

Information and Privacy Commissioner,  
Ontario, Canada



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

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## RECONSIDERATION ORDER PO-3749-R

Appeal PA16-170

Ministry of Transportation

July 18, 2017

**Summary:** The Ministry of Transportation (the ministry) received a 15-part request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to the Highway 69 construction projects. The ministry issued a fee estimate decision and denied the appellant's request for a fee waiver, and the appeal of those decisions led to the issuance of Order PO-3727. In Order PO-3727, the ministry's fee estimate was upheld. The ministry was ordered to waive an additional 10% of the fee estimate, but its decision not to waive the remaining amount was upheld. The appellant then asked that Order PO-3727 be reconsidered.

In this Reconsideration Order, the adjudicator finds that the appellant has not established that the grounds for reconsideration in sections 18.01(a) or (c) of the IPC's *Code of Procedure* have been established, and the reconsideration request is dismissed.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 57(4)(c); *IPC Code of Procedure*, sections 18.01, 18.02 and 18.08.

**Cases Considered:** *Mann v. Ontario (Ministry of the Environment)*, 2017 ONSC 1056.

### OVERVIEW:

[1] The Ministry of Transportation (the ministry) received a 15-part request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for records related to the Highway 69 construction projects, from the Killarney Highway interchange to the Alban interchange and any associated projects.

[2] The ministry issued an interim decision and fee estimate, assessing fees for access to the responsive records at \$6,740.00. The ministry requested a 50% deposit of \$3,370.00 to continue processing the request, as well as a written acceptance of the total fee estimate.

[3] Upon receipt of the ministry's decision and fee estimate, the appellant filed a request for a fee waiver on the grounds that dissemination of these records will benefit public health or safety, as contemplated by section 57(4)(c) of the *Act*.

[4] In response, the ministry advised that although it was denying the fee waiver as the grounds for it under section 57(4)(c) had not been established, the ministry was prepared to offer a 30% reduction of the fee, reducing it to \$4,718.00.

[5] In response, the appellant amended his request by deleting parts 11 and 15. The ministry advised that the amended request was essentially the same as the original request and the required level of effort would remain the same as for the original request.

[6] The appellant appealed the ministry's decision with respect to both the fee and its denial of the fee waiver to this office.

[7] Following an inquiry into the issues on appeal, I issued Order PO-3727 where I upheld the ministry's fee estimate. I ordered the ministry to waive an additional 10% of the fee estimate but upheld the ministry's decision not to waive the remaining amount.

[8] The appellant then sought a reconsideration of my findings in Order PO-3727 to order an additional 10% of the fee estimate to be waived. I note that the appellant is not disputing my fee estimate findings, but solely my findings on the fee waiver.

[9] In this decision, I find the appellant has not established the grounds for reconsideration and I dismiss his request.

## **DISCUSSION:**

### **Are there grounds under section 18.01 of the IPC's *Code of Procedure (the Code)* to reconsider of Order PO-3727?**

[10] This office's reconsideration process is set out in section 18 of the *Code* which applies to appeals under the *Act*. This section states, in part:

18.01 The Commissioner may reconsider an order or other decision where it is established that there is:

(a) a fundamental defect in the adjudication process;

(b) some other jurisdictional defect in the decision; or

(c) a clerical error, accidental error or omission or other similar error in the decision.

18.02 The IPC will not reconsider a decision simply on the basis that new evidence is provided, whether or not that evidence was available at the time of the decision.

18.08 The individual who made the decision in question will respond to the request, unless he or she for any reason is unable to do so, in which case the IPC will assign another individual to respond to the request.

### ***The appellant's request***

[11] In the appellant's request, he raised a number of reasons why I should reconsider my decision. In particular, he submits that there is "a fundamental defect in the adjudication process" (18.01(a)) and there is "a clerical error, accidental error or omission or other similar error in the decision" (18.01(c)).

[12] With regards to the ground in paragraph 18.01(a), the appellant submits that I demonstrated some fundamental defects in the adjudication process during my analysis of the fee waiver. The appellant submits:

- I presented the ministry's arguments but did not include his arguments in response. For example, I did not provide his response with respect to the ministry's comments about the Ombudsman Ontario. I also failed "to add that based on the MOECC findings, the Premier, the Minister of Transportation, MTO staff, MOECC staff, local MPP's and others were invited by [them] to visit the site and partake in some of the 'milky brown water' that MOECC stated was not a health and safety concern."
- As I found three parts of the 11-part request yield a public benefit, I should have granted a fee waiver as there "does not appear to be a template on how many negative actions that you need to qualify for a fee waiver."
- I was incorrect in my finding that the appellant's main efforts were obtaining a fee waiver instead of working cooperatively with the ministry.

[13] With regards to the grounds in paragraph 18.01(c), the appellant submits that there was an error in my finding to waive only 10% of the fee waiver. He points out that as I found a number of specific health and safety concerns related to public interest, and that dissemination of at least some portions of the records will benefit public health or safety then he should be entitled to "a full fee waiver." He states: "So if the Adjudicator agrees with our position, the Adjudicator's analysis and findings that we be granted a 10% reduction in the Fee must be considered an accidental error or

omission or some other similar error.”

***Order PO-3727***

[14] As the appellant’s reconsideration request focuses mainly on the issue of fee waiver, I will discuss my findings on that issue here.

[15] In Order PO-3727, I made a number of findings with respect to fee waiver. First, I found that the dissemination of at least some of the records will benefit public health or safety as there is a public interest in the subject matter of many of the records as they concern the environment, specifically noise, dust, sedimentation, and water pollution.<sup>1</sup> However, some parts of the 11-part request relate to a private interest. Further, I found that the disclosure of the responsive records for three parts (items #1, 3 and 8) of the 11-part request would yield a public benefit by leading to an informed citizenry which can meaningfully participate in the discussions around these topics.<sup>2</sup> I also found that there is a high probability that the appellant will disseminate the contents of the disclosed records.<sup>3</sup> Finally, I found that, when considering other relevant factors to determine whether it would be “fair and equitable,” these factors weighed in favour of waiving an additional 10% of the fee estimate.<sup>4</sup>

***Findings***

[16] In assessing the merits of the appellant’s request for reconsideration, I have taken into account sections 18.01 and 18.02 and all of the circumstances of the case.

[17] In my view, none of the appellant’s stated reasons for requesting a reconsideration of PO-3727 fit within sections 18.01(a) or (c). With respect to 18.01(a), I find that the appellant’s arguments do not have any merit. I acknowledge that I did not include the appellant’s response with respect to the Ombudsman Ontario and his invitation to a number of individuals, including the Premier, to partake in some of the ‘milky brown water’ at his cottage. However, these arguments of the ministry did not factor into my analysis or findings. I had included them under the heading of “Representations on public health or safety,” and within the paragraph discussing some of the ministry’s arguments. In similar fashion, I included some of the appellant’s arguments under the same heading. To be clear, these arguments of the ministry did not appear in my analysis of section 57(4)(c) (public health or safety).

[18] With respect to 18.01(c), I also find that the appellant’s argument does not have any merit. He argues that as I found he met the test under public health or safety, he should be granted a full fee waiver. He states: “The statements by the Adjudicator

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<sup>1</sup> See Order PO-3727, paragraphs 46 and 47.

<sup>2</sup> See Order PO-3727, paragraph 52.

<sup>3</sup> See Order PO-3727, paragraph 53.

<sup>4</sup> See Order PO-3727, paragraph 60 to 62.

clearly supports our position and confirm that we have met the terms and conditions identified and required to be granted a full fee waiver." However, "public health or safety" is one of the many factors I must consider. It is not the sole factor to be considered. As the Divisional Court of Ontario states, in *Mann v. Ontario (Ministry of Environment)*, 2017 ONSC 1056, "the sole test is whether any waiver would be fair and equitable," taking into account the factors in subsection 57(4) and other relevant factors.

[19] In summary, I find that the appellant has not established that the grounds for reconsideration in sections 18.01(a) or (c) has been met, and I dismiss the appellant's reconsideration request.

**ORDER:**

I dismiss the appellant's reconsideration request.

Original Signed by: \_\_\_\_\_  
Lan An  
Adjudicator

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July 18, 2017