sup>3</sup> Order MO-1520-I.

<sup>4</sup> Orders P-81 and MO-1614.

[14] More specific provisions regarding fees are found in sections 6, 7 and 9 of Regulation 460. Those sections read:

6. The following are the fees that shall be charged for the purposes of subsection 57(1) of the *Act* for access to a record:

1. For photocopies and computer printouts, 20 cents per page.
2. For records provided on CD-ROMs, \$10 for each CD-ROM.
3. For manually searching a record, \$7.50 for each 15 minutes spent by any person.
4. For preparing a record for disclosure, including severing a part of the record, \$7.50 for each 15 minutes spent by any person.
5. For developing a computer program or other method of producing a record from machine readable record, \$15 for each 15 minutes spent by any person.
6. The costs, including computer costs, that the institution incurs in locating, retrieving, processing and copying the record if those costs are specified in an invoice that the institution has received.

7. (1) If a head gives a person an estimate of an amount payable under the Act and the estimate is \$100 or more, the head may require the person to pay a deposit equal to 50 per cent of the estimate before the head takes any further steps to respond to the request.

(2) A head shall refund any amount paid under subsection (1) that is subsequently waived.

9. If a person is required to pay a fee for access to a record, the head may require the person to do so before giving the person access to the record.

## **Calculation of fee**

### ***Basis of fee***

[15] The ministry advises that its revised fee is based on actual work done to respond to the request.

#### *Search time – Section 57(1)(a)*

[16] The ministry submits that its search time was calculated cumulatively based on individual search times recorded from its Environmental Approvals Branch (EAB), Environmental Approvals Access and Service Integration Branch (EAASIB) and London District Office.

[17] The ministry advises that its 10 hour search time is “based on the number of hours spent manually locating responsive records in the file folders and electronic databases related to the Renewable Energy Projects (REA) that were related” to the wind turbine project.

[18] The ministry advises that though its photocopying and preparation costs were revised and reduced after the appellant narrowed the scope of her request, “the amount of time spent searching for responsive records could not be retroactively revised along with the request parameters”. The ministry went on to advise that it could have charged for the time it took to re-identify responsive records in response to the narrowed request, but it did not.

[19] The ministry advises that its EAB and EAASIB incurred 7 hours of search time to complete the following tasks:

- The search team lead reviewed the request and identified nine staff members as having responsive records;
- The search team lead sent an email to the nine staff members along with a request to search their files, including personal files which may contain responsive records (.5 hours of search time);
- Staff members were required to manually review all hardcopy folders, files and papers. In addition, they were instructed to perform key-word searches in their emails and manually review the electronic records. Finally, they were directed to perform key-word searches in the personal computer devices and manually review the electronic files (4.5 hours of search time); and

- The search team lead reviewed the records located by staff members and identified records responsive to the request as some non-responsive records were located as well. The lead also removed several duplicate copies of records and performed a branch-wide record search for responsive records in EAB and EAASIB to locate additional responsive records (2 hours of search time).

[20] The ministry advises that its London District Office incurred a total of 4 hours of search time to complete the following:

- Freedom of Information (FOI) staff entered multiple words into the search functions of three electronic databases and reviewed the "hits" by opening the emails and files to determine whether the records were responsive;
- Hard copy records in the London District Office's file rooms were manually searched by the individual responsible for the energy project related to subject-matter of the request;
- FOI staff also conducted a search of the shared network drive that is used by all district staff members to file, store and retain files electronically; and
- The files of a supervisor at the district office along with the files maintained by a Senior Environmental Officer were also searched for responsive records.

[21] The total amount of search time reported by EAB, ESSSIB and the London District office is 11 hours. The ministry advises that for the purpose of its fee estimate, it reduced the chargeable search time from 11 hours to 10 "...to account for any margin of error in the recording of the search time received from the program areas".

[22] Based on my review of the ministry's representations and in the absence of any evidence to the contrary, I find that the search time the ministry charged to locate responsive records is reasonable. In making my decision, I took into consideration that at the time the ministry conducted its search the request had not yet been narrowed. Given that the search parameters identified in the request were clearly identified, the ministry was required to process the request and conduct a search for responsive records. I am satisfied with the ministry's evidence that it took approximately 10 hours to search for responsive records and find it reasonable to charge the appellant \$30.00 per hour, for a total of \$300.00 as prescribed by Regulation 460, section 6.3.

*Preparation for disclosure - Section 57(1)(b)*

[23] Section 57(1)(b) includes time for severing a record.<sup>5</sup> The ministry advises that it identified 30 pages of records which would require partial severing to withhold information it claims would be exempt from disclosure under the *Act*. The ministry's fee estimate charged 1 hour of preparation time at the rate of \$30.00 an hour.

[24] Generally, this office has accepted that it takes two minutes to sever a page that requires multiple severances.<sup>6</sup> Accordingly, the amount the time the ministry could charge for severing 30 pages of records is 60 minutes. I find that the ministry's estimate for its preparation time is reasonable and in accordance to the \$30.00 per hour preparation time prescribed by Regulation 460, section 6.4.

*Computer and other costs incurred in locating, retrieving, processing and copying a record - Section 57(1)(c)*

[25] Section 57(1)(c) includes the cost of photocopies. The ministry identifies 205 pages of records which would have to be photocopied if the appellant is not prepared to attend its offices to review the records. The ministry's estimated photocopy charge in the amount of \$41.00 is in accordance with the \$0.20 per page fee prescribed by Regulation 460, section 6.1. Given that the ministry's photocopy charge is based on the prescribed fee, I find that it is reasonable.

*Shipping costs - Section 57(1)(d)*

[26] The ministry's fee estimate includes a \$3.00 shipping charge to deliver records to the appellant's residence. To calculate this fee, the ministry obtained a quote from its vendor in the amount of \$4.35. A copy of the quote was provided with the ministry's representations. The ministry advises that it reduced the estimated shipping cost to \$3.00 and I find that this charge is reasonable.

[27] Having regard to the above, I find that the ministry's estimated fee of \$374.00 representing its search and preparation time in addition to its photocopying and shipping charges reasonable. Accordingly, I find that the ministry's fee estimate is reasonable.

[28] Given my finding, I will now determine whether the ministry's fee should be waived, in whole or in part.

---

<sup>5</sup> Order P-4.

<sup>6</sup> Orders MO-1169, PO-1721, PO-1834 and PO-1990.

**B. Should the ministry waive its fee?**

[29] 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. Those provisions state:

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,

- (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.

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.

[30] 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.<sup>7</sup>

---

<sup>7</sup> Order PO-2726.



[31] 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.<sup>8</sup> The institution or this office may decide that only a portion of the fee should be waived.<sup>9</sup>

[32] In this appeal, the appellant sought a fee waiver on the basis that the disclosure of the records will benefit public health or safety.

### **Part 1: basis for fee waiver**

[33] 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<sup>10</sup>

[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.<sup>11</sup>

[35] In her appeal letter, the appellant challenges the ministry's advice in its fee waiver decision letter that "... there is no content in the records directly related to the issue of public health or safety".

---

<sup>8</sup> Orders M-914, P-474, P-1393 and PO-1953-F.

<sup>9</sup> Order MO-1243.

<sup>10</sup> Orders P-2, P-474, PO-1953-F and PO-1962.

<sup>11</sup> Orders MO-1336, MO-2071, PO-2592 and PO-2726.

[36] The appellant takes the position that wind turbine projects are controversial in Ontario and advises that 85 townships and counties have passed resolutions which identify that their communities do not want wind turbines, primarily for health concerns. The appellant also advises that there are over 50 citizen action groups throughout Ontario who believe that there is a direct association between wind turbines and the health of the communities which host them. In support of her position, the appellant provided numerous links to websites and articles. I reviewed these materials and am satisfied that the appellant has established that concerns about wind turbine projects and the health of neighboring communities are widespread and well documented in academic articles and websites hosted by community outreach organizations. One of the main issues discussed in these websites and articles are the potential adverse health effects related to the noise wind turbines generate and emit in their host communities.

[37] With respect to the specific records at issue in this appeal, the appellant argues that the proximity of the project's transmission lines to a community recreation area, including a children's playground in addition to nearby residences and family farms demonstrates that the subject-matter of the request relates to a public health or safety issue. The appellant submits that that "...there is sufficient evidence currently available to the public that confirms an increased risk to the health and safety of people and farm animals when in close proximity to electrical generation structures such as those found in the [specified project]".

[38] Finally, the appellant states in her submissions that she plans to disseminate the contents of the records at issue in this appeal to the affected communities via two internet sites and two google-group e-mail lists.

[39] Previous decisions from this office identified the following four factors relevant in determining whether dissemination of a record will benefit public health or safety under section 57(4)(c). If the factors are met, than part 1 of the two-part test has been met to establish the basis for a fee waiver.

*i) Whether the subject matter of the record is a matter of public rather than private interest*

[40] In its representations, the ministry agrees with the appellant's submission that the subject matter of the records relates to projects that concern a community of residents and thus is a matter of public rather than private interest. I agree and find that this part of the test has been met.

*ii) Whether the subject matter of the record relates directly to a public health or safety issue*

[41] The ministry takes the position that the actual content of the records does not contain information which relates directly to a public health or safety issue. In support of its position, the ministry states:

The Ministry notes that the records responsive to the revised request consist of communications and concerns exchanged between the Ministry and members of the public (notably the appellant), internal email correspondence related to those communications, correspondence between ministries, and correspondence between the Ministry and the proponent regarding submitted documentation and assessments, timelines and status updates for the project.

The Ministry confirms that the records retrieved in response to this request, described above, do not contain any content or information directly or explicitly related to public health or safety concerns.

The Ministry also notes that the submissions provided by the appellant do not demonstrate a direct relation between the contents of the records as described above, and a recognized public health and safety issue. Accordingly, the Ministry found that it had not been sufficiently demonstrated that the subject matter of the records relates directly to a public health or safety issue.

[42] The appellant takes the position that records responsive to her request relate directly to the public health and safety issue identified in her submissions.

[43] I have carefully reviewed the submissions of the parties along with the records and am satisfied that the subject matter of some of the records relate directly to public health or safety issues. I agree with the ministry that most of the records address general issues relating to the wind turbine project or contain information about matters posted on the proponent's website. However, a small portion of the records represent email communications the ministry received from members of the public which directly address public health and safety issues. Also, one of the records exchanged between the ministry and the proponent contains information which relates directly to public and safety issues. This record consists of an email and chart and is found on pages 117-128 and duplicated with some minor changes on pages 132-151.

[44] Accordingly, I find that the subject matter of some of the records relate directly to a public health or safety issue.

*iii) 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*

[45] Though I found that the subject matter of some of the records relate directly to a public safety matter, this finding does not end the matter. It also must be established that dissemination of the subject records would yield a public benefit by disclosing a public health or safety concern or contribute meaningfully to the development of understanding of an important public health or safety issue.

[46] The ministry submits:

The appellant's fee waiver request did not demonstrate a link between the dissemination of the responsive records and the concerns expressed in the submissions. It has therefore not been demonstrated that the dissemination of these records would yield a public benefit by either (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.

[47] The appellant's submissions did not specifically address this issue.

[48] I have carefully reviewed the records and find that the only record which, if disseminated, would yield a public benefit, is the record found on pages 117-128, (duplicated at 132-151). This record is an email and chart which was exchanged between the ministry and the proponent. In my view, the remaining records I found relate to a public safety matter contain highly personal information about the health of family members or simply raise general, well-documented concerns about wind turbines. In my view, the dissemination of the content of these records would not reveal a public health or safety concern or contribute meaningful to the development of understanding of an important public health or safety issues.

[49] However, I am satisfied that dissemination of the emails and charts exchanged between the ministry and the proponent would yield a public benefit by disclosing a public health or safety concern, or contribute meaningful to the development of understanding of an important public health or safety issue. Accordingly, I find that this part of the test has been met with respect to pages 117-128 and 132-151 only.

*iv) The probability that the requester will disseminate the contents of the record*

[50] In its representations, the ministry advises that it accepts that the appellant plans to disseminate the records. As the parties are in agreement on this issue, I find that this part of the test has been met.

[51] Having regard to the above, I find that part 1 of the test has been met with respect to pages 117-128 and 132-151 of the records. Despite my finding that only a small portion of the records directly relate to public health and safety issues, I will go on to consider whether part 2 of test has been met taking into consideration the ministry's entire fee.

## **Part 2: fair and equitable**

[52] 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.<sup>12</sup>

[53] The ministry submits that would be "unreasonable and not fair and equitable in the circumstances" of this appeal to waive its \$374.00 fee and transfer the cost of processing the request from the appellant to the ministry. In support of its position, the ministry advises that during the request stage, the appellant made inquiries about narrowing the scope of the appeal. However, the appellant did not explore the options presented by the ministry and instead filed a fee waiver request. The ministry advises that the appellant did not work constructively to narrow the scope of appeal until after she filed her appeal and a mediator was assigned to the appeal. The ministry also advises that in an effort to keep the processing costs down it:

---

<sup>12</sup> Orders M-166, M-408 and PO-1953-F.

- did not add an additional 1 hour to its search time though this time was expended to search for records responsive to the narrowed request;
- also discounted its search fee by one hour to account for any margin of error;
- invited the appellant to attend its office during the request and mediation stages of the appeal to allow the appellant the opportunity to select and only pay for the copying costs of the records she wishes to copy; and
- responded to the request in a helpful manner, worked constructively with the appellant to narrow the request and invested a considerable amount of time to address the appellant's fee related concerns.

[54] The appellant's submissions do not specifically address this issue. However, I note that the appellant states in her fee waiver request that she was not happy with the level of service she received from the ministry. In this regard, she states that her various options were not explained fully in the ministry's fee estimate. I have carefully reviewed the ministry's fee estimate letter and do not agree with the appellant. In my view, the ministry's fee estimate letter, dated January 20, 2014 provided the appellant with adequate information about her right to request a fee waiver request. Furthermore, the ministry sent the appellant a lengthy email on January 31, 2014 identifying a few options which may have resulted in lowering the processing costs.

[55] With regard to the relevant factors set out above as to whether a fee waiver is 'fair and equitable', I find that these factors weigh in favour of the ministry. In making my decision, I carefully reviewed the parties submissions, along with the mediator's report which confirms that the parties worked together to narrow the scope of the request, and I am satisfied that the ministry worked constructively with the appellant to narrow the scope of the request during mediation. I also am satisfied that the ministry identified various options to the appellant in an effort to help reduce its processing fees during the request stage. I also considered the voluminous nature of the records located during the request stage and the significant amount of time and resources expended by the ministry to search the electronic and hard copy files of numerous individuals in addition to a shared network drive. Finally, I took into consideration that the ministry waived a couple hours of its search time in an effort to lower its processing costs.

[56] Having regard to all of the factors which weigh in the ministry's favour, I find that waiving the fee in the circumstances of this appeal would shift an unreasonable burden of the cost from the appellant to the institution. 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. Having regard to the factors considered above, along with the fact that only a small portion of the records contains information which, if disseminated, would contribute meaningfully to the development of understanding of an important public health and safety issue, I find that it would not be fair and equitable to waive the fee.

**ORDER:**

I uphold the ministry's fee and uphold its decision to deny the appellant's fee waiver request.

Original Signed By:  
Jennifer James  
Adjudicator

\_\_\_\_\_  
March 23, 2015