Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3621

Appeal PA14-498-2

Ministry of the Environment and Climate Change

June 17, 2016

Summary: The ministry received a request under the *Act* for records related to the proposed construction of a waste incinerator. The ministry granted partial access to the responsive records upon payment of a fee which was ultimately reduced to $777.60. The requester applied for a fee waiver under section 57(4)(c) (public health and safety) which the ministry denied. The requester appealed the fee, as well as the ministry's decision not to grant a fee waiver. In this order, the adjudicator upholds the ministry's fee, in part, and also upholds the ministry's decision not to grant the fee waiver.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 57(1), 57(4)(c); Regulation 460, section 6.

Orders and Investigation Reports Considered: Orders MO-2530, PO-1909 and PO-3152.

OVERVIEW:

[1] The Ministry of the Environment and Climate Change (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to a proposed waste incinerator. Specifically, the requester sought access to the following information:

> …all records concerning one or both of the following companies: [two named companies]. This includes, but is not limited to, any records which mentions either of the companies by name, as well as all correspondence between [the ministry] and these companies and/or their representatives.

[2] Following some communication between the ministry and the requester, the ministry issued a final access decision, granting partial access to the responsive records upon payment of a fee of $1,484.60. The ministry broke down the fee as representing 9 hours of search time, 23 hours of preparation time and the cost to photocopy 2,608 pages of records. In the decision, the ministry indicated that upon payment of the fee it was prepared to grant partial access to the records, relying on sections 13, 19, 21, and 22 of the *Act* to withhold portions of them.

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

[4] During mediation, the appellant advised that that he is appealing the fee of $1,484.60 and does not dispute the application of the exemptions to the records. The appellant also indicated that he had submitted a fee waiver request to the ministry that had been denied and he wished to appeal the ministry's decision to deny the fee waiver.

[5] The appellant confirmed that he was not pursing access to any correspondence from "private citizens." As a result of the clarified request, the ministry issued a revised fee of $777.60, representing 9 hours of search time, 4.5 hours of preparation time, and the cost of copying 1,848 pages of records.

[6] The appellant advised that, despite the revised fee, he continued to wish to appeal the fee and the ministry's decision to deny him a fee waiver. The appellant again confirmed that the exemptions claimed by the ministry to withhold portions of the records are not at issue. Finally, he stated that he wished to receive the records on a disc.

[7] As a mediated resolution could not be reached, the file was transferred to the adjudication stage of the appeal process for an adjudicator to conduct an inquiry. During my inquiry into this appeal, I sought and received representations from both parties on the facts and issues on appeal. The representations that I received from the parties were shared in accordance with this office's procedure on sharing as set out in *Practice Direction 7*.

[8] In this order, I uphold the ministry's fee, in part, and uphold the ministry's decision to deny the fee waiver.

ISSUES:

A. Should the fee be upheld?

B. Should the fee be waived?

DISCUSSION:

A. Should the fee be upheld?

[9] An institution must advise the requester of the applicable fee where the fee is $25 or less. Where the fee exceeds $25, an institution must provide the requester with a fee estimate [Section 57(3)]. 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.[1]

[10] 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.[2] The fee estimate also assists requesters to decide whether to narrow the scope of a request in order to reduce the fees.[3]

[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.[4] 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.

[12] 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.

[13] More specific provisions regarding fees are found in sections 6, 7 and 9 of

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[1] Order MO-1699.
[2] Orders P-81, MO-1367, MO-1479, MO-1614 and MO-1699.
[3] Order MO-1520-I.
[4] Orders P-81 and MO-1614.

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.

Representations

[14] At issue in this appeal is the ministry's revised fee of $777.60. The ministry provided a breakdown of the fee, identifying the amounts charged for search, preparation, photocopying and delivery (shipping), as follows:

Search time – 9 hours @$30/hr	$270.00
Photocopying – 1848 pages @$0.20/pg	$369.60
Preparation -4.5 hours @ $30/hr	$135.00
Delivery	$3.00

Total	**$777.60**

[15] The ministry takes the position that the fee is fair, reasonable and accurate and should be upheld. It provided representations detailing how it arrived at the fee for each fee component.

Search – Section 57(1)(a)

[16] The ministry submits that the search time was calculated cumulatively based on the individual search times recorded by the ministry's Environmental Approvals Branch, Eastern Regional Office and Peterborough District Office.

[17] The ministry submits that, in accordance with Section 6 of Regulation 460, the search times were based on the number of hours spent manually searching for responsive records in file folders and electronic repositories related to the two companies named in the request.

[18] The ministry provided a summary of the actions taken, which totalled 9 hours, however, it notes as the search time was conducted in response to the appellant's initial request, which was subsequently narrowed, the amount of time spent searching for responsive records could not be retroactively revised.

[19] The ministry submits that it took approximately 0.5 hours to examine the request and identify the potential sources of records and the appropriate staff members within both the Environmental Approvals Branch (EAB) and the Environmental Approvals Access and Service Integration Branch (EAASIB) who were likely to have responsive records. It specifies that it identified six staff members as potentially having records that might be responsive to the request.

[20] The ministry submits that the identified staff members were advised, via email, that they were required to conduct a search of their files which was to include:

- manually reading through all hard copy folders, files, papers, notebooks, meetings notes, telephone logs etc.;
- performing key-word searches in their emails and manually retrieving and reading through those emails;
- performing key-word searches in their personal computer drives and manually retrieving and reading through any electronic files;
- performing key-word searches in the shared computer drive and manually reading all electronic files.

[21] The ministry submits that the review of the shared computer drive is a particularly time consuming task as it is shared by all staff and the key-word searches for the named project would return many types of documents and multiple drafts of documents.

[22] The ministry also submits that the technical lead on the project performed a branch-wide search to locate responsive records which included locating and reading through hard-copy project folders.

[23] The ministry submits that the search by staff members took approximately 6.5 hours total.

[24] Following the location of responsive records, the ministry submits that the review of those records by the technical lead took approximately 2 hours. It submits that the technical lead reviewed all the documents to ensure they were responsive and that there was no duplication of records.

[25] The ministry submits that the search time estimate of 9 hours was provided to the Freedom of Information (FOI) Office by the EAB and the EAASIB. However, it submits that the ministry's Eastern Regional Office and Peterborough District Office also provided the FOI Office with a summary of its search effort which totalled 1.25 hours.

[26] The ministry submits that the Eastern Regional Office identified four staff members involved in the search which included a search through all personal emails including attachments, personal hard drives, network drives, hardcopy groundwater files, and hard-copy project files. It submits that staff were required to read through all their emails to determine which ones were responsive to the request.

[27] The ministry submits that the Peterborough District Office identified that the Senior Environmental Officer conducted a search of all electronic and physical files related to the company/project, including all related correspondence, as well as an electronic ministry database. It also submits that he searched the previous Environmental Officer's emails in order to ensure that all responsive records were captured during the search.

[28] The ministry submits that staff who conducted the searches in both the Eastern Regional Office and the Peterborough District Office were required to track the electronic search results for all records related to the project and companies in order to locate paper records.

[29] The ministry submits that the 9 hours of search time recorded by the EAB and the EAASIB and the 1.25 hours of search time recorded by the Eastern Regional Office and the Peterborough District Office amounts to a total of 10.25 hours of search time. It submits that for the purpose of the final fee, in an effort to ensure that fees charged are accurate and equitable, the FOI office reduced the chargeable search time from 10.25 hours to 9 hours in order to account for any margin of error in the recording of the search time performed by the program areas.

Photocopying – Regulation 460 section 6

[30] The ministry submits that the photocopying fee of $369.60 is based on the number of pages that are to be disclosed to the appellant. The ministry acknowledges

that during mediation, the appellant requested that he receive the records on compact disc (CD) however, it takes the position that this would not decrease the photocopying fee which it submits is the cost associated with copying the records in order to make them available to the requester, whether in paper format or on CD.

[31] The ministry submits that many of its records are retained in paper format and digital copies of the records must be created in order to conduct its FOI review and provide access to the records. It submits that the ministry program areas are required to manually scan the records in order to facilitate their transmission to the FOI Office from the geographically dispersed program areas. It further submits that any responsive electronic records have to be copied into another format for processing and access purposes. It explains that its standard practice is to copy the records into PDF format and provide them on CD. The ministry references Orders MO-2530, MO-2577 and MO-2528 to support its approach.

Preparation – Section 57(1)(b)

[32] The ministry submits that it reached its preparation fee in accordance with the two minute per page standard previously established by this office.[5] It submits that it identified 138 pages of records that required partial severing under sections 12 to 22 of the *Act*. The ministry states that the amount accorded to this severing would be 4.6 hours, which it rounded down to 4.5 hours for a total cost of $135.00.

Shipping – section 57(1)(d)

[33] The ministry submits that the delivery fee itemized in its fee is the cost for shipping the package of records via courier from the ministry's FOI Office to the appellant. It submits that to calculate the fee, the ministry obtained a quote from it's shipping provider which calculated the cost of shipment at $4.35. The ministry states that it reduced this charge to $3.00 as identified in its fee statement.

[34] The appellant does not make any representations on the fee charged by the ministry. His representations focus on his request for a fee waiver, which will be discussed below.

Analysis and findings

[35] As set out above, the ministry has charged the appellant a search fee, a photocopying fee, a preparation fee and a shipping fee. Having reviewed the fee and having considered the representations of the ministry, I am prepared to uphold it, in part.

[36] With respect to the shipping charges of $3.00, I am prepared to allow this fee which is equal, or less, than the actual cost of shipping the records that are to be disclosed in whole or in part to the appellant. This is in accordance with previous orders

[5] Orders MO-1169, PO-1721 and PO-1834.

of this office which have upheld fees incurred for sending records to an appellant by courier, interpreting them as falling under section 57(1)(d) of the *Act* and section 6 of Regulation 460.[6]

[37] I find that the ministry's calculation for the fee charged for severing the records for disclosure is in accordance with the provisions of the *Act* and Regulation 460 and I uphold it. The ministry submits that 138 pages of records require severances and I accept that the $135.00 fee charged to perform this task is in keeping with two-minute per page standard previously established by this office and noted above.[7]

[38] The ministry has charged the appellant a fee of $369.60 for photocopying based on the 1,848 pages that are to be disclosed. It has charged this photocopying fee despite the fact that the appellant has indicated that he would like to receive disclosure on CD. The ministry submits this photocopying fee accounts for the time spent photocopying records, the majority of which are in paper format, so they can be scanned and uploaded onto a CD.

[39] Section 6.2 of Regulation 460 indicates that the cost for providing records on CD is $10.00 for each CD. Regulation 460 does not, however, address costs associated with scanning records for disclosure on CD. Previous orders examining this issue have determined that the permissibility of charging photocopying fees for scanning records depends on the current format of the records.[8] If the records are currently available in electronic format, it is expected that the institution copy them directly to CD for disclosure without the need to charge fees other than the prescribed $10.00 for each CD.[9] If the records are in paper format, scanning those records in order to provide the information on CD has been considered a necessary component of producing the records in the CD format sought by the appellant.[10]

[40] In Order MO-2530, Adjudicator Laurel Cropley addressed the issue of scanning records onto a CD in the context of a request under the *Municipal Freedom of Information and Protection of Privacy Act* and its regulations. She stated:

> Section 6.2 of Regulation 823 indicates that the cost for providing records on CD-Rom is $10 for each CD-Rom. I interpret this section as referring to making CDs of machine readable records. The regulation does not specifically refer to scanning paper records in order to provide the information on CD. In my view, this activity is a necessary component of producing the paper records in the format requested by the appellant (see Order PO-2424 for a discussion on producing a record in a version other than as a paper record.) As I noted above, section 6.4 of the regulation provides that an institution may charge $7.50 for each 15 minutes spent

[6] Orders M-429, PO-2310 and MO-3115.
[7] *Ibid.*
[8] See Orders MO-2530, MO-2577, PO-2424 and PO-3480.
[9] Order PO-3480.
[10] Order MO-2577.

> by any person "for preparing a record for disclosure." The Town has applied this fee structure in estimating the costs associated with producing the information on CDs. I am satisfied generally in the approach taken by the Town.

[41] In Order MO-2530, Adjudicator Cropley went on to find that a fee based on scanning 100 pages per hour was acceptable in the circumstances.

[42] I agree with Adjudicator Cropley's reasoning in Order MO-2530 with respect to the application of preparation fees to account for time spent on the preparing and scanning of paper records to enable disclosure on CD and adopt it for the purposes of this appeal. However, for the purposes of the appeal before me, I disagree with her finding that 100 pages per hour is an acceptable rate to charge for this task.

[43] In my view, given the circumstances of this appeal, a more appropriate estimate of time required to prepare and scan paper records for disclosure on CD is in keeping with that which was claimed by the Ontario Lottery and Gaming Corporation (OLGC) in Order PO-3152. In that appeal, the OLGC claimed and I upheld, that it would take one hour to scan 1,200 pages of records for the purpose of uploading them onto a CD. In the circumstances of that appeal, I found this calculation to be reasonable and fair. Accordingly, in Order PO-3152 I allowed the OLGC to charge a $30.00 fee, in keeping with the preparation fee rate prescribed in Regulation 460 at part 4 of section 6, for the purposes of making paper records available for disclosure on CD. In my view, given the circumstances before me, it is reasonable and fair to adopt this rate.

[44] As set out in its revised fee and explained in its representations, the ministry has charged a fee of $369.60 to photocopy 1,848 pages of records to scan then onto a CD. I will disallow this fee as, in my view, part 1 of section 6 of Regulation 460 relates to the cost of producing photocopies or computer printouts that will be provided to the appellant in hard copy rather than the background work required to make paper records available on CD. In keeping with Orders MO-2530 and PO-3152, I find the more appropriate manner in which to assess the costs incurred by an institution for preparing paper records for disclosure on CD is to apply part 4 of section 6 of Regulation 460, which sets out the costs for "preparing a record for disclosure" at $7.50 per 15 minutes spent, or $30.00 per hour. As a result, and in keeping with Order PO-3152, I will allow the ministry to charge the appellant a fee for preparing the records for disclosure on CD in the amount of $30.00 per hour at the rate of 1,200 pages per hour. As the ministry submits that there are 1,848 pages of records, I accept that a fee of $46.20 is reasonable and fair for the work required to make these pages available for disclosure on CD.

[45] Additionally, based on part 2 of section 6 of Regulation 460 mentioned above, I allow the ministry to charge $10.00 for the CD. Accordingly, while I do not uphold the ministry's photocopy fee of $369.60, I allow it to charge a total of $56.20 for the work required to make the responsive records available to the appellant on CD and the CD itself.

[46] With respect to the ministry's search fee, I uphold it only in part. First, I do not uphold the 0.5 hours that the ministry submits that it spent to review the request and identify the potential sources of records. Neither the *Act* nor Regulation 460 sets out charges for reviewing the request in order for the ministry to determine its next steps. As the 0.5 hours identified by the ministry for reviewing the request was not specifically spent on searching for responsive records, I will not uphold the search fee charged for that portion of time spent. However, as the ministry decreased its calculated search time from 10.25 to 9 hours to account for any margin of error in the recording of the time, I will not alter the search fee to account for this 0.5 hours which was improperly charged.

[47] Second, I do not accept the ministry's position that despite the fact that the request was narrowed during mediation, which resulted in a smaller number of responsive records, the fee cannot be retroactively revised and the appellant should be charged the entire fee for the initial search for records responsive to the broader request.

[48] In my view, in the circumstances of this appeal, the appellant should not be charged a fee for searching for records that are not responsive to the request, even if that request was subsequently narrowed. The ministry has not provided any evidence on whether or not the narrowing of the request would have effectively reduced the time spent on the search and its correlative fee, nor has it provided any explanation as to where these records, which the appellant no longer seeks, are held. In the absence of such evidence, I find that the ministry's search fee should be decreased by the percentage difference between the number of records that were located as responsive to the initial request and those that were identified as responsive to the revised request.

[49] In the circumstances of this appeal, the search for records responsive to the initial request generated 2,608 pages of responsive records. Once the request was narrowed, the number of responsive records was reduced to 1,848 pages. As the records responsive to the narrowed request reflects 70% of the originally located responsive records, the ministry is to charge a search fee that reflects that percentage of time taken. Accordingly, rather than $270.00, I will allow the ministry to charge a search fee of $189.00 which reflects 6.8 hours of search time, 70% of the original time spent.

[50] In summary, I have not upheld the ministry's photocopy fee and have instead allowed it to charge a fee of $56.20 for the preparation work required to make the records available for disclosure on CD, as well as for the CD itself. I have reduced its search fee to $189.00. I uphold the ministry's fees for severing records at $135.00, and for shipping at $3.00. As a result, subject to my finding of whether a fee waiver should be granted, the allowable fee to be charged by the ministry comes to a total of $383.20.

B. Should the fee be waived?

[51] 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 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 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.

[52] 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 an equitable to grant it or the *Act* requires the institution to waive the fees.[11]

[53] A requester must first ask the institution for a fee wavier, 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 wavier, in whole or in part, and may uphold or modify the institution's

[11] Order PO-2726.

decision.[12]

[54] The institution or this office may decide that only a portion of the fee should be waived.[13]

Part 1: basis for fee waiver

Section 57(4)(c): public health or safety

[55] 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 records.[14]

Representations: public health or safety

[56] In its representations, the ministry explains why it denied the fee waiver. Specifically, it explains that it considered the four factors, which I have listed above, that are considered to be relevant to a determination whether a fee waiver under section 57(4) is appropriate, and explains why it is of the view that none of them have been satisfied. As these representations are substantially similar to those that the ministry made on reply in response to the appellant's representations and as the appellant bears the burden of establishing that a fee waiver should be granted, I will address the ministry's submission on this issue below, following my outline of the appellant's submissions.

[57] The appellant submits that he requests the record in his capacity as a member of a community organization and he requests that the ministry grant a fee waiver pursuant to section 57(4)(c) of the *Act*, as the dissemination of the records will benefit public health or safety.

[58] The appellant submits that the organization's mission statement is: "Protecting

[12] Orders M-914, P-474, P-1393 and PO-1953-F.
[13] Order MO-1243.
[14] Orders P-2, P-474, PO-1953-F and PO-1962.

our environment from the impact of waste incineration, which threatens our health, prosperity and our community's unique appeal." He submits that it is a "grass-roots, not-for-profit organization that is composed entirety of volunteers. He submits that he has worked with the ministry to attempt to narrow the request in order to reduce the cost but it remains "prohibitively expensive for our organization."

[59] Addressing the factors that can be considered when determining whether a fee waiver under section 57(4)(c) is appropriate, the appellant makes the following submissions:

- The information being sought is for the purpose and the protection of the health and residents of Port Hope and beyond, as well as the protection of local agriculture, and sensitive wetland areas. Protection of public health, as well as local agriculture, is the reason why the organization was formed.

- The organization is seeking this information specifically in an effort to protect the health of residents in the area, and the Province of Ontario. Medical experts have directly disputed the proponent's claims regarding the likely health impact of the proposed facility. [In support of his position, the appellant included a reports authored by two "experts" in the field (a medically qualified toxic-pathologist and a retired medical Doctor and Professor Emeritus of Molecular Biology at the University of Guelph), who take the position that the proposed facility poses a number of health concerns.]

- In Order PO-1909, Adjudicator Donald Hale recognized that "discharge of pollutants into the air and water of the province which are at the root of the request relate directly to a public health or safety concern…issues relating to the contamination of Ontario's air and water are, by their very nature important health or safety concerns." The appellant submits that the proposed facility would directly discharge pollutants into the air and that learning more about the type and quantity of pollutants is critically important information for Port Hope residents, and all Ontarians, to know and discuss to properly assess the proposed facility.

- The organization's intention is to disseminate all relevant information obtained by sharing it with community contacts and making it available on the organization's website. The appellant submits that "[d]issemination of the information will yield a true public benefit, by ensuring that full information is available to decision makers and the public on this issue critical to local health, agriculture and tourism."

[60] At the conclusion of his submissions, the appellant submits that the proposed waste incinerator which is the subject of the records was "seemingly defeated" at a hearing of the Ontario Municipal Board in March 2015. However, he submits that given that it is possible that a waste incinerator will be built in the area (or in another area of Ontario) in the future, the responsive records are still pertinent to general public safety and health issues surrounding its potential construction.

[61] As noted above, the ministry made representations that were substantially similar to those it raised at first instance. However, in reply it responds directly to the appellant's submissions. The following description of the ministry's submissions is extracted from both sets of submissions.

[62] The ministry submits that the points raised by the appellant in his representations regarding the factors that should be considered are the same as those he raised in the fee waiver request submitted to the ministry and that it continues to take the position that a fee waiver should not be granted.

[63] With regards to the first factor, the ministry submits that it agrees with the appellant's claim that the subject matter of the records relate to projects that concern a community of residents and is therefore of a public, not private interest. Accordingly, this factor is not in dispute.

[64] With regards to the fourth factor, public dissemination, the ministry submits that it accepts that the appellant intends to make the responsive records available to those communities affected by the project by their distribution through the non-profit community organization in which he is involved. Accordingly, this factor is also not in dispute.

[65] The ministry however, does not agree that the second and third factors identified above are present in the circumstances of this appeal. With respect to the second factor, whether the subject matter of the record relates directly to a public health or safety issue, the ministry submits that this factor relates to the content of the records and not simply the topic of the initial request. It submits that it considered the question of whether the content of the records relate to a public health or safety issue and on its review of the records found that the majority of them consisted of project descriptions, technical reports and memoranda, engineering design, and records that relate to the emissions of pollutants from the proposed project. The ministry submits that the records also contain correspondence between the proponent and the ministry, and internal ministry correspondence regarding project documentation and clarifications about the project.

[66] The ministry submits that following its review of the records, it concluded that they do not contain any content or information directly or explicitly related to public health or safety concerns that are not already publicly available through an Environmental Screening Report posted on the proponent's website. The ministry states while it acknowledges and agrees with Adjudicator Hale's comments in Order PO-1909 regarding the importance of the type of information before him being made available for public discussion, it submits in the circumstances of this appeal, the information related to the pollutant emissions from the project is already publically available through the Human Health Risk Evaluation which forms part of the aforementioned Environmental Screening Report, available on the proponent's website.

[67] The ministry also notes that the submissions provided by the appellant do not demonstrate a direct relation between the contents of the records and a recognized

public health or safety issue. Accordingly, the ministry submits that it found that it had not been sufficiently demonstrated that the subject matter of the records responsive to the request relate directly to a public health or safety issue as considered by the second factor listed above.

[68] With respect to the third factor to be considered in the determination of whether part 1 of the test for fee waiver under 57(4)(c) has been met, the ministry reiterates that its review of the records confirmed that they do not contain substantive project information that has not previously been made available to the public in the proponent's publicly posted documentation. It further submits that technical documents associated with the project remain publicly available on the proponent's website and therefore, that disclosure of the responsive records would not meaningfully add to the public discourse on the subject of the project.

Analysis and finding: public health and safety

[69] Having reviewed the representations of the parties and the factors identified as relevant to a determination whether section 57(4)(c) applies, I find that the dissemination of some of the responsive records will benefit public health and safety within the meaning of that provision, thereby meeting part 1 of the test.

[70] In Order PO-1909, Adjudicator Hale considered the relevant factors when reviewing whether section 57(4)(c) applies to allow a fee waiver request for information relating to municipal and industrial air or water discharges submitted by a not-for-profit environmental organization. He stated:

> In considering [whether] the factors listed above [apply] to the information which is the subject of these appeals, I find that the subject matter of the responsive records is a matter of public, rather than private interest. In addition, I find that issues relating to non-compliance with environmental standards with respect to discharges of pollutants into the air and water of the province which are at the root of this request relate directly to a public health or safety concern. Without having reviewed the voluminous records responsive to the request, it is difficult for me to determine whether their disclosure would yield a public benefit by disclosing a public health or safety concern. The records may, or may not, contain information about a public health or safety risk. This is precisely the reason for the appellant's request.
>
> I agree with the position taken by the appellant, however, that the dissemination of the record would yield a public benefit by contributing meaningfully to the development or understanding of an important public health or safety issue. In my view, issues relating to the contamination of Ontario's air and water are, by their very nature, important public health or safety concerns. In Order P-1190, which was upheld by the Ontario Superior Court of Justice (Divisional Court) in Ontario Hydro v. Ontario (Information and Privacy Commissioner), [1996] O.J. No. 4636 (Div. Ct.),

leave to appeal refused [1997] O.J. No. 694 (C.A.), [former] Assistant Commissioner Tom Mitchinson adopted the findings of former Commissioner Tom Wright in Order P-270 with respect to the public interest which exists in information relating to the safety of Ontario's nuclear industry. He determined that:

> Commissioner Tom Wright discussed the issue of nuclear safety and section 23 in Order P-270. This appeal involved a request for agendas and minutes of the Senior Ontario Hydro/Atomic Energy of Canada Limited Technical Information Committee (SOATIC), which were denied by Hydro under section 17(1) of the *Act*. In considering whether there was a compelling public interest in discourse of nuclear safety related information, he stated.
>
> In my view, there is a need for all members of the public to know that any safety issues related to the use of nuclear energy which may exist are being properly addressed by the institution [Hydro] and others involved in the nuclear industry. This is in no way to suggest that the institution is not properly carrying out its mandate in this area. In this appeal, disclosure of the information could have the effect of providing assurances to the public that the institutions and others aware of safety related issues and that action is being taken. In the case of nuclear energy, perhaps unlike any other area, the potential consequences of inaction are enormous.
>
> I believe that the institution, with the assistance and participation of others, has been entrusted with the task of protecting the safety of all members of the public. Accordingly, certain information, almost by its very nature, should generally be publicly available.
>
> In view of the above, it is my opinion that there is a compelling public interest in the disclosure of nuclear safety related information.

Similarly, I adopt the findings of the former Commissioner and the [former] Assistant Commissioner and agree that matters relating to the safety of Ontario's air and water, like those concerned with the nuclear industry, by their very nature, raise a public safety concern. In addition, I find that the disclosure of the information contained in the records would be reasonably likely to result in the dissemination of information by the organization represented by the appellant relating to possible environmental degradation. This in turn would lead to a greater public understanding of this important issue.

> I conclude that the dissemination of the information contained in the records which are responsive to the appellant's request will benefit public health or safety within the meaning of section 57(4)(c) of the Act, as was the case in Order P-1557. The ministry recognizes this fact through its own publication of similar information on its website in recent years.

[71] I accept the reasoning applied by Adjudicator Hale in Order PO-1909 to be relevant and adopt it for the purposes of the current appeal.

[72] I have considered the parties' representations and the factors established as relevant to the determination of whether a fee waiver under section 57(4)(c) should be granted. In my view, I have been provided with sufficient evidence to support a conclusion that the dissemination of the information relating to the proposed waste incinerator would benefit public health and safety for the purposes of section 57(4)(c) and a basis for fee waiver has been established.

[73] It is clear to me, and the ministry accepts, that the records at issue, which relate to a proposed waste incinerator are a matter of public rather than private interest and that, by virtue of the appellant's involvement in the not-for-profit organization on whose behalf the request was submitted, the responsive records will be disseminated on that organization's website in a manner that makes them accessible to the general public. The first and fourth of the four factors to be considered, as listed above, are therefore not in dispute and have been met. It remains for me to determine whether the second and third factors have been established.

[74] With respect to the second factor, the ministry argues that the subject matter of the content of the responsive records are technical in nature and do not relate directly to any public health or safety issues relating to the proposed waste incinerator, I disagree with its interpretation of this factor. In my view, the subject matter of the responsive records relates to the construction of a waste incinerator, which in and or itself directly raises public health and safety issues. This is in keeping with previous orders that have held that section 57(4) (or its equivalent in the *Municipal Freedom of Information and Protection of Privacy Act* at section 45(4)(c)), does not require that there be absolute, or indisputable certainty as to the existence of a threat to public health or safety before the basis can be properly relied upon in seeking waiver of a fee.[15]Therefore, I accept that the second factor identified above has been established.

[75] Similarly, considering the third factor, I disagree with the ministry position that because many of these records are technical documents, their dissemination would not yield a public benefit by contributing meaningfully to the development of understanding of an important public health or safety issue. As was the case in Order PO-1909, there are a significant number of records at issue and without having had the opportunity to review them it is difficult for me to determine whether their disclosure would yield a public benefit by disclosing a public health or safety concern. However, in my view, if such records are reviewed by individuals who understand technical elements of the

[15] Orders MO-2163 and PO-2883.

construction of such buildings, their views could reasonably be expected to contribute meaningfully to the development of understanding of any public health or safety issues surrounding the construction of the incinerator.

[76] Additionally, in its representations the ministry argues that there is nothing in the records relating to public health or safety concerns that have not already been disclosed in material that has been publicly available. In my view, even if information that is similar to the type of information that appears in the records has been disclosed, this does not preclude the possibility that the dissemination of the information, as it appears in the records at issue, would shed light on the information already publicly available, thereby yielding a public benefit by contributing meaningfully to the development of understanding of an important public health or safety issue.

[77] Accordingly, in my view, the third factor has been established.

[78] In summary, I accept that the dissemination of information relating to the construction of the waste incinerator will benefit health and safety as contemplated by section 57(4)(c). Despite having established the existence of a basis, I must still consider whether it would be fair and equitable to grant a fee waiver in the circumstances of this particular appeal.

Part 2: fair and equitable

[79] 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 or 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 for 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.[16]

[80] The ministry submits that, prior to the appellant's request for a fee waiver, it

[16] Orders M-166, M-408 and PO-1953-F.

attempted to work with the appellant to minimize the cost of processing the request by providing recommendations and suggestions of ways in which to narrow the scope of the request, thereby reducing the cost. The ministry submits that during the mediation stage, even though it had already reviewed the whole file and searched for records, it worked cooperatively with the appellant and provided additional suggestions of how he could further reduce the scope in order to further reduce the cost which resulted in an almost 50% decrease. The ministry notes, in its representations, that the appellant did not advance any compromise solution to reduce fees at any point in the freedom of information process.

[81] The ministry submits that over the course of the processing of the request and the appeal process, it responded helpfully and constructively to the appellant's fee-related concerns and invested considerable resources in the file well beyond the chargeable fees detailed in the fee estimate letters. It submits that it committed to the process of revision, compromise and ongoing mediation and it would be unreasonable and inequitable in the circumstances to now waive the additional fees and transfer the cost of processing from the appellant to the ministry. The ministry submits that it is of the opinion that the waiver of the fees in this appeal would contravene the user-pay principle contemplated by the principles of the *Act* and followed by this office.

[82] The appellant submits that it would be fair and equitable to grant a fee waiver in the circumstances of this appeal given that the organization on behalf of whom he is making the request is a volunteer organization with the stated objective of maintaining community well being.

Analysis and finding: fair and equitable

[83] When determining whether it would be "fair and equitable" to grant a fee waiver an overarching consideration is whether waiver of the fee would shift an unreasonable burden of the cost of processing the request from the appellant to the institution. This is based on Legislature's intention to include a user-pay principle in the *Act*, as evidenced by the provisions set out in section 57. This user-pay system 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 appellant can present a persuasive argument that a fee waiver is justified on the basis that it is fair and equitable to grant it.

[84] In the circumstances of this appeal, I find that it would not be fair and equitable to waive the remaining fee as to do so would shift an unreasonable burden of the cost of the request from the appellant to the institution. In coming to this conclusion, I have considered the relevance of a number of factors listed above, as well as several additional factors.

[85] Based on the information before me, it is evident that the ministry worked diligently, in good faith, with the appellant to clarify and narrow the scope of the request with an aim to reducing the associated costs. In my view, these efforts were

productive and resulted in considerable reduction of the fees applicable to the search component of the request. I find that this factor weighs against granting the appellant a fee waiver.

[86] Although I acknowledge that the ministry takes the position that the appellant did not "advance any compromise position to reduce fees," given that the parties came to a mutual agreement on narrowing the request in a manner that reduced the fees, in my view, it must be said that the appellant worked constructively towards the common goal of narrowing the request. I find that this is a factor that weighs in favour of granting a waiver of the remaining fee.

[87] This request involves a considerable number of records. The records responsive to the narrowed request total 1,848 pages. Preparing this number of records for disclosure took a significant amount of time and effort by the ministry. Additionally, despite the number or records and the time and effort taken by the ministry to process the request, in my review of the fee I have reduced the total amount to be charged to the appellant by more than half. In the circumstances of this appeal, I find that both the number of responsive records and my reduction of the allowable fee weigh against the granting of a fee waiver.

[88] I have found that dissemination of the information about the proposed waste incinerator which is found the responsive records will benefit public health and safety within the meaning of section 57(4)(c) of the *Act*. In my view, the fact that the appellant is requesting the information on behalf of a not-for profit organization that would disseminate the information in meaningful way is a factor that weighs in favour of granting a fee waiver.

[89] However, in the appellant's representations on whether a public health and safety basis can be established, he submits that the construction of the proposed waste incinerator that is the subject of the records has "seemingly" been "defeated." In my view, the fact that the construction of the proposed incinerator is no longer imminent and, may in fact never go ahead in the manner contemplated in the responsive records, weighs significantly against the granting of a fee waiver.

[90] I recognize that even if the proposed waste incinerator project addressed by the records does not proceed, disclosure of the responsive records might provide information that is helpful to other future waste incinerator projects raising similar public health and safety concerns. In my view, that such future projects are merely speculative at this point in time and that there are already documents, available online in the public domain, that specifically address many of the public health and safety concerns related to this incinerator project, are both factors that weigh against the granting of a fee waiver in the circumstances of this appeal.

[91] In conclusion, after considering the factors that are relevant to the determination of whether or not a fee waiver should be granted in this appeal, I have concluded that the factors that weigh in favour of granting a fee waiver are outweighed by those weighing against granting it. In my view, granting a fee waiver of the remaining fee

would not be fair and equitable as it would shift an unreasonable burden of the cost of processing the request from the appellant to the ministry. Accordingly, I uphold the ministry's decision not to grant the appellant a fee waiver under section 57(4) of the *Act*.

ORDER:

1. I uphold the preparation fee charged by the ministry for the purpose of severing the records for the purposes of disclosure.

2. I uphold the shipping fee charged by the ministry in association with delivering the records to the appellant.

3. I do not uphold the ministry's photocopy fees associated with the request, but I allow it to charge preparation fees for the work associated with making the records available for disclosure on CD, as well as a $10 fee for the CD itself.

4. I do not uphold the ministry's search fees associated with the request and order it to reduce them to $189.00.

5. The allowable total fee to be charged by the ministry for access to the responsive records is $383.20.

6. I uphold the ministry's decision not to grant a fee waiver.

Original Signed By: June 17, 2016
Catherine Corban
Adjudicator