Information and Privacy Commissioner,
Ontario, Canada

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

# ORDER PO-3833

Appeal PA16-473

Ministry of the Environment and Climate Change

March 29, 2018

**Summary:** The appellant made a request to the ministry for all documents and other information concerning complaints with regard to air quality, chemical spills and pollution relating to a specified company. The ministry issued an interim fee estimate and extended the time limit to respond to the request by 180-days. The appellant appealed this decision and also requested a fee waiver which the ministry ultimately denied. In this order, the adjudicator upholds the ministry's fee estimate and reduces the time extension to 90-days. In addition, the adjudicator upholds the ministry's decision to deny the fee waiver.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 27(1), 57(1), 57(4).

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

## BACKGROUND:

[1] The appellant made a request to the Ministry of the Environment and Climate Change (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to [a named company] from January 1, 2008 to the date of the request, specifically for the following:

> • All documents and correspondence regarding compliance of law, complaints, issues and non-compliance to do with chemical spills, toxic fumes, air pollution issues and health issues to do with air quality, air

quality issues. Any issues to do with toxic emissions and/or chemical spills or emission from the plants in regards to the workers and/or any people living in the area;

● Information on any fines levied, or instructions for improvement any emissions control equipment upgrades that were done to the facilities. Any other information to do with air pollution issues at the facility. Any pollution equipment modification upgrades to deal with these issues. All documents on the amended environmental compliance approval [identified number];

● As per section 10 of the amended environmental compliance approval [identified number], [named company] is required to keep continuous monitoring of the RTO combustion chamber temperature, provide the data logs for this temperature log for June 26, 2015 to June 13, 2016 and ensure that May 8-11, 2016 is included (to be provided in an excel spreadsheet if possible);

● All logs of the RTO combustion chambers of all [named company] facilities. Also specifically, the toxicologists report in full, for chemicals that did not have standards. The report in full, not the summary.

[2] In its decision, the ministry advised that records were located and their preliminary decision was to provide partial access to the information with the identity of complainants removed to protect privacy, pursuant to section 21(1) of the *Act*. The ministry also advised that confidential corporate information will require notice to the third party, pursuant to sections 17(1)(a) and (c) of the *Act*.

[3] The ministry provided a fee estimate totaling $1,717.60 and a breakdown of the fee was provided. In addition, the ministry noted that it required a 180-day time extension after receipt of the 50% deposit of the fee as additional time was required because of the extremely large volume of material to be reviewed and prepared for disclosure. The ministry also advised that the requester could contact it if he wishes to discuss how to minimize the processing costs.

[4] The requester, now the appellant, appealed the decision.

[5] During mediation, the appellant confirmed that he is appealing the fee and requested a fee waiver based on section 57(4)(c) of the *Act* as he believes that dissemination of the record will benefit public health and safety. The appellant also takes issue with the 180-day time extension.

[6] As a result of mediation, the ministry issued a revised fee estimate in the amount of $457.30. The ministry maintained that it will need an additional 180-days to respond to the request, once the 50% deposit is received.

[7] Subsequent to mediation, the ministry issued a decision denying the appellant's fee waiver request.

[8] As mediation did not resolve the dispute, this appeal was transferred to the adjudication stage, where an adjudicator conducts a written inquiry under the *Act*. The parties were invited to submit representations which were shared in accordance with section 7 of IPC's *Code of Procedure* and Practice Direction 7.

[9] In this order, I reduce the ministry's decision on the time extension to 90 days. I uphold the ministry's decision on the fee estimate in the amount of $239.80 and uphold its decision on the fee waiver.

## ISSUES:

A. Is the time extension reasonable given the nature of the request?

B. Should the fee or fee estimate be upheld?

C. Should the fee be waived?

## DISCUSSION:

### Issue A: Is the time extension reasonable given the nature of the request?

[10] As identified above, the appellant takes issue with the ministry's time extension decision. Time extensions are governed by section 27(1) of the *Act* which states:

> A head may extend the time limit set out in section 26 for a period of time that is reasonable in the circumstances, where,
>
> > (a) the request is for a large number of records or necessitates a search through a large number of records and meeting the time limit would unreasonably interfere with the operations of the institution; or
> >
> > (b) consultations with a person outside the institution are necessary to comply with the request and cannot reasonably be completed within the time limit.

[11] Factors which might be considered in determining reasonableness include:

- the number of records requested;

- the number of records the institution must search through to locate the requested record(s);
- whether meeting the time limit would unreasonably interfere with the operations of the institution;
- whether consultations outside the institution were necessary to comply with the request and if so, whether such consultations could not reasonably be completed within the time limit.

[12] The issue in this appeal is whether the extension was reasonable in the circumstances of the request, in the context of the provisions of section 27(1).

***Representations:***

[13] The ministry acknowledges that after receiving the initial request, it did not issue its first interim decision/fee estimate within 30-days of receiving that request. In that interim decision, the ministry notified the appellant of a 180-day time extension. It noted that the additional time was required due to the volume of material to be located, reviewed and prepared for disclosure as it would not have been able to complete the request within the 30-day timeline.

[14] The ministry states that the request provided sufficient detail to identify responsive records. It noted that the number of responsive records located resulted in an initial estimate of 7,873 pages but to date the FOI office has been provided with 8,546 pages and is still awaiting the retrieval of a further 2,000 pages of off-site responsive records. It noted that it took 32.5 hours of FOI office administrative staff time to scan, electronically format and upload three banker's boxes of paper records.

[15] The ministry notes that it does not have a single, available repository of records from which it can quickly prepare a release package noting that the process where responsive records were identified and retrieved was detail-oriented and time consuming. The program areas included in the search were noted to include the central regional office, Barrie district office, sector compliance branch, environmental monitoring and reporting branch, environmental approvals branch, investigations and enforcement branch and safe drinking water branch.

[16] The ministry states that the 7.56 hours of preparation time noted in the revised fee interim decision, only reflects an estimate of the amount of preparation time needed. It refers to Order PO-3621 which states that the ministry may charge a preparation fee of $30.00 per hour in order to scan 1,200 pages of records, therefore it estimates that it will take 6.56 hours to convert approximately 7,873 pages to electronic format and 1 hour to sever those pages at a rate of 2 minutes per page. The ministry notes that every responsive record must be read in full to determine if exemptions apply and that the quantities related to the chargeable preparation fee are not translatable to the quantity of time necessary to complete all steps in the review

process.

[17] The ministry also notes that the amount of time required for a reviewer to read all responsive pages of records depends upon the types of responsive records. It states that after a preliminary review of the records currently retrieved from the program areas, the records consist of technical reports, inspection reports, emission summaries, an ambient air monitoring study, copies of environmental compliance approvals, acoustical assessments, complaints and correspondence. The ministry states that these records contain large bodies of text, and often include personal information, information related to affected parties, and in the case of internal emails, advice and legal analysis exchanged within the ministry.

[18] The ministry submits that consistent with the general estimates, reading 8,546 pages at an average speed of 2 minutes per page would require 284.9 hours and also requires a further 5 hours spent on internal research, analysis and consultations.

[19] The ministry notes that the time extension applied to voluminous FOI files not only reflects the time taken to review and prepare a single request for disclosure, but is determined relative to the ministry's overall request volume. The ministry submits that the quantity of time devoted to this appeal reflects a significant level of effort. It states that in fairness to all requesters, the ministry works to respond to requests in the order they are received. It is therefore unreasonable to expect that the ministry is able to work on a single request continuously from the time received to the date of the final decision, given that multiple requests are in process simultaneously, and require compliant responses under the *Act*[1]. The ministry notes that it estimates the amount of time needed for a request based on the volume of records, the types of records, and the number of other FOI files currently active that require responses within the same timeframe.

[20] The appellant provided representations in this appeal, after being provided with a severed copy of the ministry's representations. In his representations, the appellant speaks to fee waiver but does not specifically address the issue of time extension except to say that it was approaching the 1 year time frame (at the time of making his representations) to get information governing a multi-billion dollar high-polluting facility.

***Finding:***

[21] In its initial access decision, the ministry informed the appellant that pursuant to section 27(1) of the *Act*, the time limit for answering the request was extended for an additional 180-days from the receipt of the deposit. The ministry noted that additional time was required because of the extremely large volume of material to be reviewed and prepared for disclosure.

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[1] The ministry notes that it received 7,999 new FOI requests in 2016.

[22] In the circumstances, I am satisfied that an extension is necessary as meeting the 30-day time limit would unreasonably interfere with the operations of the institution. There is a large volume of records which need to be identified and reviewed. The ministry confirmed 8,546 pages of records noting that it was still awaiting a further 2,000 pages of off-site responsive records. Based on the evidence provided, I am satisfied that meeting the 30-day time limit set out in section 26 of the *Act* would unreasonably interfere with the operations of the ministry.

[23] The ministry has referred to its obligation to give any third party notice so that they may make representations as to why the records or part thereof should not be disclosed under section 28 of the *Act*. However, section 28 of the *Act* sets out the relevant timelines that an institution must follow when notifying third parties which is contemplated to occur within the 30-day period from the request or within an extended time limit. Therefore, I find that notification of third parties is not a relevant factor to substantiate the ministry's time extension.

[24] The ministry has referred to consultations it must undertake with its program areas to determine the context of the records. However, this is not a factor that I will consider in allowing a time extension since section 27(1)(b) only allows a head to extend the time for consultations "with a person outside the institution."

[25] To conclude, I do not uphold the ministry's 180-day time extension. While the ministry is attempting to extend its deadline for 180 days, the appellant, although not speaking to this in his representations, does not agree. I agree that on its face, a 180-day extension seems excessive, especially when the Legislature contemplated a 30-day turn around for most requests. However, given the large number of pages of records that require review and possible severance (which is a modest estimate), I agree with the ministry's estimate of 284.9 hours to review the documents which translates to more than 8 weeks to complete. Therefore some form of time extension is necessary.

[26] I have been provided with no reasons as to why the ministry should not be allowed 2 minutes per page to review and make severances. I note that the records had been located by the time the ministry provided its representations as copies were included, therefore the bulk of its search is complete. Therefore, I find that a time-extension of 90-days is reasonable in this instance. This will give the ministry time to complete its review and severance of the records before providing its final access decision to the appellant.

**Issue B: Should the fee or fee estimate be upheld?**

[27] Section 57(1) requires an institution to charge fees for requests under the *Act*. That section reads, in part:

> 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;

[28] 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:
>
> 1. For photocopies and computer printouts, 20 cents per page.
>
> 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.

[29] Where the fee for access to a record exceeds $25, an institution must provide the requester with a fee estimate.[2] 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.[3]

[30] 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.[4] The fee estimate also assists requesters to decide whether to narrow the scope of a request in order to reduce the fees, which the hospital offered in this case.[5]

[31] In all cases, the institution must include a detailed breakdown of the fee, and a detailed statement as to how the fee was calculated.[6]

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

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[2] See section 57(3) of the *Act.*
[3] Order MO-1699.
[4] Orders P-81, MO-1367, MO-1479, MO-1614 and MO-1699.
[5] Order MO-1520-I.
[6] Orders P-81 and MO-1614.

***Representations:***

[33] The ministry sets out the three fee estimates it made with regard to this request:

| Initial fee estimate | |
|---|---|
| Search time 3 hours @$30/hour | $90.00 |
| Copying 7873 pages @ 20 cents/page | $1,574.60 |
| Drawings 2 drawings @ $5.00/drawing | $10.00 |
| CD 1 CD @ $10/CD (AERMOD data) | $10.00 |
| Preparation Time 1 hour @$30/hour | $30.00 |
| Delivery | $3.00 |
| **TOTAL** | **$1,717.60** |

| Second fee estimate | |
|---|---|
| Search time 3 hours @$30/hour | $90.00 |
| CD | $10.00 |
| Prep time approx. 11.81 hours @$30/hour | $354.30 |
| Delivery | $3.00 |
| **TOTAL** | **$457.30** |

| Final fee estimate | |
|---|---|
| Search time 1 hour @$30/hour | $30.00 |
| CD | $10.00 |
| Prep time 7.56 hours @$30/hour | $196.80 |
| Delivery | $3.00 |
| **TOTAL** | **$239.80** |

[34] With regard to the search, the ministry provided affidavits from staff members

who conducted the searches noting that the search included electronic databases, shared network drives and hard copy files. The ministry notes a total of 3 hours of search time as the estimated time it would take each staff member from each program area to complete their search. The 3 hour estimate was repeated in the ministry's second fee estimate and reduced to 1 hour in the final estimate.

[35] The ministry notes that the initial copying cost was for a total of 7,873 pages and was based on an estimated number of pages of records. After a discussion with the appellant, and issuance of Order PO-3621, the ministry states that it was able to provide an alternative fee option based on providing the records in electronic format and resulting in no copying costs incurred for the request.

[36] On the preparation costs, the ministry refers to IPC orders that establish a permitted preparation time of 2 minutes per page for records that contain multiple severances applied to a record or page. It notes that the preparation time estimate was increased in the second fee estimate and accounted for 1 hour to sever 7,873 pages and 6.56 hours to convert those pages to electronic format. The ministry notes that the reason for the increase in preparation time was due to program area consultation on the types of responsive records and that the preparation time required to sever the types of records that were located would take longer than initially estimated. The ministry noted that in the initial fee estimate it indicated a copying fee for 2 drawings ($5.00 per drawing) and a $10.00 fee for the electronic transfer of modelling data onto a CD. It notes that in the revised estimates, it waived the cost of copying the drawings as it determined that this was the more equitable approach.

[37] With regard to the shipping charge of $3 noted on each estimate, the ministry provided a cost estimate from Purolator in the amount of $4.43 which the ministry reduced to $3.00.

[38] The appellant did not speak to the fee estimate in his representations.

***Analysis and finding:***

[39] While the initial fee estimate was significantly higher than the second or third estimate, it was because the ministry calculated a copying charge which was subsequently reduced by transferring the records to a CD. The third fee estimate in the amount of $239.80 was the final fee estimate and will be the focus of this analysis.

[40] Based on section 57(3), the question of whether or not I should uphold the fee estimate depends on whether the estimate is "reasonable." In assessing this question, I must assess whether the estimate is in accordance with the *Act* and *Ontario Regulation 460* (the *Regulation*), bearing in mind that this is an estimate of the number of pages that may be found prior to the search actually being completed.

[41] Section 57(1) sets out the fees that an institution shall charge and section 6 of the *Regulation* sets out a quarterly hour rate of $7.50 for both searching and preparing

records. Given that the ministry is charging $30.00 per hour for both search and preparation time, I find this hourly rate 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 records, I find the fee for search and preparation to be reasonable. The ministry notes that it will take 284.9 hours to read the records, yet is only seeking 7.56 hours of preparation time which includes 1 hour to sever 7,873 pages (the number of pages identified at the time of making the estimate) and 6.56 hours to convert them to electronic format, therefore, I find this estimation is reasonable. The ministry is charging $10 for the CD which is in keeping with section 6 of the *Regulation*. Finally, the ministry is charging $3.00 for delivery which I find reasonable as it has shown that the actual charge for this service is higher.

[42] The appellant has not provided reasons as to why the fee estimate was unreasonable in his representations.

[43] Given my findings above, I find that the fee estimate is reasonable. The ministry is using an hourly rate set by the *Regulation*, it has worked with the appellant to try to narrow the request, it has offered to provide some records for free. It has reduced its fee by reducing the search and preparation times. The ministry's fee estimate is therefore upheld.

**Issue C: Should the fee be waived?**

[44] Section 57(4) of the *Act* requires an institution to waive fees, in whole or in part, in certain circumstances. Section 8 of the *Regulation* 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.

[45] 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 the *Regulation* 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.[7]

[46] 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.[8]

[47] The institution or this office may decide that only a portion of the fee should be waived.[9]

### *Fair and equitable*

[48] 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.[10] 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

[49] 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

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[7] Order PO-2726.
[8] Orders M-914, P-474, P-1393 and PO-1953-F.
[9] Order MO-1243.
[10] See *Mann v. Ontario (Ministry of the Environment)*, 2017 ONSC 1056.

- whether the subject matter of the record relates directly to a public health or safety issue
- whether the dissemination of the record would yield a public benefit by
    a. disclosing a public health or safety concern, or
    b. contributing meaningfully to the development of understanding of an important public health or safety issue
- the probability that the requester will disseminate the contents of the record[11]

[50] 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.[12]

*Other relevant factors:*

[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.[13]

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[11] Orders P-2, P-474, PO-1953-F and PO-1962.
[12] Orders MO-1336, MO-2071, PO-2592 and PO-2726.
[13] Orders M-166, M-408 and PO-1953-F.

*Representations:*

[52] The ministry notes the legislative intent in section 57(1) to include a user-pay principle in the *Act*, 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.

[53] The ministry notes that its fee waiver decision was based on a review of the appellant's submission on fee waiver, a preliminary review of the records, previous decisions of the IPC, section 57(4) of the *Act* and section 8 of the *Regulation*. The ministry notes that in determining its decision to deny the fee waiver request, its approach was two-fold and was presented to the appellant as stage I and stage II of the section 57(4) analysis.

[54] In stage I, the ministry notes that it considered all of section 57(4). It submits that it fulfilled its obligations in section 57(4)(a), since the actual cost of processing the request was reduced so the actual cost is higher than the fee estimate. The ministry notes that the appellant did not provide submissions with regard to section 54(4)(b) (financial hardship) and therefore it did not consider whether the payment would cause financial hardship.

[55] With regard to section 54(4)(c) (public health or safety), the ministry notes that it carefully considered the submission and arguments presented by the appellant. The ministry submits that Orders P-474, M-408, P-890 and PO-1953, identify a number of factors to be considered in determining whether it is "fair and equitable" to waive fees. From the abovementioned orders, the ministry referred to the following relevant factors in determining whether dissemination of a record will benefit public health or safety:

1. Whether the subject matter of the record is a matter of public rather than private interest

2. Whether the subject matter of the record relates directly to a public health or safety issue

3. 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

4. The probability that the requester will disseminate the contents of the record.

[56] The ministry agrees that the subject matter of the records is of public rather than private interest and that the appellant provided sufficient evidence and intention that the contents of the records would be disseminated within the community. However, the ministry submits that the records do not relate directly to public health or

safety issues as they do not contain detailed and substantive information about the impact on air quality in the area, or its impacts on human health. The ministry also submits that there is no evidence to demonstrate that the dissemination of the records would yield a public benefit by disclosing a public health or safety concern, or contributing meaningfully to the development of the understanding of an important public health or safety issue.

[57] The ministry submits that the records do not contain content that directly relates to the issue of public health or safety that would meaningfully inform a discussion of public health or safety. It notes that a large number of records are copies of older versions of now defunct environmental compliance approvals and their supporting documentation. In addition, based on a review of all information to date by the Barrie district office and the FOI office's preliminary review of the records, the ministry submits that the third party company's latest emission summary, dispersion modelling and air quality testing were found to be below the ministry's air quality standards for human heath set in *Ontario Regulation 419/05*. The ministry notes the appellant's submission that "the facility is releasing chemicals like Formaldehyde above safe limits," noting that the emission summary table from the third party company lists formaldehyde at a MAX POI concentrate of 12.7 µg/m3. However, the ministry notes that in Schedule 2 to *Ontario Regulation 419/05* provides the half hour standard for formaldehyde at 65 µg/m3.

[58] The ministry refers to stage II of its section 57(4) analysis noting that it must determine whether it is fair and equitable to waive the fee. It refers to Orders M-408, P-890, PO-1953 and PO-3074 which have found that the following factors are to be considered in determining if a fee waiver is "fair and equitable":

1. The manner in which the institution attempted to respond to the appellant's request

2. Whether the institution worked with the appellant to narrow and/or clarify the request

3. Whether the institution provided any documentation to the appellant free of charge

4. Whether the appellant worked constructively with the institution to narrow the scope of the request

5. Whether the request involves a large number of records

6. Whether or not the appellant has advanced a compromise solution which would reduce costs

7. Whether the waiver of the fee would shift an unreasonable burden of the cost from the appellant to the Ministry.

[59] The ministry submits that in an effort to be fair and equitable, it reduced the fees and offered solutions to the appellant to narrow the scope of the request before and during the mediation phase. It notes that the appellant agreed to work constructively to narrow the scope of the request, but he did not advance any compromise solution to reduce fees at any point in the FOI process. The ministry notes that it has offered documentation free of charge in an effort to resolve the appeal.

[60] The ministry submits that it offered to narrow the appellant's request in its initial fee estimate. It notes that the appellant contacted it to indicate that the fee estimate was too high and expressed interest in narrowing the request. The ministry revised its fee based on providing electronic records and also indicated that it would provide a high level index of the records in order to assist the appellant in narrowing the request.

[61] According to the ministry, during mediation, it provided an index of all records located at the Barrie district office. However, the ministry states that the appellant did not advise how he wished to proceed and therefore the index did not result in a narrowing of the request. The ministry notes that when it provided its second fee estimate, it again offered to narrow the request, however, it did not receive a request for revision/clarification or any communication accepting its offer for the appellant to view the records at a local ministry office as a compromise solution to reduce costs.

[62] The ministry refers to its third fee estimate noting that it revised the fees further and offered to work with the appellant constructively and collaboratively by further reducing the overall processing fee by an additional 25%. In addition, the ministry notes that it had indicated a willingness to provide the appellant with 81 pages of records at no cost. The 81 pages are comprised of the most recent third party company's air facility inspection reports and a ministry ambient air monitoring study prepared by the ministry. The ministry indicated that the contents of these records summarize the issues and provide recent ambient air monitoring sampling data in the vicinity of the third party company.[14] The ministry noted that the records would be subject to the mandatory third party consultation pursuant to section 28(1) of the *Act*, and that disclosure of these and all additional records were contingent upon the outcome of its review under the *Act*.

[63] The ministry submits that to waive any fees would unfairly shift the burden of processing the request to it. It states that due to the volume of records, approximately 8,546 pages, waiving the fees would not be fair and equitable. Further, it submits that a fee waiver would shift an unreasonable burden of the cost from the appellant to the institution. It notes that during the preliminary review of the records, significant time was taken to read through the records and to consult with program areas and third parties which is not chargeable under the *Act* and therefore the charges associated with

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[14] The ministry notes that it offered the appellant an opportunity to view the ambient air monitoring plan even though it was outside of the appellant's requested timeframe.

the request do not fully cover the cost of the resources and time taken by the ministry to complete the request.

[64] The appellant provided representations on this issue. His representations focus on whether there is a public health or safety issue. He states that the public does not have any information or data to be educated on the pollution coming from a multi-billion dollar manufacturing facility that is in the middle of the town. He states that the public needs all the data and information possible so that when the next amended environmental compliance approval (AECA) for this facility is requesting public debate and input, the public can actually debate and fight against this approval, and force the company and ministry to set higher standards of care if the approval goes forward again. The appellant states that by "if" he means when, as the Province has already committed another forty-one million in tax payers dollars to this facility.

[65] The appellant states that by the ministry's own admission the third party company is now doing actual ambient air studies, which he believes, in part, had something to do with himself and others raising this issue with the media and local government. The appellant asserts that the third party company did not out of their own good will and volition just decide to actually implement ambient air quality testing. The appellant submits that the ministry or a third party tester should be doing this, so there is direct accountability to the public. The appellant takes issue with the fact the ministry may have to "ask" the third party company if they can release this data.

[66] The appellant submits that the public needs to know the specifics. He states that the reason why he wanted to know the RTO combustion chamber data (all of it), is so the third party company does not try to "wiggle out" of providing it. The appellant notes that he provided exact dates of the data he wanted. The appellant refers to the AECA which specifically states what the minimum temperatures have to be in those chambers to be in compliance. The appellant states that he knows for a fact from one of the ministry officers that the third party company had issues with that equipment during part or some of those days. The appellant states that if the public can get the data to show that the third party company is, in fact, not following the guidelines of the AECA, and are in non-compliance, the public may be able to use that to force concessions on the third party company and the ministry for not doing their jobs.

[67] The appellant refers to the ministry's circular argument. being that, the third party company is in compliance with the AECA because it meets the "air emissions computer model" and since it meets the model no real world testing needs to be done. He states that the ministry and the third party company pick and choose what standards to set and use the American air computer models, however, as in the example of formaldehyde, ignore the EPAS numbers on levels that they consider toxic. The appellant states that one would never really know the real world numbers since the computer model predictions are below an arbitrary level that has been set, or in the case of chemicals, they do not have standards as they get a toxicologist to issue a report that it is safe for the public to be breathing and ingesting these chemicals but do

not provide the full report to anyone.

[68] The appellant states that there are no Canadian standards that exist to base the measurements on for polyisocyanates, so the ministry decided to use United Kingdom standards. The appellant states that the ministry touts that they meet the exposure limits as set out for formaldehyde and asserts that the ministry flouts that the third party company meets the standards, however the ministry is basing this upon foreign groups standards of toxicology. Where the EPA shows formaldehyde "Air containing 8.0ug/m3 would result in not greater than a one in ten thousand increased chance of developing cancer," however, the ministry states that 12.7ug/m3 is fine for the public to be exposed to as set out by the area of impingement. The appellant states that on the one hand the ministry likes to use the American air emissions computer modeling, however the American EPAs data is ignored. The appellant submits that based on the EPAs data, 2 people exposed to 12.7ug/m3 will get cancer in his town from this chemical alone.

[69] The appellant states that he is aware, from personal discussions, that third party company employees are smelling these chemicals and that improvement and abatement has been done at the facility. The appellant states that if the public can get that data, it can then argue that if improvements were done there they should also be done for the public, and potentially come up with other solutions to address the situation.

[70] The appellant included internal documents provided to him by the Ministry of Labour (in another FOI request) which shows that workers of the third party company were taken to hospital from ill effects of fumes. The appellant also included links to local news articles which refer to a noxious scent around the third party company's facility.

[71] The appellant comments on his need to be provided with the records as it will allow him and others to force the third party company and the ministry to set higher standards and put better processes in place for the third party company to control pollution. The appellant notes that the third party company, after denying that they had anything to do with noxious smell, later found out that the problem of the "musty chemical smell" may have, in fact, been improper overhaul and maintenance of its paint sludge pits. The appellant asserts that without public oversight (suggesting the ministry is not doing this) the public are being forced to look out for their own town's health.

*Analysis and finding:*

[72] As stated, even if the appellant establishes that dissemination of the record would benefit public health or safety, section 57(4) only authorizes granting a fee waiver in circumstances where it would be fair and equitable to do so.

[73] This is supported in the already mentioned *Mann v. Ontario (Ministry of the*

*Environment)*, where the Divisional Court stated:

> 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.

[74] In fact, in *Mann*, the Court notes that the applicant "asserts simply that the fee should be waived because the information sought would benefit public health and safety". This is similar to the position taken by the appellant in this appeal. The Court notes that this position would be correct if section 57(4) required a waiver solely on that basis, however, it does not, and "requires the waiver to be fair and equitable in the opinion of the head."

[75] 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.

[76] I note that the parties agree that there is a public interest in the subject matter of the requested records and that the subject matter relates to a public health or safety issue. 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 in an important safety issue.

[77] The ministry argues that the dissemination of the records would not yield a public benefit as the records do not contain detailed and substantive information about the impact of air quality in the area or its impact on human health. Further, the ministry notes that the third party company's latest emissions summary, dispersion modelling and air quality testing were found to be below the ministry's air quality standards for human health.

[78] However, the appellant has referenced local news stories which show concern regarding noxious smells emanating around the third party company's location, one article stating that 30 complaints were made in a period of a few months. Further, the appellant has provided records he received from another FOI request from the Ministry of Labour which shows that workers for the third party company had suffered ill effects from fumes while performing cleaning duties in a specific department at the third party company's plant.

[79] Despite the ministry's assertion that the third party company's latest emission summary, dispersion modelling and air quality testing were found to be below the ministry's air quality standards, there is still an argument to be made that dissemination of the records would yield a public benefit by contributing meaningfully to the

development of understanding of an important public health or safety issue. Air quality standards reports for this area, whatever the outcome, can either confirm or refute a polluting problem, an important public interest issue. Therefore, I find that dissemination of the records would yield a public benefit by contributing meaningfully to the development of understanding of an important public health or safety issue.

[80] However, as stated, despite my finding that dissemination of the records will benefit public health or safety, this is only one relevant factor in my determining if it would be fair and equitable to waive the fee. I find that several other factors are relevant in making that determination in this appeal, including:

- Whether the waiver of the fee would shift an unreasonable burden of the cost from the appellant to the institution
- 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 requester has advanced a compromise solution which would reduce costs
- Whether the request involves a large number of records.[15]

[81] I will begin by considering whether, as the ministry suggests, the waiver of the fee would shift an unreasonable burden of the cost from the appellant to the institution. I note that the third and final fee estimate is significantly less than the original fee estimate mostly as a result of reducing the copying charges as the records would be placed on a CD. A significant difference between the first estimate when compared to the others is the preparation time. In the first estimate it was estimated at 1 hour and in the second it was estimated at 11.81 hours after a more accurate review of the records. This was reduced in the third and final estimate to 7.56 hours in the ministry's ongoing attempt to work with the appellant with regard to the actual fee. I am also mindful of the fact that the ministry has indicated a significant time commitment to read the records (284.9 hours) which is not reflected in the fee estimate. In addition, the ministry waived the cost of copying the drawings as it determined that this was the more equitable approach.

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

[82] I am also mindful to 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.[16] In this instance, given the various fee estimates and explanations for same, I find that waiver of the fee would shift an unreasonable burden of the cost from the appellant to the ministry and this is a factor that does not support a fee waiver.

[83] From the representations of the ministry, it offered solutions to the appellant to narrow the scope of the request. The ministry stated that the appellant agreed to work constructively to narrow the scope but in the end did not advance any compromise solution. The appellant was provided with a copy of the ministry's representations before he made his own, yet he did not address any attempts he made to work with the ministry to narrow the request, nor did he dispute the ministry's assertion that he did not assist in narrowing the search. Therefore I find that the ministry responded appropriately to the appellant's request and attempted to work with the appellant to narrow the search. These are two further factors that do not support a fee waiver.

[84] As confirmed by the ministry, it has offered documentation free of charge (81 pages of records at no cost) and the request involves a large number of records. These are two more factors that do not support a fee waiver.

[85] The parties representations do not mention any efforts made by the appellant to advance a compromise solution which would reduce costs. The ministry offered a number of solutions that I have already mentioned, but in addition also suggested that the appellant view the records at a local ministry office as a compromise solution to reduce costs.

[86] I am satisfied that the ministry has attempted to take a constructive approach to this request. On the other hand, it appears that the appellant has taken no steps to limit the scope of the request nor has he put forward any other compromise solution aimed at reducing the cost.

[87] After considering the representations of the parties, and weighing the factors that are relevant to a fee waiver, I find that it would not be fair and equitable to grant a fee waiver and in the circumstances of this case I find that section 57(4) does not authorize a fee waiver.

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[16] Order PO-2726

## ORDER:

1. I uphold the ministry's fee estimate.
2. I reduce the ministry's time extension to 90 days.
3. I uphold the ministry's decision on the denial of the fee waiver.

Original Signed by: March 29, 2018

Alec Fadel
Adjudicator