

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4301

Appeal PA21-00042

Ministry of Public and Business Service Delivery

September 14, 2022

Summary: The Ministry of Public and Business Service Delivery (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act*. The request was submitted on behalf of a non-profit organization for access to records related to the ministry's consultation process related to proposed regulations under the *New Home Construction Licensing Act* and the *Ontario New Home Warranties Plan Act*.

The ministry issued an interim access decision and fee estimate of \$122. The appellant wrote to the ministry, asking for a fee waiver, which the ministry denied. The appellant then paid 50 per cent of the fee estimate as a deposit and the ministry continued processing the request. The ministry issued a decision letter granting partial access to the requested records, and advising that the total fee was \$124. The ministry advised that it would provide access to the requested records once the appellant paid the balance of the fee (i.e. \$63). The appellant again asked the ministry for fee waiver, which the ministry again denied. The appellant appealed the ministry's fee to the Information and Privacy Commissioner of Ontario (IPC). She also appealed the ministry's decision to deny her request for a fee waiver.

In this order, the adjudicator upholds the ministry's fee of \$124. She also upholds the ministry's decision to deny a fee waiver.

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

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

OVERVIEW:

[1] This appeal considers the reasonableness of a fee of \$124 charged by the Ministry of Public and Business Service Delivery¹ (the ministry) for access to records sought under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The requested records relate to consultations made by the ministry about to proposed regulations under the *New Home Construction Licensing Act* and the *Ontario New Home Warranties Plan Act*. This appeal also considers the ministry's refusal to waive that fee.

[2] The appellant, an individual acting on behalf of a non-profit organization, submitted a three-part request to the ministry for access, under the *Act*, to information about consultations held on three specific dates, with consumers and industry representatives related to the proposed regulations under the *New Home Construction Licensing Act* and the *Ontario New Home Warranties Plan Act*. Specifically, the request identified records including:

- the PowerPoint presentation shared by [the ministry]/its consultant(s) during the consultations;
- a list of ministry staff and any consultant(s) retained by [the ministry] who attended the consultation(s);
- a list of industry representatives who attended the consultation(s);
- a copy of ministry staff notes taken during consultations; and
- a copy of any related written submissions from consumers or industry representatives.

[3] The ministry sought and obtained clarification of the request before issuing an interim access decision and fee estimate of \$122 to the appellant. The fee estimate was for 244 minutes of search at the rate specified in Regulation 460 of \$7.50 per 15 minutes. In response, and pursuant to section 57(4) of the *Act*, the appellant submitted a fee waiver request which was denied by the ministry.

[4] The appellant paid the fee deposit of \$61 and the ministry completed its search for responsive records.

[5] After notifying a number of affected parties, the ministry issued a decision granting full access to 21 records and partial access to 9 records, withholding some information pursuant to exemptions in section 14(1)(i) (law enforcement) and 21 (personal privacy) of the *Act*. The ministry also noted that non-responsive information had been withheld. It enclosed an Index of Records.

[6] The ministry's decision also noted that the total fee for processing the request was \$124. The ministry explained that the requested records would be released to the

¹ Formerly, the Ministry of Government and Consumer Services.

appellant after it received payment of the outstanding fee balance (\$63) and after the 30-day period for affected parties to appeal had expired. Finally, the ministry noted that the *Act* provides that all or part of the fee can be waived and invited the appellant to contact its office if it wished to file a request for a fee waiver.

[7] The requester, now the appellant, appealed the ministry's decision to the Information and Privacy Commissioner of Ontario (the IPC). A mediator was assigned to attempt to facilitate a mediated resolution between the parties.

[8] During mediation, the appellant confirmed that she is appealing the fee charged by the ministry for access to the responsive records and the ministry's denial of her request for a fee waiver. The appellant also confirmed that she is not pursuing access to the portions of the responsive records that have been withheld.

[9] Also, during mediation, the ministry explained that it considers fee waiver requests on a case-by-case basis, relying on evidence supplied by the requester. It invited the appellant to submit a new fee waiver request with supporting documentation. The appellant did so. The ministry ultimately issued a decision denying the appellant's second request for a fee waiver.

[10] As a mediated resolution between the parties was not reached, the file was moved to the adjudication stage of the appeal process where an adjudicator may conduct an inquiry.

[11] During my inquiry, I sought and received representations from both the ministry and the appellant.

[12] In this order, I uphold the ministry's fee of \$124. I also uphold the ministry's decision to deny a fee waiver.

ISSUES:

- A. Should the IPC uphold the ministry's fee of \$124?
- B. Should the ministry waive all or part of its fee?

DISCUSSION:

Issue A: Should the IPC uphold the ministry's fee of \$124?

[13] Institutions are required to charge fees for requests for information under the *Act*. Section 57 governs fees charged by institutions to process requests.

[14] The IPC can review an institution's fee or fee estimate and can decide whether they comply with the *Act* and regulations.

[15] Section 57(1) sets out the items for which an institution is required to charge a fee:

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.

[16] To process the access request at issue in this appeal, the ministry is only charging the appellant fees for search and preparation under sections 57(1)(a) and (b). It did not charge for items under sections 57(1)(c) to (e).

[17] More specific fee provisions are found in section 6 of Regulation 460 (the regulation), which applies to access requests for general records:²

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.

² As opposed to requests for access to one's own personal information, which are governed by section 6.1 of the regulation.

Representations

[18] As indicated above, the ministry first issued a fee estimate. It advised that on review of a representative sample of responsive records, it estimated that the search for responsive records would take 244 minutes. Based on the fees set out at part 3 of section 6 of Regulation 460 for manually searching it estimated a fee of \$122. As the estimate was more than \$100 the ministry required the appellant to pay a deposit of 50 percent of the estimate before it took the steps to process the request.³

[19] The appellant paid 50 per cent of the fee and the ministry continued to process the request.

[20] In its decision letter, the ministry advised that, having completed the required work to process the request, the final fee was \$124 and explained that the requested records would be released to the appellant after it received payment of the outstanding fee balance (\$63). The ministry attached an Index of Records to the decision describing the 30 records and the exemptions claimed for the 9 that it was withholding, in part. Based on the records that were provided to the IPC, these 30 records total 166 pages.

[21] In its representations, the ministry explains that its final fee of \$124 to provide access to the requested records was based on actual work conducted to respond to the request and was calculated according to the fee schedule outlined in Regulation 460 of the *Act*. Specifically, it submits that the fee estimate was calculated based on the search and preparation time required to process the request.

[22] The ministry submits that the search time totalled 244 minutes and explains that because there is no centralized email search capability, each staff member was required to undertake an individual search for records. It submits that eight staff were identified as being knowledgeable about the subject matter of the request and likely to have responsive records. It submits that each staff member conducted a search for records and documented the time they spent searching for them. It further submits that the search times included identifying and locating handwritten notes.

[23] The ministry included the following chart setting out the role or position of the eight staff members who conducted searches for responsive records and the total amount of time that each member documented as the time taken to conduct the search:

Position	Time taken to conduct search
Senior Policy Advisor	90 mins
Director	7 mins
Manager	5 mins

³ Regulation 460, section 7(1).

Manager	2 mins
Program & Policy Analyst	5 mins
Senior Program & Policy Analyst	5 mins
Senior Program & Policy Analyst	5 mins
Senior Policy Advisor	125 mins
Total Search Time:	244 mins

[24] The ministry explains that the two Senior Policy Advisors who took 90 minutes and 125 minutes to conduct their search for responsive records were the advisors who worked most closely on the consultations referenced in the access request and therefore had the most responsive records. It submits that for this reason, it took more time for them to conduct their search than the other staff.

[25] With respect to the fees that it charged for preparing the records for disclosure, the ministry submits that it charged two minutes per page where a record involved multiple redactions. It submits that this is consistent with prior IPC orders, as well as the IPC guidelines on fees, fee estimates and waivers. It submits that in this case, the preparation time totalled 4 minutes and was calculated based on the time spent redacting records.

[26] The ministry provided the following chart indicating the total fee with the breakdown of fees for search and preparation:

Description	Cost per Minute	Quantity	Total
Search time	\$7.50 per 15 minutes	244 minutes	\$ 122.00
Preparation time	\$7.50 per 15 minutes	4 minutes	\$ 2.00
TOTAL FEE:			\$124.00

[27] The ministry submits that the fee estimate should be upheld.

[28] Despite being asked to invited to submit representations on the fee charged by the ministry and to respond to the representations that it submitted, the appellant did not make any specific representations about the fee itself. Instead, her representations focused on fee waiver, specifically why it is fair and equitable for the ministry to waive the fee.

Analysis and findings

[29] At issue in this appeal is the fee charged by the ministry to provide the appellant with full access to 21 records and partial access to 9 records. These records total 166 pages. The ministry submits that its fee of \$124 is based on the actual work done to respond to the request. This means that rather than review a representative sample of the records from which the quantity and nature of the responsive records can be extrapolated, the ministry performed the work; it had individuals familiar with the type and contents of the requested records conduct a search and it also prepared the records for disclosure.

[30] In deciding whether to uphold the ministry's fee, I must consider whether it is reasonable and in keeping the fee provisions set out in the *Act* and its regulations. The burden is on the ministry to establish that the fee of \$124 is reasonable.⁴ The ministry must provide detailed information on how the fee was calculated in accordance with the applicable provisions of the *Act* and provide sufficient evidence to support its position.

Search time

[31] The ministry has calculated fees for search time of \$122 representing 244 minutes of total search time at the allowed rate under the *Act* and Regulation 460 (\$7.50 per each 15 minutes of search time).

[32] The 244 minutes of search time is divided between eight staff members who were determined to be likely to have records responsive to the request, two of whom spent considerably more time searching for records.

[33] I accept as reasonable the ministry's explanation that the two Senior Policy Advisors who took 90 minutes and 125 minutes to conduct their search for responsive records were the advisors who worked most closely on the consultations and therefore were likely to have a higher number of responsive records. I accept that it took more time for them to conduct their searches than it took the other staff.

[34] Also, as the ministry has provided me with a copy of the records, I have had the benefit of reviewing the types of responsive records that were located. They are records which relate to consultations addressing the draft regulations to be made under the *New Home Construction Licensing Act*, and the *Ontario New Home Warranties Plan Act*. They include:

- a PowerPoint consultation deck,
- meeting invitations,
- feedback submissions on issues raised during the consultation process,
- survey responses

⁴ See for example Orders P-86 and M-549.

- notes taken by staff during the consultations,
- consultations notes submitted by consumers and other stakeholders,
- consultations notes submitted by member of the public,
- consultation notes submitted by industry players, and
- sector consultations notes.

[35] Given the nature and number of types of the records that were located and total number of records that were identified, I accept that 244 minutes of search time to manually search for the responsive records is reasonable.

[36] Accordingly, I find that the ministry's estimated search time of 244 minutes is reasonable in the circumstances, considering the number and nature of the records sought and located. Therefore, I am upholding the final fee of \$124 for 244 hours of search time.

Preparation time

[37] Under section 57(1)(b) and the regulation, time spent preparing a record for disclosure can be charged for general requests, such as the one at issue here.⁵

[38] An institution, such as the ministry, can charge for time spent:

- severing (redacting) a record, including records in audio or visual format,⁶ and
- running reports from a computer system.⁷

[39] The IPC has generally accepted that it takes two minutes to sever a page that requires multiple severances.⁸

[40] An institution cannot charge for time spent on:

- deciding whether or not to claim an exemption,⁹
- identifying records requiring severing,¹⁰
- identifying and preparing records requiring third party notice,¹¹

⁵ This is in contrast to requests for the requester's own personal information where preparation fee cannot be charged: see Regulation 460, sections 6 and 6.1.

⁶ Order P-4.

⁷ Order M-1083.

⁸ Orders MO-1169, PO-1721, PO-1834 and PO-1990.

⁹ Orders P-4, M-376 and P-1536.

¹⁰ Order MO-1380.

¹¹ Order MO-1380.

- removing paper clips, tape and staples and packaging records for shipment,¹²
- transporting records to the mailroom or arranging for courier service,¹³
- assembling information and proofing data,¹⁴
- photocopying,¹⁵
- preparing an index of records or a decision letter,¹⁶ or
- re-filing and restoring records to their original state after they have been reviewed and copied.¹⁷

[41] Part 4 of section 6 of Regulation 460 states that the ministry shall charge \$7.50 for each 15 minutes spent by any person, for preparing a record for disclosure.

[42] In this case, the ministry has identified nine records that require severances to be made. From my review, I note that many of those records require multiple severances. Considering the number and nature of the records that required severances to be made prior to disclosure and that the IPC generally accepts that it takes two minutes to sever a page that requires multiple severances, the fee charged by the ministry is lower than what it could have charged. I find that the ministry's fee of \$2 for a total of two minutes of preparation time to sever nine records in preparation for disclosure, is reasonable.

Conclusion regarding the fee

[43] Based on the reasoning set out above, I uphold the ministry's total final fee of \$124. I have found that its fees of \$122 for search time and \$2 for preparation time, are both reasonable.

Issue B: Should the ministry waive all or part of its fee?

[44] As stated above, the appellant made two requests for a fee waiver. First, when the ministry provided her with a fee estimate of \$122 and second, when it provided her with the final fee of \$124. The ministry denied both of the appellant's requests for a fee waiver.

[45] Section 57(4) of *Act* requires an institution to waive fees, in whole or in part, if it is fair and equitable to do so. Section 8 of Regulation 460 set out additional matters the institution must consider in deciding whether to waive a fee. Those provisions state:

¹² Order PO-2574.

¹³ Order P-4.

¹⁴ Order M-1083.

¹⁵ Orders P-184 and P-890.

¹⁶ Orders P-741 and P-1536.

¹⁷ Order PO-2574.

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.

[46] The fee provisions in the *Act* establish a "user-pay" principle. The fees referred to in section 57(1) and outlined in sections 6 and 6.1 of Regulation 460 are mandatory unless the requester can show that they should be waived.¹⁸

[47] A fee must be waived, in whole or in part, if it would be "fair and equitable" to do so in the circumstances.¹⁹ The factors an institution must consider include those set out in section 57(4) of the *Act*. In this appeal, only the factors in sections 57(4)(b) (financial hardship) and (c) (benefit public health or safety) are to be considered. The appellant has not relied on the considerations at sections 57(4)(a) or (d), and I am satisfied that they are not relevant for determining whether a fee waiver would be fair and equitable in this case.

[48] Any other relevant factors must also be considered when deciding whether it would be fair and equitable to waive the fee. Relevant factors 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,

¹⁸ Order PO-2726.

¹⁹ See *Mann v. Ontario (Ministry of Environment)*, 2017 ONSC 1056.

- 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 offered a compromise that would reduce costs,
- whether the institution provided any records to the requester free of charge, and
- whether the waiver of the fee would shift an unreasonable burden of the cost from the requester to the institution.²⁰

[49] A requester must first ask the institution for a fee waiver, and provide detailed information to support the request. If the institution either denies this request, or chooses to waive only a portion of the fee, the IPC may review the institution's decision, and can uphold or modify the institution's decision.²¹ The IPC may decide that only a portion of the fee should be waived.²²

Representations

[50] In her first fee waiver request the appellant requested that the fee be waived in its entirety on the basis that disclosure of the records would benefit public health or safety as considered by section 57(4)(c). In her second fee waiver request the appellant also raised financial hardship under section 57(4)(b) as a ground for the fee waiver, in addition to the previously raised factor for public health and safety under section 57(4)(c). The ministry denied both of the appellant's requests for a fee waiver.

Ministry's representations on fee waiver

[51] In its representations, the ministry submits that it did not grant the appellant's request for a fee waiver because the appellant has not provided evidence to show that a fee waiver is fair and equitable in the circumstances. It submits therefore, the appellant has not demonstrated a basis for a fee waiver under section 57(4) of the *Act*.

[52] The ministry submits that it considered whether to grant a fee waiver under section 57(4)(b) on the basis that payment of the fee would cause financial hardship to the organization that the appellant represents. However, it submits that it decided that the appellant did not provide sufficient evidence to show that payment of the fee would cause financial hardship.

[53] The ministry submits that previous IPC orders have established that a party requesting a fee waiver must provide evidence about its financial circumstances,

²⁰ Orders M-166, M-408 and PO-1953-F.

²¹ Section 57(5), Orders M-914, MO-1243, P-474, P-1393 and PO-1953-F.

²² Order MO-1243.

including information about income, assets and expenses.²³

[54] The ministry submits that the appellant has not provided any details regarding the income, assets or expenses of the organization that she represents. The ministry submits that the appellant states that her organization “has very scarce financial resources” and is financially “very strapped” but that this is not sufficient information for the ministry to consider a fee waiver based on financial hardship.

[55] The ministry also submits that it considered, as suggested by the appellant, whether it could grant a fee waiver under section 57(4)(c) on the basis that dissemination of the information will benefit health or safety.

[56] The ministry submits that in her request for a fee waiver, the appellant suggests that the records relate directly to public health and safety because they are related to proposed regulations intended to address the need for amended warranty legislation related to new homes that properly responds to the Ontario *Building Code*²⁴ violations which can impact consumer’s health and safety.

[57] The ministry also acknowledges a number of “examples of linkages to health and safety and Ontario’s new home warranty program” provided by the appellant in her request for a fee waiver. The ministry explains generally that they are internet links to that describe examples of various experiences that a number of individuals have had with Tarion, the organization that is responsible for administering the *Ontario New Home Warranties Plan Act*, not the ministry.²⁵

[58] The ministry submits that, despite the appellant’s position, there is no public benefit to health or safety as a result of disclosing the records. It explains that the records consist of a slide deck, meeting invites, feedback submissions and notes taken and received during consultations on the draft regulations (Bill 159) to be made under the *New Home Construction Licensing Act*, and the *Ontario New Home Warranties Plan Act*. The ministry submits that the subject matter of the records does not directly relate to a public health or safety issues and explains that the records relate to topics such as:

- licencing requirements for builders or vendors,
- the transition of regulation functions between Tarion and the regulatory authority,
- the application process to enrol homes in the Ontario New Home Warranties and Protection Plan, and

²³ Orders M-914, P-591, P-700, P-1142, P-1365, P-1393.

²⁴ O. Reg. 332/12, under Building Code Act, 1992, S.O. 1992, c.23.

²⁵ In its representations, the ministry does not provide more detail about these examples provided by the appellant. In her representations, however, the appellant refers to these examples of “linkages to health and safety and Ontario’s new home warranty program” that she included in her request for a fee waiver. These will be described in more detail below, in the description of the appellant’s representations.

- the governance of the regulatory authority.

[59] The ministry submits that the content of the records does not contain information about the Ontario *Building Code* or information that relates to any of the examples provided by the appellant in her request for a fee waiver. It submits that the records at issue in this appeal do not relate to any specific amendments or policy issues that would have an impact on any experiences that individuals might have had with Tarion, which is a separate organization and not part of the ministry.

[60] The ministry submits that the fact that the records relate to the general topic of Ontario new home warranty legislation and regulation does not necessarily mean that the content of those records relates to public health or safety and specifically in this case, disclosure of the records would not reveal a specific concern related to public health or safety or otherwise aid in the understanding of an important public health or safety issue.

[61] The ministry submits that in concluding that a fee waiver was not fair and equitable in the circumstances after considering the grounds set out in section 57(4), it considered another relevant factor. It submits that it considered that the ministry has been proactive in disclosing information to the appellant outside of formal access requests and since 2018 the ministry has sent approximately 35 letters and emails to the appellant's organization, proactively releasing information in response to concerns raised on topics including but not limited to the Ontario New Home Warranty, the *New Home Construction Licensing Act, 2017*, associated plans and funding for the Home Construction Regulatory Authority, Tarion's compensation packages, impacts of COVID-19 on Ontario's homeowners, and information relating to complaints about used or damaged furnaces. The ministry provided a list of examples where the ministry has released and shared this type of information outside of a formal access request, free of charge.

[62] Concluding its representations, the ministry submits that the appellant has failed to establish the grounds for a fee waiver on the basis of financial hardship without providing financial details and also on the basis of public health or safety as she has not established that the content of the records is such that disclosure would benefit public health and safety.

Appellant's representations on fee waiver

[63] In her representations, the appellant acknowledges that she did not provide documentation to support her position that the fee should be waived on the basis of financial hardship. She states:

While financial hardship is indeed a factor in this matter [named organization] is not able to provide [its] financial statements as doing so would violate confidentiality consideration of some of those consumers who make donations to [named organization].

[64] The majority of the appellant's representations focus on her position that a fee waiver should be granted under section 57(4)(c) because disclosure of the requested records would benefit public health or safety.

[65] The appellant submits that the ministry appears to be unwilling to consider the larger scenario related to related to the requested records and the need for new legislation to eliminate Tarion's monopoly. She submits that every aspect of her organization's work relates directly to the health and safety of buyers of newly built homes, future or existing. She submits that building codes exist to protect the health and safety of buyers of the building's inhabitants and failure of builders to promptly fix building code violations, once the new owners move in, puts their health and safety at risk. She submits that failure of the warranty provider, Tarion, to provide swift back up warranty coverage and to fix code violations were builders do not fix code violations, which, she submits is Tarion's purpose directly puts the health and safety of inhabitants at risk.

[66] The appellant also refers to the "examples of linkages to health and safety and Ontario's new home warranty" that she provided to the ministry in her fee waiver requests.²⁶ She submits that the examples demonstrate that on a number of occasions, protracted disputes with the corporation who administers Ontario's new home warranty program, had a significant and negative impact on a number of individuals' health or safety. These examples are detailed descriptions of various scenarios including:

- an individual's mental health was seriously and negatively impacted by a protracted dispute with the warranty provider for compensation for a home purchased from an unregistered builder;
- an individual's physical health was seriously and chronically impacted by the presence of mould in their newly built home and the subsequent dispute to receive compensation for the illness had a negative impact on the financial and mental health of that individual's family;
- an individual reported code violations and serious construction defects in their new home to the warranty provider. During the protracted dispute between the parties, the construction defects were not addressed which led to mould and the cancellation of the homeowner's insurance which impacted his ability to renew his mortgage and the home went into foreclosure;
- an individual was diagnosed with cancer which his oncologist suggested could have been related to mould exposure in their home;
- mould resulting from a construction defect in a newly built home forced a family to move out of their home and be driven into poverty.

[67] The appellant submits that all of these examples are direct examples of the

²⁶ To her representations, the appellant attached an appendix setting out these examples.

impact of inadequate warranty protection by the monopoly warranty provider, Tarion, and describe the risks the builders and Tarion perpetrated on the occupants, first by failing to deliver homes that meet code, then by the builder failing to fix the code violations and finally by Tarion failing to play its part by backstopping the builder's warranty and fixing the code violations properly. She submits that the examples describe the direct impact of the code violations on the occupants, which include sickness, stress, bankruptcy and, in some cases death. She submits that these direct impacts are unconscionable and must be rectified by revised legislation.

[68] The appellant submits that in order for her organization to do the work necessary to bring about legislative change to reduce the direct impacts on the health and safety of Ontario, "it is necessary to obtain the documents that contributed to the understanding of issues in the environment where decisions were made that led to the passage of Bill 159." The appellant submits that Bill 159 is the largest factor that has led to the continued suffering on Ontario in newly built homes due to the effect of living with building code violations that impact their health and safety.

[69] The appellant disputes the ministry's position that content of the records does not relate to matters of public health or safety. She submits that licencing builders is directly related to the health and safety of those who will inhabit new homes they build, as is home enrolment in the warranty which, she submits, "is supposed to fix code violations if builders do not" and the governance of the regulatory authority of the builders. She submits that these are all contributing factors to whether a newly built home meets building code which has an impact on the health and safety of its inhabitants.

[70] The appellant submits:

All records concerning aspects of the laws and regulations, and organizations delivering the regime for new home construction and warranty are part and parcel of the system that delivers new homes to consumers that in many cases threaten health and safety.

[71] The appellant asks that the fees for her request be waived so that her organization may continue to do its work to achieve safe and healthy homes for Ontarians.

[72] Although in both of her fee waiver requests the appellant requested a full waiver of the fee, at the end of her representations it appears that she might be content with a partial fee waiver. The appellant submits that despite the *Act's* "user pay principle" for the ministry to waive the remaining balance of \$63 (as the deposit of 50 per cent of the fee estimate was already paid) would not shift an unreasonable burden of the cost from the appellant to the ministry. The appellant also submits given the ministry's "sizeable budget," no real hardship will be visited upon it were a fee waiver granted. She also submits that "[p]roviding documents to a consumer advocacy organization that is strictly operated by volunteers and relies on funding from consumer donations should not be characterized as a burden."

Analysis and findings on fee waiver

[73] As mentioned above, the appellant has requested a fee waiver on the basis that payment of the fee will cause the organization for which she acts financial hardship (section 57(4)(b)) and/or that dissemination of the records would benefit public health or safety (section 57(4)(c)). The ministry has refused to waive the fee. For the reasons set out below, I uphold the ministry's decision on the basis that it has not been established that it would be fair and equitable to waive the fee on either of the grounds raised by the appellant or for any other reason.

Section 57(4)(b) – financial hardship

[74] For me to find that section 57(4)(b) applies, an appellant must provide sufficient evidence regarding their financial situation, including information about income, expenses, assets and liabilities.²⁷ The fact that the fee is large does not necessarily mean that payment of the fee will cause financial hardship.²⁸

[75] Based on my review of the parties' submissions and the appellant's fee waiver requests, I find that the appellant has not established that payment of \$122 will cause the organization that she represents financial hardship. I have considered the appellant's submission that the organization she represents is a non-profit organization; however, she did not provide any documentary evidence of the organization's expenses or financial position. In the absence of such evidence, I have not been provided with a sufficiently detailed picture of the organization's financial circumstances to establish that it would be fair and equitable to permit a fee waiver under section 57(4)(b) on the basis of financial hardship.

Section 57(4)(c) – benefit to public health or safety

[76] The appellant also relies on the factor in section 57(4)(c), that dissemination of the records will benefit public health or safety.²⁹

[77] The focus of section 57(4)(c) is "public health or safety." To establish the relevance of this factor, it is not enough to show that there is a "public interest" in the records - the public interest must relate to gaining information about a public health and safety issue.³⁰

[78] The following factors may be relevant in determining whether distribution of a record will benefit public health or safety:

²⁷ Orders M-914, P-591, P-700, P-1142, P-1365 and P-1393.

²⁸ Order P-1402.

²⁹ The appellant does not rely on the other factors in section 57(4), and I find that these other factors, found in sections 57(4)(a) and (d) do not apply in this appeal. The actual cost of processing the request has not been determined, as the fee is only an estimate in this appeal. The appellant specifically does not rely on financial hardship. Also, the appellant has not been given access to the record and the fee estimated is more than \$5.

³⁰ Orders MO-1336, MO-2071, PO-2592 and PO-2726.

- 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 distribution of the record once disclosed would yield a public benefit:
 - a. by disclosing a public health or safety concern, or
 - b. by contributing meaningfully to the development of understanding of an important public health or safety issue, and
- the probability that the requester will share the contents of the record with others.³¹

[79] The appellant argues that the fee should be waived because dissemination of the material will benefit public health and safety. Taking the appellant's arguments into account and having reviewed the content of the records, I am not persuaded that there exists a benefit to public health or safety in disclosure of the specific information in these records.

[80] As explained above, the records that will be disclosed, on payment of the fee, relate to ministry consultations on draft regulations to be made under the *New Home Construction Licencing Act, 2017* and the *Ontario New Home Warranties Plan Act*. They contain submissions outlining the viewpoints of a variety of different types of stakeholders who were consulted. The consultation was focused on specific discussion topics to be touched upon in the draft regulations that do not directly relate to public health or safety. Through the consultations, the ministry sought input on the implementation of regulations on subject matters including:

- licencing requirements for builders or vendors,
- the designation process of a new regulatory authority,
- the transition of regulation functions to a separate warranty and protections administrator and to a new regulatory authority,
- the application process to enrol homes in the Ontario New Home Warranties and Protection Plan,
- the governance of the new regulatory authority,
- information sharing, and

³¹ Orders P-2, P-474, PO-1953-F and PO-1962.

- the claims process and indemnification under the *Ontario New Home Warranties Plan Act*.

[81] I do not accept that dissemination of this information, which consists of various stakeholders' views on these particular topics, views which may or may not be considered by the ministry in its development of regulations under the two acts, will contribute meaningfully to the development of understanding of an important public health or safety issue or will benefit public health and safety in any other way. I find the factor at section 57(4) weighing in favour of a fee waiver has not been established.

Other factors

[82] In addition to the factors at section 57(4), I have also considered whether any additional relevant factors (those listed above, as well as other factors that might be relevant to the circumstances of this appeal), support a conclusion that it would be fair and equitable to waive the fee. I find that none have been established.

[83] However, I find that there are relevant factors that support a conclusion that it would *not* be fair and equitable to grant a fee waiver in this appeal. First, I note that despite the fact that the *Act* and in Regulation 460 sets out fees for providing photocopies of the records, the ministry did not charge photocopying fees. Therefore, the total fee charged to the appellant is actually less than set out in the *Act*.

[84] I have also considered that the ministry's submission that it has provided the appellant and her organization many records free of charge. I gather from the ministry's representations that it has been cooperating with her since 2018 and has proactively released a significant number of records related to topics of interest to the appellant absent formal access requests, including about the Ontario New Home Warranty, the *New Home Construction Licensing Act, 2017*, and associated information related to the Home Construction Regulatory Authority, Tarion. Therefore, I accept the ministry has frequently been accommodating to the appellant and her requests for access to information of interest to her organization. In my view, this factor weighs against ordering a fee waiver in this case.

[85] Having considered the relevant factors in this case, I find that it would not be fair and equitable to waive the fee in the circumstances of this appeal. I uphold the ministry's decision to deny a fee waiver.

ORDER:

1. I uphold the ministry's fee of \$124.
2. I uphold the ministry's decision to deny a fee waiver.

Original Signed by: _____
Catherine Corban
Adjudicator

September 14, 2022 _____

