

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4458

Appeals PA22-00136 and PA22-00137

Ontario Media Development Corporation

November 20, 2023

Summary: The OMDC received two requests under the *Act* for records relating to retroactive changes to the Ontario Interactive Digital Media Tax Credit. The OMDC issued a fee estimate for each request and agreed to waive part of the fee when the appellant applied for a fee waiver. The appellant appealed the OMDC's fee seeking a full fee waiver based on financial hardship and on the basis that dissemination of the records would benefit public health and safety. He also claimed that the FOI coordinator at the OMDC was in a conflict of interest as she was also the executive assistant to the CEO. In this order, the adjudicator does not order a further fee waiver and finds that the FOI coordinator and the CEO of the OMDC are not in a conflict of interest in responding to his requests. The appeal is dismissed.

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

Orders and Investigation Reports Considered: Orders MO-1285, MO-1336, MO-3208 and PO-2381.

OVERVIEW:

[1] The Ontario Media Development Corporation (the OMDC) received two requests under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to litigation commenced against the OMDC connected to retroactively enacted changes to the Ontario Interactive Digital Media Tax Credit (the OIADC).

[2] The first request:

Any and all documents (including but not limited to correspondence, emails, letters, memos, handwritten notes and notebooks, files et cetera) pertaining to [the appellant] and [named company] (and any of its agents including but not limited to [three named individuals] and any subsidiary companies with regard to the Ontario Interactive Digital Media Tax Credit. I request specific searches of documents of any nature relating to the following: [ten named individuals]

[3] The second request:

Any and all documents (including but not limited to correspondence, emails, letters, spreadsheets, handwritten notes and notebooks, files, et cetera) pertaining to meetings, panels, consultations and deliberations by staff of Ontario Creates with regard to changes to the eligibility criteria to the Ontario Interactive Digital Media Tax Credit in general and in particular concerning the requirement of 25% of the total labour be paid as salaries to employees, in preparation for the Provincial Budget of April 2015. Time Period of the Records: [specified].

[4] The OMDC issued an interim access decision for the first request, providing partial access to the requested records, and a fee estimate in the amount of \$1500. The OMDC issued an interim access decision for the second request, and provided a fee estimate totaling \$600 for search time. For each request the fee for preparation time was yet to be determined.

[5] The requester provided the OMDC with a fee waiver request for each of the requests. For each request, the OMDC responded by waiving the fee by 50% for the cost to search and 50% for preparation time, once that portion of the fee was determined (\$750 and \$300 respectively). The OMDC requested a 50% deposit of the waived fee and the requester paid the deposits.

[6] The requester, now the appellant, appealed the institution's fee waiver decisions to the Office of the Information and Privacy Commissioner of Ontario (the IPC).

[7] During mediation, the mediator had discussions with the appellant and the OMDC. The OMDC issued another revised fee estimate for each request, confirming the 50% fee reduction with regard to its search and also waiving any preparation fees.

[8] The appellant takes the position that the OMDC should fully waive the fee for each request. He also takes the position that the current FOI coordinator who is also the executive assistant to the OMDC's CEO, and the CEO are in a conflict of interest in processing his requests. This issue was added to the scope of the appeal.

[9] As no further mediation was possible, the file was transferred to the adjudication stage of the appeals process in which an adjudicator may conduct an inquiry under the *Act*. As the adjudicator assigned to this appeal, I decided to conduct an inquiry and

invited representations from the parties. Representations were shared in accordance with the IPC's *Code of Procedure*.

[10] In this order, I find that the OMDC is not required to waive its fee further. I also find that the OMDC's FOI coordinator and its CEO are not in a conflict of interest in processing the appellant's access requests.

ISSUES:

- A. Should the OMDC waive its fee further and provide a full fee waiver?
- B. Is the OMDC in a conflict of interest in making a decision on the appellant's access request?

DISCUSSION:

Issue A: Should the institution waive its fee further and provide a full fee waiver?

[11] 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.¹

[12] 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;

(c) whether dissemination of the record will benefit public health or safety; and

(d) any other matter prescribed by the regulations.

¹ Order PO-2726.

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.

[13] 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.²

Other relevant factors

[14] 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
- whether the waiver of the fee would shift an unreasonable burden of the cost from the requester to the institution.³

Representations

The OMDC's representations

The first request

[15] The OMDC submits that the estimated search time was 56 hours, which at

² Section 57(5), Orders M-914, MO-1243, P-474, P-1393 and PO-1953-F.

³ Orders M-166, M-408 and PO-1953-F.

\$30/hour resulted in a fee estimate of \$1,500, reduced by 50% (to \$750) in response to the fee waiver request. The OMDC submits that it was not possible to estimate the preparation fee until the volume of records had been identified, but it also agreed to reduce the preparation fee by 50% once the number of hours had been determined. Through mediation, the OMDC further agreed to waive the preparation fee entirely, so the total cost to process the request was \$750.

[16] The OMDC submits that the actual size and scope of the search ultimately required approximately 125 hours of search time involving more than a dozen staff. It submits that this was more than double the original estimate as a result of the number of staff involved in the search, the volume of potentially responsive records (both electronic and physical), and the fact that the records went back so many years that IT staff were required to retrieve archived records. As a result, it submits that the appropriate search fee for this request would have been \$3,750, and that it effectively reduced the search fee by 80% in setting the fee at \$750.

[17] The OMDC submits that the review and preparation of the records for this request (approximately 3,000 pages) has taken in excess of 700-person hours to date and is not yet complete as severances and third-party processes are ongoing. The OMDC submits that as a small agency with few FOI requests, it was necessary to engage external expertise for the preparation of the records at a cost of approximately \$43,000, above and beyond the staff time required to review the records and prepare associated communications.

[18] The OMDC notes that the FOI requests are directly associated with an ongoing legal action commenced by the appellant against it, which, the OMDC submits, necessitated an even greater degree of scrutiny during the review and preparation of documents.

[19] The OMDC acknowledges that the allowable preparation fees are limited to two minutes per page at \$30/hour, which would equate to a \$3,000 preparation fee and notes that the fee was waived entirely.

[20] In summary, it submits that the allowable fees for this request total \$6,750 (\$3,750 search + \$3,000 preparation) and by setting the fee at \$750, it effectively provided an 89% fee reduction.

The second request

[21] The OMDC submits that the estimated search time was 20 hours, which at \$30/hour resulted in a fee estimate of \$600. It notes that it reduced this estimate by 50% (to \$300) in response to the fee waiver request with the fee for preparation to be determined. Through mediation, the OMDC further agreed to waive the preparation fee entirely, so the total cost to process the request was \$300.

[22] The OMDC submits the actual size and scope of the search ultimately required

approximately 125 hours of search time, was more than double the original estimate. It states that this was due to the volume of potentially responsive records (both electronic and physical), and the fact that the records went back so many years that IT staff were required to retrieve archived records. Therefore, it submits that the appropriate search fee for this request would be \$1,500, and that it effectively reduced the search fee by 80% in setting the fee at \$300.

[23] The OMDC submits that the review and preparation of the records (approximately 1,400 pages) took in excess of 1,000 person hours, in part, because of the large number of third parties involved. Similar to the first request, the OMDC engaged external expertise for the preparation of the records at a cost of approximately \$57,000, above and beyond the staff time required to review the records and prepare associated communications, etc.

[24] The OMDC submits that despite the actual cost, the allowable preparation fees under the *Act* (two minutes per page at \$30/hour) would equate to a \$1,400 preparation fee noting that this fee was waived entirely.

[25] In making its decision to waive part of the fee, the OMDC submits that it took the appellant's financial hardship into account. It submits that it has borne the vast majority of the financial burden for the request and given the scope and complexity of the request, it is appropriate for the appellant to pay a small portion of the cost under the user-pay principle.

[26] The OMDC submits that despite several attempts, the appellant refused to work with it to narrow the scope of the request or to find a compromise that would reduce the scope of the search and volume of records, resulting in the resources and costs involved.

[27] The OMDC notes that the appellant has been transparent that his interest in these records relates to a legislative change, which made certain applications from his company for the Ontario Interactive Digital Media Tax Credit (OIDMTC) ineligible for funding. The OMDC submits that the scope of the requests extends to records dating back seven years with staff and departments of the OMDC that have no role or relationship to the administration of tax credits or the OIDMTC. The OMDC also submits that as an administrative body it does not have any legislative authority or responsibility, and it would have been possible and reasonable to reduce the size and scope of the request and associated search, without compromising the appellant's specific interest in the records.

The appellant's representations

[28] The appellant confirms that his FOI requests relate directly to litigation he commenced against the OMDC for lack of duty of care to taxpayers connected to

retroactively enacted changes to the OIDMC.⁴

[29] The appellant submits that he recognizes that his requests have placed a burden on the OMDC both in terms of time requirements for paid staff and for external costs which they were obliged to bring in since they receive few such requests. He acknowledged the OMDC's professionalism and attention to his requests (also noting that they were still not complete more than 17 months since they were made).

[30] The appellant submits that by their own admission the external costs do not represent a significant financial burden to a government agency such as the OMDC. The appellant submits that even though the OMDC determined that processing the requests does not cause it any hardship, it takes the position that he should be obliged to pay part of the fee because of the co-pay principle which he suggests is punitive.

[31] The appellant explains that the reason for his request is his need to understand exactly what transpired at the OMDC which caused the agency to act very much out of character when compared with previous interactions with his company over more than a dozen years of operation. The appellant takes issue with the alleged actions of the OMDC suggesting that it did or failed to do something that resulted in his company shutting down and leaving him with an enormous debt.

[32] The appellant provided financial information to support his submission that he is impecunious relying on a CPP disability benefit, and often relying on a food bank.

[33] The appellant submits that the *Act* contemplates and allows for a full fee waiver, where there is true financial need. He suggests that with a request that the OMDC purports to cost \$57,000 requesting a few hundred dollars from him seems punitive. The appellant notes that in similar requests to the Ministry of Finance, he received a 95% fee waiver.

[34] The appellant submits that despite the OMDC's suggestion that he is paying his lawyer in the action against it, he is being represented on a contingency basis.⁵

[35] The appellant suggest that public health and safety is relevant in this appeal. He refers to his action against the OMDC and suggests that if he is successful it could create a legal prohibition to prevent the government from implementing retroactive changes to tax law. He also suggests that it would benefit other producers who were similarly affected by the retroactive changes to the OIDMTC.

[36] The appellant submits that he is obliged to use research in order to reveal the decision-making process that led to many companies being made casualties. He submits

⁴ According to the appellant changes to the OIDMC were announced in April 2015 but not enacted into law until March 2017.

⁵ The appellant provided a letter from his counsel confirming that he is being represented on a contingency basis.

that he is unaware which parties are involved in or in what ways, which makes it difficult for him to narrow the focus of his request. The appellant submits that the OMDC suggesting that he should work with it to limit the scope of his inquiry is absurd under the circumstances.

[37] The parties provided reply representations in this appeal which will be referred to, as needed, in my analysis.

Analysis

[38] The appellant is seeking records relating to himself and/or his company regarding the OIDMTC. In his second request he seeks documents pertaining to meetings, panels, consultations and deliberations by staff of Ontario Creates⁶ regarding changes to the eligibility criteria to the Ontario Interactive Digital Media Tax Credit in general and in particular concerning the requirement of 25% of the total labour be paid as salaries to employees.

[39] A fee must be waived, in whole or in part, if it would be “fair and equitable” to do so in the circumstances.⁷ Section 57(4) makes clear that all of the factors must be considered.

[40] The appellant relies on the following factors that must be considered in deciding whether it would be fair and equitable to waive the fee:

- whether the payment will cause a financial hardship for the person requesting the record [Section 57(4)(b)]
- whether dissemination of the record will benefit public health or safety [Section 57(4)(c)].

[41] The OMDC responded to these factors and also relied on the following factor:

- the extent to which the actual cost of processing, collecting and copying the record varies from the amount of the payment. [Section 57(4)(a)]
- the appellant did not work with the OMDC to narrow the scope of the request [other factors]

[42] I will consider these factors below.

Actual cost in comparison to the fee: section 57(4)(a)

[43] In its representations, the OMDC submits that the actual search time for the first request was 125 hours, more than double the time estimated (56 hours), and that the

⁶ Otherwise known as the OMDC.

⁷ See *Mann v. Ontario (Ministry of Environment)*, 2017 ONSC 1056.

appropriate search fee for this request would be \$3,750. It also explains that the search time for the second request ultimately required 50 hours, more than double the time estimated (20 hours), and that the appropriate search fee for this request would be \$1,500. Therefore, even without considering the cost of processing the requests, the actual cost to the OMDC for its searches is significantly higher than the total amount charged to the appellant.

[44] Further, as discussed, the OMDC has fully waived any preparation fee it could charge under the *Act*, despite the unusual cost it undertook to process the requests. While it acknowledges that it is not entitled to recuperate the cost of the external contractor who prepared (or are preparing) the records, it identified that there were approximately 3,000 pages relating to the first request and approximately 1,400 pages relating to the second request. The OMDC has referred to the high cost of preparing the records because of the large number of third parties involved. I agree with the OMDC that taking into regard the amount it could charge for the processing of the requests (approximately \$3,000 for the first request and \$1,400 for the second request,) it has reduced the fee that could be charged by a significant amount.

[45] It is clear that the fees charged are lower than the actual cost to the OMDC to process the appellant's requests. It is also apparent that the OMDC has incurred significant costs that have not been charged to the appellant including staff time reviewing and copying many pages of documents. Therefore, I agree that the actual cost of searching and preparing the records for disclosure vary from the amount of the fee estimates and I find that this factor weighs against a further waiver of the fee and is a relevant factor in this appeal.

Financial hardship of the appellant: section 57(4)(b)

[46] For section 57(4)(b) to apply, the appellant must provide evidence regarding their financial situation, including information about income, expenses, assets and liabilities.⁸

[47] Based on my review of the parties' representations, I find that payment of the fee estimate will cause the appellant financial hardship. I note that the OMDC considered the appellant's financial hardship when it made its fee waiver decision. In his representations, the appellant attached a bank demand letter and a line of credit statement that support his submission that he is impecunious, living on credit and frequently utilizing a food bank.⁹

[48] In my view, despite the OMDC's fee waiver, the appellant has provided sufficient evidence to show that payment of the fees will cause financial hardship. This factor weighs in favour of a fee waiver and is relevant in this appeal.

⁸ Orders M-914, P-591, P-700, P-1142, P-1365 and P-1393.

⁹ Attachments to the appellant's representations were not shared with the OMDC.

Public health and safety: section 57(4)(c)

[49] 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.¹⁰

[50] 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.¹¹

[51] I have considered the representations related to the issue of a fee waiver under section 57(4)(c). In the circumstances, I am not persuaded by the appellant’s submissions that dissemination of the information relating to his request would benefit public health or safety. For the following reasons, I find that this factor is not relevant in this appeal.

[52] The appellant suggests that if he is successful in his court action, it could create a legal prohibition to prevent the government from implementing retroactive changes to tax law. He also suggests that it would benefit other producers who were similarly affected by the retroactive changes to the OIDMTC.

[53] Upon consideration, I accept that there is a public interest in a legal prohibition to prevent retractive changes to tax law, especially with similarly affected parties who may benefit from the appellant’s case if he is successful. However, I am not persuaded that the existence of a public interest by itself fits within the “public health or safety” section of the fee waiver provisions in section 57(4)(c), in its ordinary sense.

[54] In considering the relationship between “public health or safety” in section 57(4)(c) of the *Act* and the notion of public interest as that concept is understood

¹⁰ Orders MO-1336, MO-2071, PO-2592 and PO -2726.

¹¹ Orders P-2, P-474, PO-1953-F and PO-1962.

elsewhere in the *Act* and in other contexts, I am assisted by my review of previous orders of this office. In Order MO-1336, for example, the adjudicator considered arguments that a fee waiver should be granted based on the criteria set out in section 45(4) (the municipal *Act* equivalent to section 57(4)), with respect to the public health and safety factor, the adjudicator stated:

The focus of section 45(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.

[55] I agree with the adjudicator analysis in Order MO-1336, and will apply it in this appeal.

[56] In my view, there is insufficient evidence of a nexus between dissemination of the records relating to the requests in this appeal, and to health and safety, of importance to the public. To be clear, I find that the application of retroactive changes to tax laws does not directly relate to either public health or safety. Having concluded that the appellant has not established that the information in the records relates *directly* to a matter of public health or safety as contemplated under section 57(4)(c), I find that this is not a relevant factor supporting a further waiver of the fee in this appeal.

Section 57(4)(d) and section 8 of Regulation 460

[57] Section 8 of Regulation 460 prescribes 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.

[58] After reviewing the appellant’s sur-reply, it is evident that he is in receipt of at least some of the records. The OMDC submits that the preparation of records for the second request is still ongoing, but the appellant submits that he had to pay something in the range of \$500 to be able to access the information. As a result, I find that item 1 applies in this appeal and weighs against a further fee waiver. The fee is not \$5 or less, therefore item 2 does not apply.

Other factors

[59] As noted, my consideration includes the factors listed in the regulation, as well as any other relevant factors.¹² The OMDC submits that the appellant could have narrowed the scope of his requests which is a factor to consider.

¹² Orders M-166, M-408 and PO-1953-F.

[60] In my view, the appellant did not adequately address the OMDC's submission concerning narrowing of the requests. He states that he is obliged to conduct thorough research for his legal case, and since the Minister of Finance has not responded to his various correspondence over a five-year period, it is difficult to narrow the focus of the requests. He submits that he is unaware which parties are involved in or in what ways, which makes it difficult for him to narrow the focus of his request. However, the OMDC notes that the scope of the requests extends to records dating back seven years with staff and departments of the OMDC that have no role or relationship to the administration of tax credits or the OIDMTC. This was not adequately addressed in the appellant's representations.

[61] Considering the OMDC's suggestion on how to narrow the request, and also taking into regard the fee estimate, the appellant's impecuniosity and the user-pay principle of the fee provisions, I find that it would be reasonable to expect the appellant to work with the OMDC to narrow the search parameters of the requests. This does not prevent further requests if what was discovered in the narrowed request leads to another request for information. I also reject the appellant's suggestion that given the relationship between himself and the OMDC, it is not reasonable to expect him to work with it to narrow the request. In my view, since it is set out in the Regulation, there is an obligation on the part of the appellant to work with the institution to narrow the request, if possible. Despite any acrimonious relationship with the head, as described by the appellant, this obligation exists and continues.

[62] I also consider as a relevant factor, whether further waiver of the fee would shift an unreasonable burden of the cost from the appellant to the OMDC. The OMDC has already waived a significant portion of the fee and has incurred significant costs in hiring its consultant to complete the search given the large number of records and the OMDC's inability to process the requests on its own. Given the actual cost of processing the two requests, and considering the user-pay principle, I find that it would be unreasonable to order a further fee waiver because it would shift an unreasonable burden of the cost from the appellant to the OMDC. Lastly, the large number of records for each request is also a factor that weighs against a further fee waiver.

Conclusion

[63] I find that the following factors weigh against a full waiver of the fee:

- the actual cost of the requests to the OMDC which it partially waived
- the requests involve a large number of records (3,000 pages of records for the first request and 1,400 pages for the second request)
- the appellant did not work constructively with the OMDC to narrow the scope of the requests

- further waiver of the fees would shift an unreasonable burden of the cost from the appellant to the OMDC
- the requests involve a large number of records

[64] I find that the following factor weighs in favour of the waiving of the fee:

- payment of the fee will cause the appellant financial hardship.

[65] Considering all the relevant factors, one of which weighs in favour of granting a fee waiver and the rest which do not, I find that in balance, it would not be fair and equitable to grant a full fee waiver. In arriving at this determination, I have considered, in particular, the user-pay principle articulated above.

Issue B: Is the OMDC in a conflict of interest in making a decision on the appellant's access request?

[66] At mediation, the appellant noted a conflict of interest in the OMDC's handling of his request.

[67] Previous IPC orders have considered the issue of conflict of interest or bias with respect to individuals who decide the issue of disclosure.¹³ In determining whether there is a conflict of interest, these orders posed the following questions:

- a. Did the decision-maker have a personal or special interest in the records?
- b. Could a well-informed person, considering all of the circumstances, reasonably perceive a conflict of interest on the part of the decision-maker?

[68] These questions are not intended to provide a precise standard for measuring whether or not a conflict of interest exists in a given situation. Rather, they reflect the kinds of issues which need to be considered in making such a determination.

Representations

[69] The appellant states that he was initially satisfied with the processing of his request when it was being handled by the FOI coordinator who was also the corporate secretary of the OMDC. The appellant indicated that his concerns about conflict of interest were not triggered because she led him to believe that she reported to the OMDC board, and not the CEO. The appellant submits that when the role of the FOI Coordinator was re-assigned to the executive assistant to the CEO, the CEO was now "directly implicated" in the process. He submits that he was further alarmed when he read that "the Head" as identified in the *Act* had basically *carte blanche* to deny access to records.

¹³ See, for example, Orders M-640, MO-1285, MO-2073, MO-2605, MO-2867, MO-3204, MO-3208, PO-2381, MO-3513-I and MO-3672.

[70] The appellant submits that the CEO's decisions are at the centre of his litigation against the OMDC and she herself is named personally as a respondent.¹⁴ He states that the CEO will be identified by name in litigation and she is aware of this. The appellant submits that the CEO has the potential to influence the outcome of his legal action by limiting his access to information which represents the conflict of interest.

[71] He also submits that if he is successful in his legal action, the CEO's reputation as a senior manager would be impacted. The appellant suggests that this may entice the CEO to deny access to specific records. The appellant submits that the FOI coordinator is in a conflict of interest by implication of her position as the CEO's executive assistant.

[72] The appellant submits that access to information is crucial to his legal action. He suggests that if there is any chance that the CEO or the FOI coordinator, however innocently, might influence the availability of information, the result would be an unacceptable outcome for him and for the public. The appellant suggests that an independent party needs to be appointed to manage and review the process.

[73] In reply representations, the OMDC submits that the CEO and her executive assistant are both carrying out their job responsibilities as public servants. The OMDC submits that it takes its responsibilities under the *Act* seriously, and has made extraordinary efforts to ensure that all records relevant to this request were collected and disclosed in whole, or in part, where possible. While the OMDC acknowledges that collecting and processing more than 4,000 pages of records took time, all records have now been disclosed and there is no basis whatsoever to claim that the agency, or any individual staff person, withheld records or would benefit from withholding records.

[74] The OMDC submits that contrary to the appellant's representations, the CEO is not personally named in the lawsuit. Moreover, it submits that as a designated Ontario public servant, the CEO is protected from any personal liability in litigation which may arise from discharging her duties. It notes that legal proceedings occasionally arise for government agencies, and it is part of the CEO's responsibility to oversee the response on behalf of the agency. It submits that this is the normal course of business and a normal responsibility for a senior leader; and there is no reason to believe that the CEO's professional reputation, or employment, will be at risk as a result.

[75] The OMDC also notes that these appeals relate to fee waivers, rather than the disclosure of records and suggests that none of the unfounded allegations raised by the appellant in his representations with respect to conflict of interest has any bearing on the determination of fees, which is formulaic in nature.

Analysis and finding

[76] In Order MO-1285, the adjudicator discussed the factors to consider when

¹⁴ The appellant submits that the CEO is named as Jane Doe in its current form.

addressing whether a conflict of interest exists. She states:

Previous orders of this office have considered when a conflict of interest may exist. In general, these orders have found that an individual with a personal or special interest in whether the records are disclosed should not be the person who decides the issue of disclosure. In determining whether there is a conflict of interest, these orders looked at (a) whether the decision-maker had a personal or special interest in the records, and (b) whether a well-informed person, considering all of the circumstances, could reasonably perceive a conflict of interest on the part of the decision-maker (see, for example: Order M-640).

[77] I agree with and adopt the reasoning stated above for this appeal.

[78] Having considered the representations of the appellant, I find that the FOI coordinator is not in a conflict of interest by processing these requests because I am unconvinced that the CEO, or her executive assistant have a personal or special interest in the requests.

[79] In Order PO-2381, the adjudicator addressed whether the Ontario Realty Corporation's CEO, as the individual who made an access decision, was in a conflict of interest position in relation to the decision-making process because he had been personally involved in the dealings with the requester that led to the requester's access request. The adjudicator citing *Imperial Oil*¹⁵ stated:

[I]n my view, the fact that the CEO has been personally involved in resolving the question of the disposition of these lands in his capacity as senior official of the ORC, including participating in exploring options other than sale to the appellant's company, combined with the fact that the ORC and the appellant are in litigation over the appropriate disposition of these lands, is not sufficient to disqualify the CEO from exercising the statutory function of deciding access requests under the *Act*. These facts do not establish a conflict of interest or a reasonable apprehension of bias.

In carrying out his functions under the *Act*, the CEO was not required to be impartial in the way that would be expected of an independent adjudicator. As set out in the *Imperial Oil* decision, the contextual nature may vary to reflect the content of a decision-maker's activities and the nature of his functions. The CEO was required to carry out certain functions and, in doing so, to comply with the procedural fairness obligations set out in the *Act* and to comply with the other legislation governing the ORC. He was also required to exercise his discretion in good faith, taking into account all relevant considerations and disregarding

¹⁵ *Imperial Oil Ltd. v. Quebec (Minister of the Environment)* (2003), 231 DLR (4th) 577 (SCC).

irrelevant ones. I cannot conclude from the evidence before me that he did otherwise.

[80] I agree with the adjudicator's approach and will apply it to this appeal.

[81] As noted by the OMDC, it is a small agency which receives relatively few requests under the *Act*. As stated in Order MO-3208, individuals in a small municipality may be required to undertake a number of roles and this situation alone is not sufficient to establish a conflict of interest. I adopt this principle for this appeal.

[82] Considering the parties' representations and Order PO-2381, I find that a well-informed person, considering all of the circumstances, would not reasonably perceive a conflict of interest on the part of the FOI coordinator or the CEO in responding to these requests. I acknowledge that the FOI coordinator is also the executive assistant to the CEO, but employees in a small agency may be required to undertake a number of roles as set out in Order MO-3208. Further, as noted by the OMDC, the CEO is a public servant and the designated Head under the *Act*. It is her responsibility to respond to access requests pursuant to the *Act*, in good faith. In my view, there is no evidence that either the FOI coordinator or the CEO have exercised their duties in bad faith and the existence of the appellant's civil action does not convince me that a conflict of interest exists.

[83] Despite the FOI coordinator's role in the OMDC, I find that there is no conflict of interest with respect to her processing the requests.

ORDER:

The appeal is dismissed.

Original signed by: _____
Alec Fadel
Adjudicator

November 20, 2023