Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3074

Appeal PA11-189

Ministry of the Environment

April 27, 2012

Summary: The ministry received a request for records about how the comments made at a public consultation meeting were taken into consideration in the development of a specific regulation. The ministry issued an interim access and fee estimate decision, denying access to certain records or portions of records pursuant to sections 12(1) and 22 of the *Act*. The requester paid the deposit and requested a fee waiver on the basis that dissemination of the records would benefit public health or safety. In its final access decision, the ministry denied access to certain records or portions of records pursuant to sections 12(1), 13, 19 and 21.

This order partially upholds the ministry's fee and denies the fee waiver. Also this order upholds the ministry's application of section 12(1) and finds that the remaining information is not exempt under section 21(1).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, 2(1) definition of personal information, 2(3), 12(1), 57(1), 57(4)(c).

OVERVIEW:

[1] The Ministry of the Environment (the ministry or MOE) received a request under the *Freedom of Information and Protection of Privacy Act* (*FIPPA* or the *Act)* for records related to the government's review and consideration of comments from a specific public consultation meeting. The requester later clarified his request to seek:

> Documentation that shows how the comments heard by MOE at the Port Elgin public consultation meeting in June 2009 were taken into

consideration in the development of the Renewable Energy Approval regulation (O. Reg. 359/09).

[2] The ministry issued an interim access and fee estimate decision indicating that it was denying access to certain records or portions of records pursuant to sections 12(1) (cabinet records) and 22 (records that are already publicly available) of the *Act*. The ministry's fee estimate for processing the request was $658.00.

[3] The requester paid the deposit to proceed with the request and then wrote to the ministry requesting a fee waiver on the basis that dissemination of the records would benefit public health or safety.

[4] The ministry then issued its final decision and denied the request for a fee waiver. The ministry noted that it had already reduced its search time from 30 hours to 20 hours on the basis that the requester is a private citizen, and that the actual cost of processing the request exceeds the chargeable fees. The ministry added that waiving any additional fees would unfairly shift the burden of processing the request, from the requester to the ministry.

[5] The ministry indicated that its final fee was $660.70, based on the following calculation:

Search Time	20 hours @ $30.00/hour	$ 600.00
Photocopying	251 pages @ $0.20/page	$ 50.20
Preparation Time	0.25 hour @ $30 /hour	$ 7.50
Delivery		$ 3.00
Total		$ 660.70

[6] The ministry also indicated that its search for responsive records had not located records indicating how comments from the Port Elgin meeting had influenced O. Regulation 359/09. It further indicated that it had located records illustrating how all comments received during the EBR (Environmental Bill of Rights) notice period influenced O. Regulation 359/09.

[7] With respect to access, the ministry's decision was to grant partial access with respect to the responsive records it had located and that it was claiming sections 12(1), 13 (advice or recommendations), 19 (solicitor-client privilege) and 21 (personal privacy) for the balance of the responsive records.

[8] The requester submitted the balance owing on the fee ($331.70) and the ministry released the 251 pages, as per its access decision.

[9] The requester, now the appellant, filed an appeal to this office.

[10] During mediation, the appellant questioned the inability of the ministry to locate records linking the Port Elgin meeting comments to the development of O. Regulation 359/09. The appellant has thereby raised the issue of whether the ministry conducted a reasonable search to locate responsive records.

[11] During the course of mediation, the appellant indicated that he wished to obtain copies of the flip charts and other non-responsive records from the Port Elgin meeting referred to in his request. During mediation of this appeal, the appellant filed a new request for access to the flip charts and the 5,000 pages of records that the ministry had found to be non-responsive. The ministry issued an interim access and fee estimate decision for that request. The appellant then filed an appeal of this interim access and fee estimate decision and appeal file PA11-458 was opened. Therefore, the records deemed as non-responsive in appeal file PA11-189 are being adjudicated upon in appeal file PA11-458.

[12] Representations were received from the ministry and the appellant and shared in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction Number 7*.

[13] In this order, I partially uphold the ministry's fee and I do not allow the fee waiver. I uphold the ministry's application of section 12(1) where claimed and I find that the remaining information at issue is not personal information and is, therefore, not exempt under section 21(1).

RECORDS:

[14] The records that remain at issue are listed in the ministry's index of records as set out in the following chart:

Record #	**DESCRIPTION**	**PAGE NUMBER**	**EXEMPTIONS CLAIMED**
10	Minister's Briefing Material	65-74	Sections 12, 13, 19
14	Advice to Government	87, 88	Sections 12, 13
24	Draft Letter: Renewable Energy provisions of the EPA	155, 156	Partially Withheld under Section 21
25	Advice to Government	157	Sections 12, 13, 19
30	Memo: Capacity Allocation Exempt Facility and Agricultural Land Use	171, 172	Partially Withheld under Section 21
47	Advice to Government	226, 227	Sections 12, 13, 19

52	Advice to Government	263	Sections 12, 13, 19
54	Advice to Government	276-284	Sections 12, 13, 19

ISSUES:

A. Should the fee of $660.70 be upheld?

B. Should the fee be waived?

C. Did the institution conduct a reasonable search for records indicating how comments from Port Elgin June 22, 2009 meeting were considered by government in developing O. Regulation 359/09?

D. Does the mandatory exemption at section 12 apply to Records 10, 14, 25, 42, 47, 52 and 54?

E. Do the withheld portions of Records 24 and 30 contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

DISCUSSION:

A. Should the fee of $660.70 be upheld?

[15] Where the fee exceeds $25, an institution must provide the requester with a fee estimate [Section 57(3)].

[16] Where the fee is $100 or more, the fee estimate may be based on either

- the actual work done by the institution to respond to the request, or
- a review of a representative sample of the records and/or the advice of an individual who is familiar with the type and content of the records [Order MO-1699].

[17] The purpose of a fee estimate is to give the requester sufficient information to make an informed decision on whether or not to pay the fee and pursue access [Orders P-81, MO-1367, MO-1479, MO-1614 and MO-1699].

[18] The fee estimate also assists requesters to decide whether to narrow the scope of a request in order to reduce the fees [Order MO-1520-I].

[19] In all cases, the institution must include a detailed breakdown of the fee, and a detailed statement as to how the fee was calculated [Orders P-81 and MO-1614].

[20] This office may review an institution's fee and determine whether it complies with the fee provisions in the *Act* and Regulation 460, as set out below.

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

> A head shall require the person who makes a request for access to a record to pay fees in the amounts prescribed by the regulations for,
>
> (a) the costs of every hour of manual search required to locate a record;
>
> (b) the costs of preparing the record for disclosure;
>
> (c) computer and other costs incurred in locating, retrieving, processing and copying a record;
>
> (d) shipping costs; and
>
> (e) any other costs incurred in responding to a request for access to a record.

[22] More specific provisions regarding fees are found in sections 6, 7 and 9 of Regulation 460. Those sections read:

> 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.
>
> 7. (1) If a head gives a person an estimate of an amount payable under the Act and the estimate is $100 or more, the head may require the person to pay a deposit equal to 50 per cent of the estimate before the head takes any further steps to respond to the request.
>
> (2) A head shall refund any amount paid under subsection (1) that is subsequently waived.
>
> 9. If a person is required to pay a fee for access to a record, the head may require the person to do so before giving the person access to the record.

[23] The ministry provided both confidential and non-confidential representations on the fee. The representations were about the actual search and review activities rather than a representative sample, which were used to prepare the fee estimate. In its non-confidential representations, the ministry submits that it located approximately 300 pages of records of which the appellant was provided with 251 pages.

[24] Of the approximately 300 pages, 2 pages were blank and 25 pages were considered to be not relevant to the request of how the comments heard by the MOE at the Port Elgin consultation meeting in June 2009 or during the entire comment period were taken into consideration in the development of O. Reg. 359/09.

[25] According to the ministry, the appellant's request for "documentation that shows how the comments heard by the MOE at the Port Elgin consultation meeting in June 2009 were taken into consideration in the development of the Renewable Energy Approval regulation (O. Reg. 359/09)," is a very broadly worded request requiring it to conduct an extensive search for records. The ministry states:

> When this request was initially received, the ministry's FOI [Freedom of Information] Office sent it to the Environmental Programs Division which has several programs/branches which would likely have responsive records...

> Based on a representative sampling of responsive records, it was discovered that there were no records located that specifically mentioned the Port Elgin Ontario Information Session and the influence comments raised in the session had on the development of O. Reg. 359/09. There was one record located (Appendix "B") that merely summarized the comments raised at the Port Elgin Information Session.

[26] Concerning the specifics of the search, the ministry states that the Director, Program Planning and Implementation Branch (the Director),[1] was the ministry's representative at the Port Elgin Information Session. He searched through his notes and emails regarding the session and the issues raised as written on the flip charts.

[27] The Director conducted a search through all of his approximately 1300 emails (including embedded attachments) and approximately 75 pages of his notebooks for responsive records. The ministry states that it took the Director three hours to review his emails and notebooks to develop a fulsome list of issues raised at the Port Elgin Information Session. It then took him five hours to open his emails and read his notebooks to determine if he had any responsive records.

[28] The ministry states that the Director utilized the list of issues created to conduct key word and phrase searches, focusing on an approximately 2 week period in August 2009 when the responsible manager for the file[2] was out of the office. The Director's search of his notebooks using the list of issues raised at the Port Elgin Information Session did not result in the location of any responsive records.

[29] Responsive electronic records were provided to the Briefings and Issues Coordinator, Office of the Assistant Deputy Minister, Environmental Programs Division who coordinated the search for records for the entire Environmental Programs Division.

[30] The Program Advisor Program Planning and Implementation Branch (the Program Advisor) provided support at the Port Elgin Information Session and took notes of the issues raised at the session. She reviewed the issues raised against her personal notes to identify any gaps in the issues to be searched. She spent one hour to search for the documentation related to the Port Elgin Information Session and develop a fulsome list of issues raised at this meeting. No additional responsive records were located by her.

[31] The Manager Green Energy, Program Planning and Implementation Branch (the Manager) was responsible for the development of O. Reg. 359/09. The ministry states that she was the primary holder of records related to the development of the Regulation, would have extensive knowledge of the files, and would be the best person to determine their relevance to the appellant's request.

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[1] who was the project management lead for the development of O. Reg. 359/09.
[2] the Manager, Green Energy, Program Planning and Implementation Branch.

[32] The Manager utilized the list of issues created by the Director and the Program Advisor to narrow her search based on folder names in her email archives and computer system. She conducted a search using key words and phrases within the identified folders to draw out responsive records. Since key words and phrases were not sufficient to complete the search, she opened up emails and embedded files as well as files in her personal drives. She spent four hours of time to search for responsive emails and files.

[33] No records were located by the Manager that specifically linked the Port Elgin Information Session with the development of O. Reg. 359/09; however, approximately 7000 pages were located, most were related to comments that were received prior to the 45 day comment period, but dealt with the same issues raised at the meeting.

[34] The Senior Program Advisor Program Planning and Implementation Branch (the Senior Program Advisor) worked on the green energy file from October 2009 and was selected to conduct a search for responsive records due to his familiarity with both the subject matter and the file structure of the electronic records for the Branch. He was the best person to search the central electronic repository of information. He located file folders/files created during the period of time related to this request.[3]

[35] There were approximately 500 files that pertained to this period of time. The ministry states that many of these files could be ruled out as being not responsive due to the file folder structure. Of the 500 files located, approximately 100 were considered to have potential to be responsive to the request based on a scan of the file names and file folders. To determine if they were in fact responsive, each file was opened and examined to evaluate whether they reflected the issues raised at the Port Elgin Information Session. Ultimately, 20 records were found to be responsive to the appellant's request. It took the Senior Program Advisor one and a half hours of time to search for responsive files.

[36] The ministry states that the total number of hours searched by the above identified staff is 14.5 hours. A total of 251 pages were released to the appellant. In accordance with Regulation 460, the charge for photocopying is $0.20 per page or 251 X $0.20 = $50.20.

[37] In terms of preparation time, all of the records located by the ministry were emails, electronic files that were embedded in the emails, files on the drives of individual staff or the central electronic repository. To extract the information from their location and forward to the FOI Office as well as removing exempt information took 30 minutes.

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[3] records created between June 2009, which was the start of the 45 day comment period and September 24, 2009 when the Regulation came into force.

[38] Delivery of the records to the requester's home in Port Elgin, Ontario by courier was estimated at $3.00, since the receipt for the courier was not received until after the records were sent.

[39] The appellant submits that he should not have been charged a fee of $660.00 if no responsive records were located.

Analysis/findings

[40] As stated above, the ministry sought the following fee from the appellant:

Search Time	20 hours @ $30.00/hour	$ 600.00
Photocopying	251 pages @ $0.20/page	$ 50.20
Preparation Time	0.25 hour @ $30 /hour	$ 7.50
Delivery		$ 3.00
Total		$ 660.70

[41] The appellant disputes the fee on the basis that he received no responsive records.

[42] The appellant sought in his request:

> Documentation that shows how the comments heard by MOE at the Port Elgin public consultation meeting in June 2009 were taken into consideration in the development of the Renewable Energy Approval regulation (O. Reg. 359/09).

[43] The interim decision indicated that the preliminary search resulted in finding records related to all of the comments that the ministry received from the public and other organizations with respect to improvements to O. Reg. 359/09 and do not exclusively relate to the requested information concerning only those comments heard at the meeting in Port Elgin on June 22, 2009.

[44] The ministry states that the appellant was informed that there would likely not be any records responsive to his request that link the Port Elgin Information Session with the development of O. Reg. 359/09. The appellant also was informed that he could withdraw his request with no additional fees or pay the deposit and the ministry would complete its search for records. However, the appellant indicated that he would like to continue and paid the deposit.

[45] Accordingly, in the circumstances, I find that as the appellant elected to receive the records, despite these records not being responsive, I find that a fee is properly chargeable in this appeal.

[46] There was no additional search time required to search for the approximately 6,800 pages at issue in the related appeal file PA11-458 as the ministry had completed the search as part of the processing of request in this appeal. As a result, the appellant was not charged any search time to process the request in appeal file PA11-458. The search fee covered the search for responsive records in appeal file PA11-189. The records found to be non-responsive by the ministry are the subject of the appellant's request in appeal file PA11-458.

[47] In terms of the amount of the fee, I note that the ministry charged a fee for 20 hours of search time, yet its representations indicate that only 14.5 hours of search time was utilized. Therefore, I am reducing the search fee to 14.5 hours for a total search fee of $435.00, which was calculated using the $30.00 per hour search fee allowed by Regulation 460, cited above.

[48] Based upon my review of the ministry's representations, I find that some of the search fee time is not reasonable or is a duplication of time already charged. In particular, it took the Director, Program Planning and Implementation Branch three hours of time to review 1300 emails and locate and review 75 pages of notebooks to develop a fulsome list of issues raised at the Port Elgin Information Session. He then spent another five hours to open these emails and read his notebooks to determine if he had any responsive records.

[49] The ministry did not provide a satisfactory explanation as to why the Director, Program Planning and Implementation Branch could not have looked for responsive records while he was developing the list of issues. The request was clarified by the appellant prior to any search being undertaken. Accordingly, I disallow the three hours of the 14.5 hours of search time where this individual did not open his emails while reviewing them or look for responsive records in his notebooks.

[50] The appellant did not dispute the remainder of the fee of $60.70 for photocopies, preparation and shipping charges. The ministry charged $7.50 for preparation time. Section 57(1)(b) includes time for:

- severing a record [Order P-4]
- a person running reports from a computer system [Order M-1083]

[51] Generally, this office has accepted that it takes two minutes to sever a page that requires multiple severances [Orders MO-1169, PO-1721, PO-1834, and PO-1990].

[52] Section 57(1)(b) does not include time for

- deciding whether or not to claim an exemption [Order P-4, M-376, P-1536]

- identifying records requiring severing [MO-1380]
- identifying and preparing records requiring third party notice [MO-1380]
- removing paper clips, tape and staples and packaging records for shipment [Order PO-2574]
- transporting records to the mailroom or arranging for courier service [Order P-4]
- assembling information and proofing data [Order M-1083]
- photocopying [Orders P-184 and P-890]
- preparing an index of records or a decision letter [P-741, P-1536]
- re-filing and re-storing records to their original state after they have been reviewed and copied [PO-2574]
- preparing a record for disclosure that contains the requester's personal information [Regulation 460, section 6.1].

[53] In its representations, the ministry claims 30 minutes of preparation time to extract the information from their location and forward to the FOI Office as well as removing exempt information. However, extracting information from their location and forwarding to the FOI Office is not allowable as preparation time under section 57(1)(b).

[54] Generally, this office has accepted that it takes two minutes to sever a page that requires multiple severances.[4] The records have already been severed by the ministry. There appears to be 2 pages that contain severances.[5] Accordingly I will allow the ministry, two minutes per page for 2 pages at $30 per hour for a total of $2.00.

[55] I will allow the photocopy costs of 251 pages at $0.20 per page[6] for a total of $50.20 and the shipping costs of $3.00.[7]

[4] Orders MO-1169, MO-2687, PO-1721, PO-1834 and PO-1990.
[5] Page 155 of Record 24 and page 171 of Record 30.
[6] Section 57(1)(c) includes the cost of photocopies.
[7] Section 57(1)(d) allows an institution to charge the cost of shipping.

[56] Accordingly, I find that the fee is as follows:

Search Time	11 hours @ $30.00/hour	$ 330.00
Photocopying	251 pages @ $0.20/page	$ 50.20
Preparation Time	0.25 hour @ $30.00/hour	$ 2.00
Delivery		$ 3.00
Total		$ 385.20

[57] I will now determine whether the fee of $385.20 should be waived in whole or in part.

B. Should the fee be waived?

[58] Section 57(4) of the *Act* requires an institution to waive fees, in whole or in part, in certain circumstances. The appellant relies on section 57(4)(c), which reads:

> 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,
>
> > whether dissemination of the record will benefit public health or safety;

[59] Section 8 of Regulation 460 sets out additional matters for a head to consider in deciding whether to waive a fee. This section states:

> 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.

[60] The fee provisions in the *Act* establish a user-pay principle which is founded on the premise that requesters should be expected to carry at least a portion of the cost of processing a request unless it is fair and equitable that they not do so. The fees referred to in section 57(1) and outlined in section 6 of Regulation 460 are mandatory unless the requester can present a persuasive argument that a fee waiver is justified on the basis that it is fair and equitable to grant it or the *Act* requires the institution to waive the fees [Order PO-2726].

[61] A requester must first ask the institution for a fee waiver, and provide detailed information to support the request, before this office will consider whether a fee waiver should be granted. This office may review the institution's decision to deny a request for a fee waiver, in whole or in part, and may uphold or modify the institution's decision [Orders M-914, P-474, P-1393, and PO-1953-F].

[62] The institution or this office may decide that only a portion of the fee should be waived [Order MO-1243].

Part 1: basis for fee waiver

[63] The following factors may be relevant in determining whether dissemination of a record will benefit public health or safety under section 57(4)(c):

- whether the subject matter of the record is a matter of public rather than private interest

- whether the subject matter of the record relates directly to a public health or safety issue

- whether the dissemination of the record would yield a public benefit by

    (a) disclosing a public health or safety concern, or

    (b) contributing meaningfully to the development of understanding of an important public health or safety issue

- the probability that the requester will disseminate the contents of the record

[Orders P-2, P-474, PO-1953-F, PO-1962]

[64] The focus of section 57(4)(c) is "public health or safety". It is not sufficient that there be only a "public interest" in the records or that the public has a "right to know". There must be some connection between the public interest and a public health and safety issue [Orders MO-1336, MO-2071, PO-2592 and PO-2726].

[65] In his fee waiver request, the appellant made reference to comments he said had been made by the ministry. He said that the ministry stated that Dr. King, Chief Medical Officer of Health, indicated that wind turbines do not create a health or safety hazard. The appellant submits in his fee waiver request that Dr. King's report should not have bearing on his fee waiver request. The appellant states:

> Dr. King's [book] Report was issued on May 20, 2010, a year after the Port Elgin consultation meeting on June 22, 2009; The Port Elgin community comments related to adverse health and safety effects from industrial wind turbines were almost one year earlier on June 22, 2009; The 550 metre regulation was promulgated and came into effect on September 24, 2009, some 8 months prior to Dr. King's report.
> ...
> Furthermore, Dr. King's report relates to the 550 metre setback; The MOE requested our particular community's input on the viability of the 550 metre setback; Our government, who are employed by us, was under an obligation to review and consider our Community comments related to adverse health defects and industrial wind turbines; some of the comments were from actual victims of adverse health effects from industrial wind turbines.
>
> My request is related only to how my Community's comments related to adverse health effects were reviewed and considered by our government. It fits squarely under section 57(4)(c).
>
> The dissemination of the records will benefit public health or safety whether or not Dr. King's report is relevant or not.

[66] Concerning the fee waiver request, the ministry decision letter states that:

> The records in this case would not meet the criteria in section 57(4)(c) as the ministry has already published how all of the comments that were received by the ministry in response to the posting on the Environmental influenced the passage of O. Regulation 359/09.
>
> In addition, the Ontario Medical Officer of Health has already provided the public with the information that wind turbines do not create a health or safety hazard to the public and the ministry has made publicly available the policy on wind turbines and the scientific references upon which the wind turbine policy is based.

[67] In its representations, the ministry states that it has made public its decision with respect to 359/09 on the Environmental Registry, a record that was provided to the appellant as part of the disclosure package. The ministry submits that:

> The health or safety issue has been raised by members of the public, the government, the media, social media, the Ontario Medical Officer of Health, the Environmental Review Tribunal, and the Courts and it is the ministry's position that public dissemination of the 251 pages would not add to the discussions that have already taken place.
>
> Specifically, the ministry has published a list of studies (from around the world) on the health effects of the wind turbines. This was also released to the appellant as part of the release package as well as on the ministry's website.[8]
>
> The Ontario Medical Officer of Health, Dr. King has conducted a review of the health impacts associated with wind turbines and her review concludes that while some people living near wind turbines report symptoms such as dizziness, headaches, and sleep disturbance, the scientific evidence available to date does not demonstrate a direct causal link between wind turbine noise and adverse health effects.[9]
>
> The Environmental Review Tribunal held a full hearing on the health and safety issues related to wind turbines and issued a decision on July 18, 2011 that indicated that there were no health or safety issues raised in relation to one specific wind farm.[10]
>
> A private citizen, now the president of Wind Concerns Ontario, filed an application for Judicial Review on October 19, 2009 with respect to O. Reg. 359/09.
>
> The application allegations included that scientific uncertainty exists regarding the potential health effects of wind turbines and that. 359/09 did not take this into account and that the Regulation did not comply with the Statement of Environmental Values (SEV), the common law and international law.
>
> The applicant was seeking to have the sections of the Regulation related to wind energy projects declared invalid and an injunction to restrain the Director from approving any wind projects.

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[8] http://www.ene.gov.on.ca/stdprodconsume/groups/lr/@ene/documents/nativedocs/stdprod_085127.pdf
[9] http://www.health.gov.on.ca/en/public/publications/ministry_reports/wind_turbine/wind_turbine.pdf.
[10] http://www.ert.gov.on.ca/files/201107/00000300-AKT5757C7CO026-BGI54ED19RO026.pdf.

> On March 3, 2011, the Ontario Superior Court of Justice Divisional Court rendered its Decision that the Minister complied with the process mandated by the Environmental Bill of Rights in that there was full public consultation and consideration of the views of interested parties and that the ministry's review included science-based evidence and the opinions of subject-matter experts.

[68] In his representations, the appellant states that the request relates to the health and safety issue of the proposed 550 metre setback required between an industrial wind turbine and a home and the Port Elgin community's concerns related thereto. He notes that Appendix "B" of the ministry's representations states that the meeting of June 22, 2009[11] was attended by about 170 people and was "very focused on health tonight." Appendix "B" is described by the ministry as summarizing the comments raised at the meeting.

Analysis/Findings

[69] Based upon my review of the records and the parties' representations, I agree with the appellant that the relevant factors support a finding that dissemination of the records will benefit public health or safety under section 57(4)(c). I will now list each factor and my findings.

The subject matter of the records is a matter of public rather than private interest

[70] The request concerns the ministry's consideration of comments made at a public meeting and elsewhere concerning the development of O. Reg. 359/09. This regulation concerns the approval of wind and other renewable energy generation facilities under the *Environmental Protection Act*. A wind facility uses wind to generate electricity through the use of one or more wind turbines

The subject matter of the records relates directly to a public health or safety issue

[71] The ministry describes in its representations what was discussed at the Port Elgin June 22, 2009 meeting, most of which relates directly to public health or safety, as follows:

> WIND ISSUES
>
> Wind turbine noise causes health effects
>
> - More research is needed on health effects from wind turbines
> - An epidemiological study is needed on health effects

[11] The meeting referred to in the request.

- More research is needed to explore links between noise and health effects

Need to further investigate special characteristics of turbine noise

- Inaudible noise can still affect people
- Need to consider relationship between noise and annoyance from turbines
- Need to explore how cyclical nature of turbine noise influences annoyance/health

Need to enhance wind turbine modeling

Issues with MOE's noise guidelines

- They are not stringent enough
- Need to investigate how masking noise from wind should apply to noise limits
- Other jurisdictions have more stringent noise limits
- Need to evaluate noise at night
- Need to address wind shear
- MOE should take a more subjective approach to regulate noise
- Noise limits should better account for the quiet background levels in rural environments

Issues with setback approach

- Other jurisdictions have more stringent setbacks
- Setbacks should be based on turbine height
- Setbacks should be based on sound emissions

Other health issues that need more consideration

- Electromagnetic Fields
- Dirty electricity on the grid
- Stray voltage
- Shadow flicker

Issues related to public safety due to blade throw and ice throw

- Hydro One networks recommends further setbacks for blade throw
- Blade throw has been found to be higher in Ontario than in other jurisdictions

- Setbacks for safety should be based on the number of people in the vicinity
- Need to better understand risks of blade throw
- Need to have better understanding of the use of ice sensors on turbines
- Need more information on safety risks of small scale wind

Wind turbines prevent other agricultural land uses

Wind turbines kill birds and bats

Issues with removing planning approvals from municipalities

Need assurances about decommissioning

Need protection of natural features

Need protection for other wildlife including migratory corridors

Need protection of archaeology

SOLAR ISSUES

Solar siting issues

- Issues around solar installation resulting in removal of trees to better expose panels
- Setbacks for solar can exist under municipal planning approval and should be made consistent
- Solar may need fencing

Solar facilities should have rules for recycling components during decommissioning

Solar installation occupational health issues during installation

Solar facilities use of water for washing panels jurisdictions

[72] From my reading of the ministry's description of the meeting, it is clear to me that the subject matter of the records relates directly to public health or safety issues.

Dissemination of the records would yield a public benefit by contributing meaningfully to the development of understanding of an important public health or safety issue

[73] The records concern the consideration of comments made in response to the development of the regulation concerning the approval of various energy generating facilities. Although the ministry has provided submissions concerning how this regulation was approved and upheld by the court, this does not particularly address the subject matter of the records. The records concern the comments that were made prior to the approval of the regulation, which is broader than what the ministry has already disseminated in the court application or concerning the approval process.

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

[74] Based upon my review of the ministry's confidential and non-confidential representations as well as the appellant's representations, and based upon the appellant's past involvement in disseminating similar information I am satisfied that the appellant will disseminate the information in the records. The appellant has been quite active in communicating the concerns of his community about the public health and safety issue concerning the 550 metre setback of wind turbines referred to above.

[75] Accordingly, I find that part 1 of the test has been met and find that dissemination of the record will benefit public health or safety. I will now consider whether part 2 of the test has been met.

Part 2: fair and equitable

[76] For a fee waiver to be granted under section 57(4), it must be "fair and equitable" in the circumstances. Relevant factors in deciding whether or not a fee waiver is "fair and equitable" may include:

- the manner in which the institution responded to the request;
- whether the institution worked constructively with the requester to narrow and/or clarify the request;
- whether the institution provided any records to the requester free of charge;
- whether the requester worked constructively with the institution to narrow the scope of the request;
- whether the request involves a large number of records;
- whether the requester has advanced a compromise solution which would reduce costs; and
- whether the waiver of the fee would shift an unreasonable burden of the cost from the appellant to the institution.

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

[77] The ministry's position is that the appellant provided insufficient evidence of the benefits of dissemination of the records to the public on the basis of health or safety that would outweigh the costs to the ministry.

[78] The ministry submits that to reduce the scope in this particular case, the FOI pointed out to the appellant that the decision posted on the Environmental Registry provided the analysis of how the comments raised during the EBR posting, the Information Sessions and other consultations influenced the development of O. Reg. 359/09. The ministry states that the FOI Analyst explained to the appellant that the search could not be based on use of the words Port Elgin as these words were not central to the issues raised at the session and that he did not have to proceed with the request as it was unlikely that any responsive records specific to Port Elgin would be located. The appellant wanted his request processed on the basis of the interim decision and fee estimate in order to determine if responsive records existed.

[79] The appellant did not directly address whether a fee waiver is fair and equitable directly in his representations.

Analysis/Findings

[80] As stated above, I agree with the ministry that once the appellant paid the deposit, he agreed to the scope of the request which included the search for records related to how all comments heard during the comment period of the Environmental Registry posting, not just the Port Elgin Information Session, had influenced the development of O. Reg. 359/09.

[81] Concerning the relevant factors set out above as to whether a fee waiver is "fair and equitable", I find that these factors weigh in favour of the ministry. I find that the ministry properly responded to the appellant and offered to work with the appellant to clarify the scope of the request. The request required that a large number of records be reviewed. The appellant did not advance a compromise solution which would reduce costs. I find that a fee waiver would shift an unreasonable burden of the cost from the appellant to the institution.

[82] The search fee has been reduced to $330.00 in this order. This fee covers the 3search fee for the records deemed responsive to both this appeal and appeal file PA11-458. In its fee estimate representations in appeal file PA11-458, the ministry states that:

> There was no additional time required to search for the approximately 6,800 pages as it had completed that exercise as part of the processing of request [in appeal file PA11-189].

> As a result, the appellant is not charged any search time to process request [in appeal file PA11-458].

[83] The search fee was for the records deemed responsive by the ministry to the request as fulfilled, namely, records related to all comments made regarding the development of O. Regulation 359/09.

[84] Accordingly, I find that waiver of the fee of $385.20 is not fair and equitable in the circumstances and I will not waive this fee.

C. Did the institution conduct a reasonable search for records indicating how comments from Port Elgin June 22, 2009 meeting were considered by government in developing O. Regulation 359/09?

[85] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 24 [Orders P-85, P-221 and PO-1954-I]. If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[86] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [Orders P-624 and PO-2559]. To be responsive, a record must be "reasonably related" to the request [Order PO-2554].

[87] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request [Orders M-909, PO-2469, PO-2592].

[88] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control [Order MO-2185].

[89] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist [Order MO-2246].

[90] The ministry was asked to provide a written summary of all steps taken in response to the request. In particular, the ministry was asked:

1. Did the institution contact the requester for additional clarification of the request? If so, please provide details including a summary of any further information the requester provided.

2. If the institution did not contact the requester to clarify the request, did it:

   (a) choose to respond literally to the request?

   (b) choose to define the scope of the request unilaterally? If so, did the institution outline the limits of the scope of the request to the requester? If yes, for what reasons was the scope of the request defined this way? When and how did the institution inform the requester of this decision? Did the institution explain to the requester why it was narrowing the scope of the request?

3. Please provide details of any searches carried out including: by whom were they conducted, what places were searched, who was contacted in the course of the search, what types of files were searched and finally, what were the results of the searches? Please include details of any searches carried out to respond to the request.

4. Is it possible that such records existed but no longer exist? If so please provide details of when such records were destroyed including information about record maintenance policies and practices such as evidence of retention schedules.

[91] The appellant questions the ministry's inability to locate a record linking the Port Elgin meeting comments to the development of O. Regulation 359/09. The appellant has contended that the ministry should have involved certain individuals in its search and should have used certain keywords.

[92] The ministry states that its staff most familiar with the development of the Regulation conducted the search. It states that staff initially did not conduct a key word search related to the words Port Elgin or Saugeen Shores as suggested by the appellant as these words were not critical to understanding the comments heard at that consultation meeting as outlined above.

[93] The ministry states that it subsequently searched using the key words Port Elgin and Saugeen Shores and located one record (Appendix "B" to the ministry's representations). The ministry states that this record is not responsive to the request in this file, but is responsive to the appellant's subsequent request (in appeal file PA11-458). This record summarizes the comments heard and does not address how the comments from the Port Elgin Information Session were considered by the ministry in developing O. Reg. 359/09.

[94] The ministry repeats that its Director, Program Planning and Implementation Branch had lead responsibility for the development of O. Reg. 359/09 and was the ministry's representative at the Port Elgin Information Session. He searched approximately 1300 emails (including embedded attachments) and approximately 75 pages of his notebooks for responsive records.

[95] Searches were also conducted by the Program Advisor, Program Planning who provided support and took notes at the Port Elgin Information Session.

[96] The Manager, Green Energy, Program Planning and Implementation Branch, who was the manager at the time responsible for the development of O. Reg. 359/09, also conducted a search. She conducted a search using key words and phrases within the identified folders to draw out responsive records. Since key words and phrases were not sufficient to complete the search, she opened up emails and embedded files as well as files in her personal drives.

[97] The Senior Program Advisor, Program Planning and Implementation Branch worked on the green energy file from October 2009 and was selected to conduct a search for responsive records due to his familiarity with the subject matter and the file structure of the electronic records for the Branch.

[98] The appellant did not provide direct representations as to whether the ministry conducted a reasonable search. His representations focus on why the ministry did not locate records specifically linking the Port Elgin meeting comments to the development of O. Regulation 359/09.

Analysis/findings

[99] As stated above, the appellant agreed that the ministry was to search for records concerning all comments made regarding the development of O. Regulation 359/09. He still questions the ministry's inability to locate records linking specifically the Port Elgin meeting comments to the development of O. Regulation 359/09.

[100] Based upon my review of the parties' representations, I find that the ministry conducted a reasonable search for responsive records. The ministry did conduct a search using the keywords Port Elgin and Saugeen Shores. The ministry also had the

individuals who were familiar with the records conduct the search. The search resulted in the ministry locating records regarding all comments made regarding the development of O. Regulation 359/09, not only those raised at the Port Elgin Information Session.

[101] Based upon all of the evidence, I uphold the ministry's search as reasonable.

D. Does the mandatory exemption at section 12 apply to Records 10, 14, 25, 42, 47, 52 and 54?

[102] Section 12 reads:

> A head shall refuse to disclose a record where the disclosure would reveal the substance of deliberations of the Executive Council or its committees, including,
>
> (a) an agenda, minute or other record of the deliberations or decisions of the Executive Council or its committees;
>
> (b) a record containing policy options or recommendations submitted, or prepared for submission, to the Executive Council or its committees;
>
> (c) a record that does not contain policy options or recommendations referred to in clause (b) and that does contain background explanations or analyses of problems submitted, or prepared for submission, to the Executive Council or its committees for their consideration in making decisions, before those decisions are made and implemented;
>
> (d) a record used for or reflecting consultation among ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;
>
> (e) a record prepared to brief a minister of the Crown in relation to matters that are before or are proposed to be brought before the Executive Council or its committees, or are the subject of consultations among ministers relating to government decisions or the formulation of government policy; and
>
> (f) draft legislation or regulations.

[103] The ministry provided both confidential and non-confidential representations on the application of section 12(1) to the records.

[104] The ministry submits that Records 10, 14, 25, 42, 47, 52, and 54 are exempt as disclosure would reveal the substance of deliberations of the Legislation and Regulations Committee (LRC) and of Cabinet with respect to the decisions required for the final version of O. Reg. 359/09.

[105] The ministry states that the Minister brought the matter to the LRC on August 24, 2009 and to Cabinet on September 8, 2009. As part of this submission, the changes to the draft of O. Reg. 359/09, as outlined on the Environmental Registry were presented. O. Reg. 359/09 received Royal Assent on September 24, 2009.

[106] The ministry states that the records reveal the suggested wording, as well as the issues of 359/09 that needed to be addressed before final approval.

[107] The ministry states that specifically Records 10, 52 and 54 (which is a duplicate of Record 10) are slide decks that briefed the Minister on issues that were brought to LRC and Cabinet. The ministry also relies on sections 12(1)(b) and (e) for these records. For section 12(1)(b), the ministry states that the records also contain the analysis and the options for the Minister prior to taking the matter to the LRC. For section 12(1)(e), the ministry states that the records' titles reveal their purpose.

[108] The ministry relies on sections 12(1)(b) and (d) for Records 14 and 25 as these records contain the discussions between the Assistant Deputy Ministers for the ministry and the Ministry of Transportation (MTO), as well as the policy staff of both ministries, of the issues discussed and the similarity with the speaking notes for the LRC and Cabinet meetings.

[109] The ministry relies on sections 12(1)(b), (e) and (f) for Record 42 as disclosure of this record would reveal an issue raised at LRC and Cabinet.

[110] The ministry relies on sections 12(1)(c) and (d) for Record 47 as disclosure of the information would reveal the issue that was discussed at LRC and Cabinet.

[111] The appellant did not provide representations on this issue.

Analysis/findings

[112] Based upon my review of Records 10, 52 and 54, I find that the information therein comes within the introductory wording of section 12(1). This wording exempts records where disclosure would reveal the substance of deliberations of the Executive Council or its committees. The LRC is a committee of Cabinet (the Executive Council).

[113] The use of the term "including" in the introductory wording of section 12(1) means that any record which would reveal the substance of deliberations of an Executive Council (Cabinet) or its committees [not just the types of records enumerated in the various subparagraphs of section 12(1)], qualifies for exemption under section 12(1) [Orders P-22, P-1570 and PO-2320].

[114] A record that has never been placed before Cabinet or its committees may qualify for exemption under the introductory wording of section 12(1), where disclosure of the record would reveal the substance of deliberations of Cabinet or its committees, or where disclosure would permit the drawing of accurate inferences with respect to these deliberations [Orders P-361 PO-2320, PO-2554, PO-2666, PO-2707 and PO-2725].

[115] In order to meet the requirements of the introductory wording of section 12(1), the institution must provide sufficient evidence to establish a linkage between the content of the record and the actual substance of Cabinet deliberations [Order PO-2320].

[116] I also agree with the ministry that section 12(1)(b) applies to Records 14, 25, and 42 as these records contain policy options or recommendations prepared for submission to Cabinet or the LRC. Such records are exempt and remain exempt after a decision is made [Order PO-2320, PO-2554, PO-2677 and PO-2725].

[117] I find that section 12(1)(c) applies to Record 47 as disclosure of the information therein would reveal background explanations or analyses of problems prepared for submission to Cabinet or the LRC for their consideration in making decisions before decisions are made and implemented, [Orders PO-2554 and PO-2677].

[118] Accordingly, based upon my review of the records for which section 12(1) has been claimed, and the ministry's confidential and non-confidential representations, I find that the mandatory exemption at section 12(1) applies to Records 10, 14, 25, 42, 47, 52 and 54 and that these records are, therefore, exempt. Therefore, I will not consider whether these records are exempt by reason of sections 13 and/or 19.

[119] I will now determine whether the remaining information at issue in this appeal, which is the withheld information in Records 24 and 30, is exempt.

E. Do the withheld portions of Records 24 and 30 contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[120] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except if they relate to another individual,
>
> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[121] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

[122] Sections 2(2), (3) and (4) also relate to the definition of personal information. These sections state:

> (2) Personal information does not include information about an individual who has been dead for more than thirty years.
>
> (3) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.
>
> (4) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[123] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225].

[124] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225 and MO-2344].

[125] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

[126] The ministry withheld a name and address from Record 24 and an email address in Record 30. The ministry submits that the name and address in Record 24 is not personal information but is also not responsive to the request. The ministry also submits that the email address in Record 30 is a personal email address.

[127] The appellant did not provide representations on this issue.

Analysis/findings

[128] Based upon my review of the information withheld from both Records 24 and 30, I find that this information is not personal information.

[129] The name and address in Record 24 consist of the name and address of an individual acting in his official capacity. The entire letter in Record 24, except for the addressee information, has been disclosed to the appellant. I do not agree that the

addressee information for this letter is non-responsive. The rest of the letter was determined by the ministry to be responsive as it is about the consideration of comments made in response to the development of the regulation concerning the approval of various energy generating facilities.

[130] As stated above, section 2(3) states that personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

[131] Similarly, the individual in Record 30 corresponded with the ministry in his business capacity. According to my review of this record, this individual was clearly emailing the ministry concerning business information. As well, this individual's email address has already been disclosed to the appellant by the ministry on page 172 of this record.

[132] As the information at issue in Records 24 and 30 is not personal information, the personal privacy exemption in section 21 cannot apply. As no other exemptions have been claimed for this information and no other mandatory exemptions apply, I will order it disclosed.

ORDER:

1. I allow the ministry to charge the appellant a fee of $385.20.

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

3. I uphold the ministry's search for records.

4. I uphold the ministry's decision to withhold Records 10, 14, 25, 42, 47, 52 and 54.

5. I order the ministry to disclose to the appellant **May 18, 2012** the information remaining at issue in Records 24 and 30.

Original signed by: April 27, 2012
Diane Smith
Adjudicator