

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3768

Appeal PA16-152

Ministry of Transportation

September 12, 2017

Summary: In response to a request for records relating to highway maintenance contracts, the ministry issued a fee estimate decision. It also denied the appellant's request for a fee waiver. In this order, the adjudicator upholds the ministry's fee estimate. She orders the ministry to waive 50% of the fee but upholds the ministry's decision not to waive the remaining cost.

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

Orders and Investigation Reports Considered: Orders PO-3743, MO-3469, PO-3755, and MO-2129.

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

BACKGROUND:

[1] In February 2014, the Legislature's Standing Committee on Public Accounts requested that the Auditor General conduct an audit on winter highway maintenance. In April 2015, the Auditor General issued her *2015 Winter Highway Maintenance* special report (special report). Upon the issuance of her special report, the Ministry of Transportation (the ministry) requested that the Auditor General provide a follow up report at the end of the subsequent winter to review the ministry's progress in implementing her recommendations. Approximately a year and a half later, the Auditor General issued the *Follow-Up on April 2015 Special Report* (follow-up report).

[2] In December 2015, the ministry received a 5-part request, pursuant to the *Freedom of Information and Protection of Privacy Act* (the *Act*) for various records relating to highway maintenance contracts. The ministry issued a fee estimate in the amount of \$1150.

[3] Shortly afterwards, the appellant submitted a fee waiver request under section 57(4)(c) of the *Act*. He submitted that a fee waiver should be granted, in light of the ministry having waived its fees on an earlier similar request of his and in light of the information being even more relevant from a health and safety standpoint, due to the Auditor General's special report. The ministry denied the appellant's fee waiver request.

[4] Prior to filing an appeal at this office, the appellant narrowed his request to parts 1 and 2, which read as follows:

1. A PDF copy of all Area Maintenance Contracts [AMCs] for Ontario's highways awarded after December 14, 2014, as well as the award decision documents for these contracts.
2. A PDF copy of all non-conformance reports for all Area Maintenance Contractors, including a brief description of each incident and the penalties imposed, for the period from December 1, 2014 and forward. Summary reports only, not individual incident records.

[5] During mediation, the ministry advised that it had received a request for the same records in part 2 from another requester, but relating only to the Northeastern Region (Sault St. Marie, Sudbury, Cochrane, New Liskeard and Huntsville), for the time period from March 2014 to May 2016. The ministry advised that the requester in that request was willing to pay the fees and that as a result, the ministry would be willing to disclose to the appellant, without fees, the same records they released to the other requester.

[6] Subsequently, the ministry issued a revised access decision to the appellant, noting that full access was being granted to records responsive to the related request and indicating that if the third parties do not appeal the ministry's access decision, a copy of the responsive records would be released to the appellant.

[7] Sometime afterwards, the ministry provided to the appellant the records responsive to the related request. It advised the appellant that two third parties filed appeals and that it was disclosing the records not at issue. Since that time, one third party appeal has resolved while the other appeal is at the inquiry stage.

[8] The appellant advised he wished to pursue access to the remaining records. This was conveyed to the ministry, which then issued a revised estimate in the amount of \$692.50.

[9] The fee estimate was calculated as follows:

Part 1:

- Search time: 0.25 hour @ \$30/hour = \$7.50

Part 2:

- Search time: 18.75 hours @ \$30/hour = \$562.50
(1.25 hours x 15 contract areas = 18.75 hours)
- Preparation time: 3.75 hours @ \$30/hour = \$112.50
(0.25 hour x 15 contract areas = 3.75 hours)

CD: \$10

[10] The ministry advised that it would proceed to process part 1, given the low amount and that the appellant did not object to the fee estimate for it.

[11] As no further mediation was possible, the appeal was moved to the adjudication stage, where an adjudicator conducts an inquiry under the *Act*. The parties were invited to submit representations, which were shared in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction Number 7*.

[12] In this order, I uphold the ministry's fee estimate as reasonable. I order the ministry to waive 50% of the fee but uphold the ministry's decision not to waive the remaining cost.

ISSUES:

- A. Should the fee estimate for part 2 of the request be upheld?
- B. Should the fee be waived?

DISCUSSION:

A: Should the fee estimate for part 2 of the request be upheld?

[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.

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

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:

- 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.

[15] Where the fee for access to a record exceeds \$25, an institution must provide the requester with a fee estimate.¹ 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.²

[16] 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.³ The fee estimate also assists requesters to decide whether to narrow the scope of a request in order to reduce the fees.⁴

[17] In all cases, the institution must include a detailed breakdown of the fee, and a

¹ See section 57(3) of the *Act*.

² Order MO-1699.

³ Orders P-81, MO-1367, MO-1479, MO-1614 and MO-1699.

⁴ Order MO-1520-I.

detailed statement as to how the fee was calculated.⁵

[18] This office may review an institution's fee and determine whether it complies with the fee provisions in the *Act* and Regulation 460.

Representations

Ministry's representations

[19] The ministry submits that its fee estimate for part 2 of the request is reasonable. The ministry points out that, as it does not have a summary report for the information requested, staff from the five regions must compile the information requested from both electronic and paper records.

[20] More specifically, the ministry submits that some 80 staff and 20 supervisors involved in the Contract Administration will conduct the search for the 15 contract areas relevant to the appeal. The ministry estimates that it will take an hour and 15 minutes for each contract area to be searched, which is based on five staff from each of the 15 contract areas searching through their records to locate all non-conformances in which consequences were imposed, each staff spending 15 minutes conducting the search. The ministry points out that the total of all these 15 minute searches is its estimate of 18 hours and 45 minutes of search time.

[21] Further, the ministry submits that once the information described above is compiled, it would require 15 minutes to create the requested records for each of the 15 contract areas, for a total of three hours and 45 minutes.

Appellant's representations

[22] The appellant submits that the fee estimate for part 2 of the request is not reasonable. He points out that he received four summaries for the Northeastern Region (which had been prepared for another requester), and they are no more than one-page long. The appellant questions why it could be "so costly to produce what would seem to be straightforward reports that the ministry should be producing anyway." He also points out that, during a conversation with ministry staff, he was told that ministry officials do have access to contractor performance data. The appellant also points out that the ministry must intend to prepare reports summarizing the times a contractor missed outcome targets due to the Auditor General's recommendations, and, if so, it would be unfair to charge the public an additional fee for work the ministry already intends to carry out.

⁵ Orders P-81 and MO-1614.

Ministry's reply

[23] In response, the ministry points out that, in her follow-up report, the Auditor General noted that the ministry had made little or no progress in developing and implementing "a robust centralized system that tracks the results of all audits and fines to better enable provincial analysis of contractor's performance."

[24] The ministry reiterates that the requested records do not exist but must be created from compiling non-conformance reports, and reviewing the status of any possible appeal of the conformance issue, as the non-conformance process includes a three-level appeals process.

[25] The ministry also points out that, in the absence of a central system, these records are maintained locally, and that any compilation process must be repeated in each case in every contract area.

Appellant's sur-reply

[26] In response, the appellant points out that the ministry contradicts itself:

... It makes a convincing case that basic compliance summaries, necessary for meaningful oversight of contractors and the AMC program, cannot be prepared without extensive labour. But after arguing for a high FOI fee by demonstrating its inability to meaningfully oversee its AMC program without high additional costs, the Ministry goes on to argue that there is no benefit to public health or safety in disseminating these records, since it is fully able to oversee its AMC program. One of these arguments must fail.

Finding

[27] Section 57(1) sets out the fees that an institution shall charge. As stated above, section 6 of Regulation 460 sets out a quarterly hour rate (\$7.50) for both searching and preparing a record. Given that the ministry is charging \$30.00 per hour for each of the search and preparation time, I find that the hourly rate charged by the ministry is in accordance with the *Act*. Furthermore, given that the requested records must be produced from the records compiled after the search is completed, and that there are a large number of contract areas requested, I find the fee for search and preparation to be reasonable. I note that the appellant argues that the fee estimate should not be so costly as he believes the ministry *should* have a centralized system. However, as noted in the Auditor General's follow-up report, the ministry does not have such a system in place currently.

B: Should the fee be waived?

[28] 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.

[29] The fee provisions in the *Act* establish a user-pay principle which is founded on the premise that requesters pay the prescribed fees associated with 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.⁶

[30] 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.⁷

⁶ Order PO-2726.

⁷ Orders M-914, P-474, P-1393 and PO-1953-F.

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

FAIR AND EQUITABLE

[32] For a fee waiver to be granted under section 57(4), the test is whether any waiver would be “fair and equitable” in the circumstances.⁹ Factors that must be considered in deciding whether it would be fair and equitable to waive the fees include:

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

[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 record¹⁰

[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.¹¹

Representations on public health or safety

Ministry’s representations

[35] The ministry submits that the appellant has not established a persuasive basis on which to grant a fee waiver. The ministry points out that the dissemination of the

⁸ Order MO-1243.

⁹ See *Mann v. Ontario (Ministry of the Environment)*, 2017 ONSC 1056.

¹⁰ Orders P-2, P-474, PO-1953-F and PO-1962.

¹¹ Orders MO-1336, MO-2071, PO-2592 and PO-2726.

requested information will not yield a public benefit as the Auditor General's follow-up report found that the ministry "has made significant progress on making needed changes to how it manages contractors that perform winter maintenance." As such, the ministry argues that these records will no longer benefit the public by disclosing a safety concern, or contributing meaningfully to understanding a public safety issue. Further, the ministry points out that more than half of the requested records relate to a period before the ministry responded to the Auditor General's special report. As such, the ministry argues "they are effectively outdated, and no longer represent an accurate picture of the state of winter highway maintenance in Ontario."

Appellant's representations

[36] The appellant submits that the dissemination of the requested records will benefit public safety as there are still serious concerns about the state of winter highway maintenance in Ontario. In support of this argument, he provided three articles, printed in December 2016, as examples. He also points out that less than half of the Auditor General's recommendations were fully implemented by the ministry.

[37] Moreover, he points out that of the five actions listed under the Auditor General's recommendation #6, two actions are in the category "little or no progress" (which includes "develop and implement a robust centralized system that tracks the results of all audits and fines to better enable provincial analysis of contractors' performance") while one action is in the category "will not be implemented" (which is "ensure that decisions to waive fines are appropriately justified and documented, and are consistently applied throughout the province").

[38] Further, the appellant submits that the ministry knows it will not have to face questions about performance data, since so little of this data will be disclosed, which impacts on the ministry's incentive to ensure high safety standards.

Ministry's reply

[39] In response, the ministry points out that it has "fully implemented" or is "in process of [implementing]" more than half of the Auditor General's recommendations. The ministry reiterates that the requested records are "effectively outdated, and no longer represent an accurate picture of the state of highway maintenance in Ontario." The ministry also points out that it is able to exercise oversight over its contractors as it had developed a new audit program and, significantly, taken on the staff necessary to run it, besides establishing a target number of audits for each contract area based on appropriate risk factors. Further, the ministry submits that it has made a partial implementation by establishing new procedures to achieve province-wide consistency with respect to large fines.

Appellant's sur-reply

[40] In response, the appellant points out that the ministry still has no simple way of

answering basic questions relating to the oversight of its AMC program, which is what his access request sought to answer. He also points out that, in the ministry's reply, it cited the absence of a central system that would allow for the compilation of basic compliance reports without onerous costs is significant as the Auditor General recommended such a central system in her special report and noted "little or no progress" in her follow-up report. Further, he submits:

Any Ministry argument that it is too costly to prepare such basic compliance summaries is an argument in *support* of the fairness and equitability of disseminating this information in order to benefit public safety.

Analysis and finding on section 57(4)(c)

[41] Having reviewed the representations of the parties and the factors identified as relevant to determine whether section 57(4)(c) applies, I find that the dissemination of the requested records will benefit public health or safety within the meaning of that provision.

[42] I note that the parties agree that there is a public interest in the subject matter of the requested records as they concern winter highway maintenance in Ontario. They also agree that the subject matter of the records relates directly to public safety.

[43] However, they disagree on whether the dissemination of the records would yield a public benefit by disclosing a safety concern, or by contributing meaningfully to the development of understanding of an important safety issue.

[44] The ministry argues that the dissemination of the records would not yield a public benefit as the Auditor General's follow-up report found that it has made significant progress in managing contractors that perform winter highway maintenance. The ministry also argues that the requested records are effectively outdated, and no longer represent an accurate picture of the state of winter highway maintenance as more than half of the requested records relate to a period before the ministry responded to the Auditor General's special report.

[45] I agree with the ministry that more than half of the requested records may be outdated. However, they do indicate the number of contractors and the specific contractors who were non-compliant during the specific time period. I find that this information may be valuable as it will allow the public to hold these contractors accountable today.

[46] Although the Auditor General made eight recommendations (which contain a total of 19 actions), recommendation #6 is most significant here as it is at the heart of part 2 of the request.

[47] Part 2 of the request states the following:

A PDF copy of all non-conformance reports for all Area Maintenance Contractors, including a brief description of each incident and the penalties imposed, for the period from December 1, 2014 and forward. Summary reports only, not individual incident records.

[48] Recommendation #6 deals with the oversight of contractors' performance. Out of the five actions under this recommendation, the Auditor General noted that the ministry had "fully implemented" two while the ministry had made "little or no progress" on two actions and one action "will not be implemented". In my view, it would be challenging for the ministry to oversee its contractors' performance when it has made little or no progress on developing and implementing a robust centralized system that tracks the results of all audits and fines. Without a tracking system in place, it would be difficult to see a pattern of non-compliance or a history of non-compliance amongst its contractors. I note that the ministry has developed a new audit program and is establishing a target number of audits for each contract area based on appropriate risk factors. However, the results of these audits would be less effective without a tracking system. In my view, the appellant's request attempts to obtain the information which would be in a tracking system.

[49] In sum, I conclude that the dissemination of the requested records will benefit public health or safety under section 57(4)(c).

Other relevant factors:

[50] While I have found that dissemination of the requested records would benefit public safety, I will now consider whether other relevant factors apply in order to determine if it would be fair and equitable to waive the fee in the circumstances.

[51] For a fee waiver to be granted under section 57(4), it must be "fair and equitable" in the circumstances. Additional 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.¹²

Representations on other relevant factors

Ministry's representations

[52] The ministry submits that, even if it is found that one of the factors listed in section 57(4)(c) applies, it would still not be fair and equitable to grant the request for a fee waiver. The ministry points out that, in the past, it has provided over 14,000 pages of responsive records without charge. It has also provided some of the records at issue in this appeal without charge when another requester has paid for them, and hundreds of pages of records at nominal cost for records relating to its winter highway maintenance program. The ministry argues that this amounts to a form of subsidy. The ministry also submits that it has agreed to create the records requested when it is not required to do so.

Appellant's representations

[53] The appellant submits that it would be fair and equitable for him to receive a fee waiver. He argues that he does not believe the ministry has provided him with a subsidy by providing him with the Northeastern Region records without charge as another requester assumed the costs of the search and preparation time for them. Moreover, the appellant argues that it seems illogical for the ministry to be able to make its claims to the Auditor General without having the summaries of the non-compliance data he is requesting.

Ministry's reply

[54] In response, the ministry disagrees with the appellant that records provided under a request other than the one under this appeal are irrelevant to the ministry's decision to impose a fee for the records at issue. The ministry argues that *Mann v. Ontario (Ministry of Environment)* supports this position as the Divisional Court is clear that there is no such limitation on the determination of whether a fee waiver is fair and equitable. The ministry submits that it is entitled to weigh past fee waivers granted to the appellant in forming its opinion. Further, the ministry argues that, in considering whether it is fair and equitable, the context of the Auditor General finding that the ministry has improved its oversight of the winter maintenance program and increased the program's transparency to the public is significant.

Appellant's sur-reply

[55] In response, the appellant disagrees with the ministry that the *Mann* decision

¹² Orders M-166, M-408 and PO-1953-F.

supports the argument that there is some sort of credit that accrues when a fee waiver is granted for an earlier request that applies when considering a fee waiver for subsequent requests by the same requester. He argues that there is nothing in *Mann* that supports this argument, and to allow such an argument to stand would introduce a radical new concept to the law. He points out that the result of the ministry's argument is that it would discourage repeated access requests and disproportionately impact journalists and other individuals whose job is to hold the government accountable.

Analysis and finding

[56] First, I will deal with the ministry's submission that it is clearly within its range of discretion to consider, as a factor, that it had provided records free of charge in other requests in determining whether a fee waiver is now fair and equitable. I note that the ministry cites the *Mann* decision in support of this argument.

[57] In *Mann*, the Divisional Court stated:

I do not agree with the respondents that the subsection involves a two part test, although I accept that one could approach the analysis in two stages. *There is only one requirement in the subsection for waiver of all or any part of a fee and that is whether, in the opinion of the head, it is fair and equitable to do so.* The head is guided in that determination by the factors set out in the subsection, but it remains the fact that the sole test is whether any waiver would be fair and equitable. [Emphasis added]

[58] I agree with the ministry that *Mann* allows the head to not only consider those factors enumerated in section 57(4)(c) but other relevant factors, including whether past fee waivers were granted to the appellant, in determining whether any waiver would be fair and equitable. I acknowledge the appellant's concern that considering past fee waivers may result in him having a "finite MTO quota of fairness and equitability" and disproportionately impact journalists and other individuals whose job is to hold the government accountable. However, *Mann* allows the head to consider the enumerated factors and other relevant factors, such as past fee waivers. That said, this is one of numerous factors available for the head to consider when exercising their discretion whether to waive the fee. It is *not* the sole factor.

[59] My finding above that dissemination of the records will benefit public safety is a factor in favour of granting a fee waiver.

[60] However, there are a number of other relevant factors to consider. One factor is the fact that the requested records must be created as they do not exist. As stated in Order MO-2129, an institution usually has no obligation to create a record. Another relevant factor is the fact that the ministry had previously provided 14,000 pages of records free of charge to the appellant on a previous request. Both these factors weigh in favour of the ministry not granting a fee waiver.

[61] Another important factor to consider is whether waiver of the fee would shift an unreasonable burden of the cost of processing the request from the appellant to the ministry. I am mindful of the legislature's intention to include a user-pay principle in the *Act*. The 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) 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.¹³

[62] After considering the representations of the parties, and given my finding concerning public safety, I find that the evidence supports that it is fair and equitable to waive 50% of the fees. In my view, this respects the user-pay principle contained in the *Act*, while making the records more accessible to the appellant, without shifting an unreasonable burden to the ministry.

[63] Accordingly, I order the ministry to waive 50% of the fee in this appeal, which would result in the fee estimate being \$346.25. I uphold the ministry's decision not to waive the remaining cost.

ORDER:

1. I uphold the ministry's fee estimate.
2. I order the ministry to waive 50% of the fee, which result in the fee estimate being \$346.25.
3. I uphold the ministry's decision not to waive the remaining cost.

Original Signed by: _____
Lan An
Adjudicator

September 12, 2017 _____

¹³ Order PO-2726.