Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4397

Appeal PA22-00069

Ministry of Children, Community and Social Services

May 25, 2023

Summary: This order deals with two fee estimates and a fee waiver decision issued by the Ministry of Children, Community and Social Services (the ministry) to the appellant. The appellant requested a fee waiver which the ministry decided not to grant. In this order, the adjudicator upholds the ministry's fee estimates in part, reducing the ministry's estimated time to search for records by 50 percent, and she upholds the ministry's decision to not grant 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(4)(a), 57(4)(b), and 57(4)(c); Regulation 460, section 6.

Orders Considered: Order PO-3035.

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

OVERVIEW:

[1] This order disposes of the issues raised as a result of an appeal of an access decision made by the Ministry of Children, Community and Social Services (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The access request was for a list in machine-readable format of all freedom of information requests for general records received by the ministry over a specified time frame (approximately 7.75 years), including the file number, a description of the request, the disposition, the

decision date, and whether the records were released for each request.

[2] The appellant is a not-for-profit organization that trains and employs student and early career journalists and researchers.

[3] In response to the access request, the ministry issued an interim decision with two fee estimates based on two possible searches in the amounts of $915.00 and $1140.00, respectively. The ministry stated in its interim decision letter that the final fee could not be determined until all of the responsive records were collected and processed and that the final fee may be more or less than the amounts indicated depending on the number of records located and the time required to undertake the search and review of the records.

[4] The appellant then requested that the ministry waive the fee. The ministry advised the requester that it would not be fair and equitable to waive the fee associated with this request, but rather "would shift an unreasonable burden of the cost to the ministry." As a result, the ministry did not grant the requester's request for a fee waiver.

[5] The requester, now the appellant, appealed the ministry's fee estimates and fee waiver denial to the Information and Privacy Commissioner of Ontario (the IPC). The parties were unable to reach an agreement during the mediation of the appeal. The appeal moved to the adjudication stage of the appeals process, where an inquiry was conducted. I sought and received representations from the ministry and the appellant, which were shared in accordance with the IPC's *Practice Direction 7*.

[6] For the reasons that follow, I uphold the ministry's fee estimates in part, and reduce the estimates for the ministry's search time by 50 percent. I uphold the ministry's decision not to grant the appellant's request for the fee waiver.

ISSUES:

A. Should the ministry's fee estimate be upheld?

B. Should the ministry waive its fee?

DISCUSSION:

Issue A: Should the ministry's fee estimate be upheld?

[7] This issue deals with whether the ministry's fee estimate for searching for information responsive to the access request should be upheld.

[8] Institutions are required to charge fees for requests for information under the

Act. Section 57 governs fees charged by institutions to process requests.

[9] Under section 57(3), an institution must provide a fee estimate where the fee is more than $25. The purpose of the fee estimate is to give the requester enough information to make an informed decision on whether or not to pay the fee and pursue access.[1] The fee estimate also helps requesters decide whether to narrow the scope of a request to reduce the fee.[2]

[10] Where the fee is $100 or more, the fee estimate can 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] In all cases, the institution must include a detailed breakdown of the fee, and a detailed statement as to how the fee was calculated.[4]

[11] The IPC can review an institution's fee and can decide whether it complies with the *Act* and regulations.

[12] Section 57(1) sets out the items for which an institution is required to charge a fee. It states, 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;

[13] More specific fee provisions regarding general access requests are found in section 6 of Regulation 460. Section 6 states, 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:
>
> > 3. For manually searching a record, $7.50 for each 15 minutes spent by any person.

Representations

[14] The ministry submits that the fee estimate is based entirely on the time required to search for information and compile a custom record in response to the appellant's access request and that the appellant's access request is based on two possible search scenarios, as follows:

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

> Scenario 1 – a list in machine-readable format of all freedom of information requests for general records received by the ministry during a specified time period, showing the file number, description, disposition, and decision date of each request, or
>
> Scenario 2 – a list in machine-readable format of all freedom of information requests for general records received by the ministry during a specified time period, showing the file number, description, disposition, decision date, and whether the records were ultimately released for each request.

[15] The ministry states that it sent an interim decision letter to the appellant, advising of estimated fees for search time: Scenario 1 would likely require 30.5 hours of search time, resulting in an estimated fee of $915.00, and Scenario 2 would likely require 38 hours of search time, resulting in an estimated fee of $1140.00. These fees, the ministry submits, were calculated using the amounts laid out in section 6 of Regulation 460.

[16] The ministry further submits that during the time period covered by the request, it was using Nordat, a software application, to track requests under the *Act* in order to generate its annual statistical report for the IPC. Although Nordat can produce a small number of reports based on the request-level data it holds, the ministry submits that its capabilities are extremely limited, and that it is not possible to produce a report in Nordat that would satisfy the appellant's request, and it is not possible to create custom reports.

[17] To respond to the appellant's request, the ministry argues, it would have to manually extract each of the specified data-points from Nordat or elsewhere, one entry at a time, and paste them into a new, machine-readable list. Although the appellant asked for a list of access requests for general information only, Nordat is not able to produce a report or list that only captures general requests. Given that the ministry receives over 3000 access requests each year (both personal and general), sifting through every single request received to create this custom record would be a very time-consuming, manual process.

[18] Based on a similar manual search undertaken in the past, the ministry was able to extrapolate a formula on which the fee estimate was based. That request was for two data-points: the file number, and a description of request, and that search took 3.5 hours per year of data. For the purposes of this formula, the ministry considered this to be a "base search." The appellant's request was for the following data-points:

- file number,
- description of request,
- disposition,

- decision date, and
- whether the records were ultimately released.

[19] The ministry submits that of these data-points, disposition and decision date are both contained in Nordat. The ministry estimated that adding both data-points to the base search would add one hour of search time per year of data. The remaining data point – whether a requestor paid all fees and the records were ultimately released – is not tracked in Nordat. To gather this information, the ministry would have to cross-reference each request from Nordat with the corresponding files on a shared drive, which the ministry estimated would add one hour of search time per year of data.

[20] The ministry further submits that it considered two other factors in determining the estimated time for searching for the requested information, as follows:

- due to the previous similar request, the ministry already had a short list of request numbers and descriptions which overlapped with approximately 9 months of this request. The ministry proposed to use this list as a partial starting point, to reduce the search time slightly, and
- data for a particular calendar year (part of the request) was captured in a now retired version of Nordat, from which data was extracted. The ministry believed that searching this data extract would require approximately half the time of a standard base search.

[21] The ministry estimated the required search time for each of the two scenarios as follows:

> Scenario 1 – a list showing the file number, description, disposition, and decision date of each request.
>
> • Base search of 3.5 hours/year × 6 years (7.75 years minus .75 years of overlapping data with earlier request and 1 year of the particular year's data) = 21 hours
>
> • Reduced base search for the particular year data = 1.75 hours
>
> • 1 hour/year for disposition and decision date × 7.75 years = 7.75 hours
>
> **Total** search time of 30.5 hours and an estimated fee of $915.00.
>
> Scenario 2 – a list showing the file number, description, disposition, decision date, and whether the records were ultimately released for each request.

- Base search of 3.5 hours/year × 6 years (7.75 years minus .75 years of overlapping data with earlier request and 1 year of the particular year data) = 21 hours

- Reduced based search for the particular year data = 1.75 hours

- 1 hour/year for disposition and decision date × 7.75 years = 7.75 hours

- 1 hour/year for whether the records were released × 7.75 years = 7.75 hours

Total search time of 38 hours and an estimated fee of $1140.00.

[22] The ministry submits that the estimated fees for both scenarios are based on realistic estimates of the amount of time required for an experienced employee knowledgeable in the subject matter of the request to search for records and manually create the custom record sought. Considering that this search would take one employee either 30.5 or 38 hours to complete, it is the ministry's position that, if anything, the estimated fees associated with this request are lower than the actual cost to the ministry to process and collect the record, not higher.

[23] Lastly, the ministry submits that the appellant advised the ministry prior to and during the mediation of the appeal that they had made similar requests to other ministries and that the other fees had been lower than those estimated by the ministry. The ministry states that the appellant's position is that the other lower fees is another ground for finding that the ministry's fee estimate is unreasonable and artificially high. The ministry argues that this line of argument is not relevant to this appeal for two reasons: First, the provisions in the *Act* provide no basis for this argument. Second, different ministries use different databases to track access requests, and those databases have varying capabilities. Some ministries may be able to create a custom report focusing on the specific data-points requested, but the ministry's system cannot readily do so.

[24] The appellant's position is that the fee estimate is not reasonable. They submit that they had been in discussions with several other ministries at that time of the access request and had learned that there are different software programs in use to catalogue these requests. The appellant then limited the scope of the access request by excluding personal information requests, requests which were abandoned or withdrawn, and for requests for which there were no responsive records. The appellant states that their conversations with the ministry yielded two scenarios and two fee estimates, and that their attempts to limit both the scope of the request and the ministry's burden resulted in a higher fee estimate.

[25] The appellant submits that the same request was sent to 10 other provincial ministries, that many ministries provided the information without significant fees and

that this ministry is the only one to date which has not negotiated a reduction in the cost.[5]

[26] Regarding the ministry's search for records, the appellant submits that it is unclear why the ministry claims that Nordat is incapable of producing a list of general records requests. The appellant argues that it is reasonable to assume that the latest technology is capable of creating a simple list because Nordat's website states that "All requests are at you (sic) fingertips. Requests can be located in a number of different ways, from request lists, filtering and direct access using the request number, requester name, etc." Nordat's website also explains that "reporting is a key feature" of its software and that the software is capable of several different types of reports, including tracking reports, analysis reports, productivity reports, request audit reports and the annual IPC statistical report. The Nordat website also includes a screenshot of its software program, which appears to indicate that the program is capable of extracting a similar list to what was requested.

[27] The appellant also argues that the ministry has not tendered any evidence that it asked Nordat whether its software could produce the information at issue in this request.

[28] The appellant further submits that they contacted the owner of Nordat and asked whether the software program is capable of exporting a list similar to the request submitted to the ministry. The president of Nordat replied that it could. The appellant argues that the information on Nordat's website as well as correspondence with the company refutes the ministry's assertions that it would be a difficult and time-consuming process to produce a simple report. The appellant argues that the burden to prove the reasonableness of a fee rests with the ministry, and the evidence before them is insufficient to make this determination because the fee is based upon outdated assumptions which do not reflect the capabilities of the software program the ministry uses.

[29] In reply, the ministry submits that it cannot comment on the possibilities which may be inherent in the Nordat system, but that regardless of what the base program might be able to accomplish, the reports produced within its version of Nordat are limited and non-customizable, and do not capture many of the data-points requested by the appellant. The ministry goes on to submit that the proposed search was designed by a ministry staff member who has been using Nordat daily for eight years, through a number of different versions. This staff member is considered to be a subject-matter expert in Nordat's use. The ministry further submits that the time required to conduct a "base search" was established while processing a similar access request five months prior to the appellant's access request.

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[5] The appellant provided copies of decision letters they received from other ministries in response to identical access requests to the request that is the subject matter of this appeal. The estimated search times in these decisions ranged from 30 minutes to five hours.

Analysis and findings

[30] The fee estimates at issue are based solely on the time estimated for searching for information that is responsive to the appellant's access request. The ministry has estimated search fees of $915.00 and $1140.00 representing 30.5 and 38 hours of search time, respectively, at the allowed rate under the *Act* and section 6 of Regulation 460 of $30 per hour of search time.[6] I find that the ministry's two fee estimates for searching for information responsive to the appellant's access request are excessive and ought to be reduced.

[31] Past IPC orders have found that where a request is broad and involves records that are likely to be dispersed throughout an institution, and where a search generates a significant number of responsive records and its processing requires a considerable amount of work undertaken by a number of different staff in a number of different departments, a high search fee may apply.[7] These orders have found that, in that regard, it is the breadth or scope of the request rather than the method of calculation that results in the significant fee estimate.

[32] In this case, the appellant's request is for the file number, a description of the request, the disposition, the decision date, and an indication whether the records were ultimately released for all requests to the ministry for general records over an approximate span of 7.75 years. The ministry states in its representations that the search for this information would be conducted by one employee who has experience using the Nordat database, from which most of the requested information would be extracted. The remaining information (whether the record was released) would be obtained by cross-referencing each request from Nordat with the corresponding files on a shared drive. In my view, while I appreciate that the ministry receives over 3000 access requests (for both personal and general records) per year, I find that the nature of this access request is not broad and does not involve records that are dispersed throughout the ministry. I also find that while the search will generate a significant amount of information, its processing will not require a considerable amount of work undertaken by a number of different staff in a number of different departments at the ministry.

[33] The appellant's position is that they made the same access request to other ministries and were charged lower fees, which is a ground for finding that the ministry's fee estimate is unreasonable and artificially high. In response, the ministry's position is that the provisions in the *Act* provide no basis for the appellant's argument, and that different ministries use different databases to track access requests, and those databases have varying capabilities. Some ministries may be able to create a custom report focusing on the specific data-points requested, but the ministry's system cannot readily do so.

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[6] Broken down as $7.50 for each 15 minutes.
[7] See, for example, Orders MO-3502, PO-3375, PO-3379 and PO-3716.

[34] While I agree with the ministry that there are no explicit provisions in the *Act* that address comparing search times between institutions in making a fee estimate, the issue at hand is whether or not I find that the ministry's fee estimates for search time are reasonable or not based on the evidence before me. I find that the ministry's process for searching for the information time consuming. Order PO-3035 is instructive in this regard. In that Order, former Commissioner Brian Beamish found that an estimate of 32 hours to search for expense reimbursement records was excessive, coming to the conclusion that the institution's records management process was unwieldy and not conducive to easily focused searches for a well-defined class of records. I agree with and find the approach taken by the former Commissioner to be relevant to the appeal before me. The ministry acknowledges the limitations of its version of Nordat, problems inherent in the system which I find should not be visited on the appellant. The fact that other ministries that received the same access request from the appellant were able to search for the same type of information in significantly less time leads me to the conclusion that the ministry's records management process, in the circumstances of this case, is not conducive to easily focused searches.

[35] For these reasons, I find that the ministry's estimates for the search time for the information requested by the appellant and resulting fee estimates are excessive. I will order the ministry to reduce the fees in both scenarios for search time by 50 percent, which will result in fee estimates of $457.50 and $570.00.

Issue B: Should the ministry waive its fee?

[36] The appellant requested a fee waiver, which the ministry denied. 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.[8]

[37] The *Act* requires an institution to waive fees, in whole or in part, if it is fair and equitable to do so. Section 57(4) of the *Act* and section 8 of Regulation 460 set out matters the institution must 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;

[8] Order PO-2726.

> (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.

[38] 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.[9]

[39] A fee must be waived, in whole or in part, if it would be "fair and equitable" to do so in the circumstances.[10] Factors that must be considered in deciding whether it would be fair and equitable to waive the fee are those listed in section 57(4)(a), (b), (c) and (d).

Representations

[40] The ministry's position is that the IPC has found in numerous orders that the *Act* is founded on a user-pay system, based on the premise that requestors should be expected to carry at least a portion of the cost of processing a request unless it is fair and equitable that they do not do so. Considering the amount of time required for a ministry staff member to create a custom record to respond to the request, the ministry submits that waiving the fees would unfairly shift the burden of costs to the ministry, particularly in the absence of any evidence of financial hardship. The ministry argues that there is no evidence that waiving the estimated fees associated with this access request would be fair and equitable.

Section 57(4)(a) – actual cost in comparison to the fee

[41] The appellant submits that the ministry has asserted multiple times that "the estimated fees associated with this request are lower than the actual cost to the ministry to process and collect the record, not higher." The appellant argues that there is insufficient evidence to support this claim. The appellant further submits that the

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[9] Section 57(5), Orders M-914, MO-1243, P-474, P-1393 and PO-1953-F.
[10] See *Mann v. Ontario* (*Ministry of Environment*), 2017 ONSC 1056.

ministry's fee estimate is not proportional to the level of complexity of the request. The information being requested is surface-level and administrative in nature. However, the fee estimate is inflated due to the ministry's use of an apparently outdated content management system that makes it time-consuming to run basic queries. Simply put, it would not be fair or equitable for the appellant to bear the burden of these costs in its attempt to build a vital resource for the public.

[42] The ministry's position is that the appellant has not been able to show that the actual costs associated with searching for and processing the record would vary from the amount of payment.

Section 57(4)(b) – financial hardship

[43] The appellant argues that it qualifies for a fee waiver under section 57(4)(b), based on financial hardship. The appellant submits that when it sent its budget to the ministry as evidence to support its request for a fee waiver, there was $1,595 remaining in it for freedom of information requests for the rest of the year. The appellant states that if they were to pay the ministry's fee estimate, their freedom of information budget would effectively disappear. The appellant agues that this would limit the ability to do their work, threaten the livelihoods of their staff and impede important public-interest research. The appellant's position is that this would constitute a financial hardship on a non-profit institution that works to serve the public, relies solely on philanthropic funding, and trains and employs student- and early-career journalists and researchers.

[44] The appellant further submits that financial hardship is only one factor to be considered and that the overarching question is whether a fee waiver would be fair and equitable.

[45] The ministry submits that in the appellant's request for a fee waiver, they stated that they are a small not-for-profit research unit that conducts collaborative research with journalists, academics and students, and develops and publishes knowledge, facts, and ideas on matters of public interest that enlighten, inform and generate important discussions. The appellant stated that they seek information in the public interest, that their resources are limited because they are funded exclusively through philanthropic donations and that the denial of a fee waiver would cause significant financial hardship.

[46] The ministry further submits that at the time of the fee waiver request, the appellant did not provide any financial information in support of the request and it was therefore unable to determine whether the fees associated with this access request would in fact cause the appellant financial hardship.

[47] The ministry states that the appellant subsequently provided a spreadsheet, setting out their organization's budget and expenditures as of the end of the relevant calendar year. The ministry submits that the appellant drew attention to the amount which the appellant had budgeted for freedom of information requests, and that over

one-third of this budgeted amount had already been spent, leaving a particular dollar amount available. The ministry denied the request for a fee waiver on these grounds, since the appellant's budget clearly showed that they had the means to pay the fees in this request.

[48] The ministry goes on to argue that the appellant's argument seemed to hinge on the fact that if they paid the fees associated with this request, they would only have a certain amount of money left with which to pay for other access requests. The ministry submits that this does not constitute financial hardship. The ministry further submits that an organization's decision to allocate a percentage of their total budget towards making access requests does not constitute a situation of "financial hardship", particularly where the overall budget provided by the appellant showed projected revenue that exceeded expenses.

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

[49] The appellant submits that their work clearly falls within section 57(4)(c). The appellant's position is that the records sought in this request are a matter of public, rather than private, interest. Allowing academics, advocacy groups, community organizations, journalists, non-profits, researchers, students and members of the public to know what records are available fosters a better understanding of provincial policy relating to health and safety in our province.

[50] In any event, the appellant further submits that the sole test is whether any fee waiver would be fair and equitable. A fee waiver may be fair and equitable even if none of the subsections are met.[11]

[51] The ministry submits that in the appellant's fee waiver request, they stated their belief a fee waiver was justified since the disclosure of these records would be "in the public interest." The ministry submits that section 57(4)(c) of the *Act* concerns public health and safety, not a general "public interest." The ministry advised the appellant that in previous IPC orders, including MO-1336, PO-2592, PO-1402, and PO-2726, the IPC has found that there must be a direct relation between the subject matter of the record and a recognized public health or safety issue. No direct relation was drawn by the appellant, so it was not clear to the ministry how the disclosure of the requested records would specifically benefit public health and safety.

[52] Lastly, the appellant argues that there are other considerations which would make it fair and equitable to grant its request for a fee waiver, set out below.

The ministry's response to the fee waiver request

[53] The appellant submits that they tried to work collaboratively with the ministry to adjust the request to the specifications the ministry said it required, but this increased

[11] The appellant refers to Order PO-4177 at para. 45 to support this argument.

the fee estimate. There were no further conversations or attempts to find an amicable solution. At no point during discussions with the ministry, the appellant argues, were they offered any solutions other than drastically limiting their access request. The appellant also argues that given that the ministry receives several access requests yearly, it is reasonable to expect that the ministry is capable of producing a rudimentary list, even with Nordat's limited capabilities. The appellant's position is that expecting them to cover the cost of the ministry's inefficiencies would be unfair and inequitable and contrary to the spirit of the *Act*.

The public interest in the requested information

[54] The appellant also submits that it would be fair and equitable to grant the fee waiver because there is a public interest in the information they are seeking.

The "open data and information" concept in various jurisdictions

[55] The appellant also argues that the provincial government's open data and open information directives aim to ensure delivery of, transparency of, and access to government data. The appellant submits that its work closely aligns with the provincial government's stated policies.

[56] The appellant submits that the federal government and a variety of cities and provinces across the country provide for publicly-available comprehensive databases of completed freedom of information requests.

[57] The ministry submits that the appellant noted in their fee waiver request that a fee waiver was warranted because, in their opinion, the records responsive to this request should already be publicly available. They wrote at length about the concept of "open data" and drew comparisons to several other jurisdictions, citing these as justification for why no fee should be required. The ministry submits that this is not relevant to this appeal. Section 57(4) does not offer as basis for a fee waiver for a requestor's belief that records should be in a form other than they are. The ministry is under no obligation under the *Act* to make these records available through proactive disclosure, and an institution's choice to proactively disclose a record, or to refrain from such disclosure, is not a part of the access process and is not appealable under the *Act*.

Analysis and findings

[58] The appellant has requested a fee waiver citing the factors in sections 57(4)(a), (b) and (c) of the *Act*, as well as other considerations, and the ministry has refused to waive its 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 any of the grounds raised by the appellant or for any other reason.

[59] A fee must be waived, in whole or in part, if it would be "fair and equitable" to

do so in the circumstances.[12] The factors an institution must consider are set out in section 57(4) of the *Act* and, as set out above, are:

- actual cost in comparison to the fee - section 57(4)(a),
- financial hardship - section 57(4)(b),
- public health or safety - section 57(4)(c), and
- the requester has been given access to the record or the fee is $5 or less - section 57(4)(d) and section 8 of Regulation 460

[60] In *Mann v Ontario* (*Ministry of the Environment*),[13] the Divisional Court indicated that each of the factors in section 57(4) must be considered; however, if only one applies, or even if none of the enumerated considerations apply, a fee waiver may still be granted if it is fair and equitable to do so. Specifically, the Court stated:

> There is only one requirement in the subsection for waiver of all or 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 fee waiver would be fair and equitable*. (emphasis added)

[61] As a result, it is possible for a fee waiver to be fair and equitable in the circumstances where only one, or even none, of the section 57(4) factors is made out. Conversely, it is possible for a fee waiver not to be fair and equitable even if one or more of the section 57(4) factors apply. All of the relevant considerations must be taken into account.

[62] In this case, the appellant's fee waiver request is based on the application of the factors in sections 57(4)(a), (b) and (c). The appellant has not relied on the factor in section 57(4)(d), and I am satisfied that it is not relevant for determining whether a fee waiver would be fair and equitable in this appeal. I will now determine if sections 57(4)(a), (b) and/or (c) apply.

[63] I find that the basis for a fee waiver in section 57(4)(a) is not satisfied in this appeal. The appellant's claims for a fee waiver under section 57(4)(a) relate to the issue of a proper fee estimate, which is addressed above, and I find that section 57(4)(a) does not apply.

[64] In order for section 57(4)(b) to apply, the appellant must provide some evidence regarding their financial situation, including information about income, expenses, assets

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[12] See *Mann* v. *Ontario* (*Ministry of Environment*), 2017 ONSC 1056.
[13] 2017 ONSC 1056 (CanLII).

and liabilities.[14] The fact that the fee is large does not necessarily mean that payment of the fee will cause financial hardship.[15] The appellant provided the IPC with a copy of their relevant projected budget for the relevant year. This projected budget indicates overall revenue exceeding overall expenses. The amount budgeted for the cost of freedom of information requests represents a portion of the overall budget, and exceeds the amount of the fee estimate provided by the ministry in response to the access request. I find that the appellant has not established that the fee estimate will cause them financial hardship. I have considered the appellant's submission that they are a public interest non-profit organization; however, the projected budget provided by the appellant establishes that it would not be fair and equitable to permit a fee waiver under section 57(4)(b) on the basis of financial hardship.

[65] I am also not persuaded by the appellant's arguments regarding the consideration in section 57(4)(c) of the *Act*. For this factor to apply, I must be satisfied that dissemination of the information sought will benefit public health or safety. The focus of section 57(4)(c) is "public health or safety." 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.[16]

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

- 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.[17]

[67] While I am satisfied that there is a high probability that the content of the records will be disseminated once the appellant obtains access to them, I am not persuaded that the actual information in them will benefit public health and safety. It is

[14] Orders M-914, P-591, P-700, P-1142, P-1365 and P-1393.
[15] Order P-1402.
[16] Orders MO-1336, MO-2071, PO-2592 and PO-2726.
[17] Orders P-2, P-474, PO-1953-F and PO-1962.

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.[18]

[68] The access request is simply for a list of all freedom of information requests for general records received by the ministry over a specified time frame, including the file number, a description of the request, the disposition, the decision date, and whether the records were released for each request. While this information may be of interest to the public, I find that it falls short of meeting the requirement of section 57(4)(c) that the dissemination of the information will benefit public health or safety. I find that the appellant has not established that there is some connection between any public interest in these records and a public health and safety issue, or how the information in these records would benefit public health or safety. As a result, I find that section 57(4)(c) does not apply to support the appellant's fee waiver request.

[69] As noted above, in deciding whether it is fair and equitable to waive all or part of a fee, a decision maker will have regard not only to the prescribed considerations, but also to the fairness of shifting some or all of the burden of the cost of the request from the requester to the institution and, by extension, to the Ontario public.[19] Therefore, my finding that the factors in sections 57(4)(a), (b), (c) and (d) are not applicable in the circumstances of this appeal are not determinative. I must also consider whether there are additional factors relevant to determining whether a fee waiver is "fair and equitable" in the circumstances.

[70] An institution must consider any other relevant factors 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,
- 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

[18] Orders MO-1336, MO-2071, PO-2592 and PO-2726.
[19] Order PO-4001-R.

- whether the waiver of the fee would shift an unreasonable burden of the cost from the requester to the institution.[20]

[71] The appellant has argued that considerations supporting a fee waiver include a public interest in the information, the ministry's response to the request, and the open data concept. I have already addressed the appellant's public interest argument, above. Regarding the ministry's response to the appellant, while the parties were not able to come to a compromise regarding the fee estimates, I find that the ministry's conduct was entirely appropriate throughout the request and appeals process and that there is no justification for granting a fee waiver on that basis. I further find that while the open data concept is timely and important, at present the absence of a proactive open data policy is not a basis for granting a fee waiver.

[72] In conclusion, I have not been provided with sufficient evidence to support a conclusion that it would be fair and equitable to consider a fee waiver on the basis of the actual cost in comparison to the fee, financial hardship or public health or safety. I also find, based on other considerations identified above, that I have not been provided with sufficient evidence that would justify deviating from the user-pay principle set out in the *Act*. Accordingly, I do not accept that in the circumstances of this appeal, it would be fair and equitable to grant the appellant a fee waiver and I uphold the ministry's decision to deny their fee waiver request.

ORDER:

1. I do not uphold the ministry's fee estimates and decrease them by 50 percent to $457.50 and $570.00, respectively.

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

Original Signed by: May 25, 2023
Cathy Hamilton
Adjudicator

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