

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3132

Appeal PA11-458

Ministry of the Environment

November 8, 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. Following the issuance of an interim access and fee estimate decision, the ministry issued a final access and fee decision. This order partially upholds the ministry's fee and denies the fee waiver request.

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

Orders and Investigation Reports Considered: Orders PO-3074, MO-2471, MO-2776.

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:

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 decision and fee estimate on January 26, 2011, followed later by a final access decision/final fee on April 7, 2011.

[3] The requester, now the appellant, appealed the ministry's decision of April 7, 2011 and appeal file PA11-189 was opened by this office. During the mediation stage of appeal file PA11-189, the appellant indicated that he wished to obtain copies of the flip charts from the Port Elgin public meeting of June 22, 2009. The ministry advised the mediator that it did not consider the flip charts to be within the scope of the appellant's request and that as a result, the appellant would need to submit a new access request under the *Act* for copies of the flip charts.

[4] During mediation, the appellant also indicated that he wanted access to the 5,000 pages of records that the ministry had located during the search for responsive records. The ministry had found these 5,000 pages to be non-responsive to the request in appeal file PA11-189. The ministry indicated that these 5,000 pages consisted mostly of emails and some attachments (e.g. slide decks).

[5] The ministry advised that if the appellant wishes to pursue access to these 5,000 pages, he would need to submit a new access request under the *Act* and the ministry would need to issue an access decision regarding each of these pages. The appellant subsequently filed a new request for the flip charts and the 5,000 pages of records deemed non-responsive in appeal file PA11-189. The ministry then issued an interim access decision and fee estimate dated September 14, 2011. The appellant appealed this decision and this appeal file PA11-458 was opened.

[6] The ministry issued a final access and fee decision on July 13, 2012, indicating that it would provide access to the flip charts and partial access to the other paper records, which now consisted of 6800 pages of records. Concerning the fee, the ministry only charged the appellant for preparing and processing the records for disclosure, as the search fee was incurred in appeal file PA11-189, as referred to in Order PO-3074.

[7] The ministry stated in its decision letter that:

In accordance with Section 57 of the *Freedom of Information and Protection of Privacy Act*, the fee is:

Preparation Time 14 hours @ \$30/hour	\$ 420.00
Flip Chart 24 pages @ \$5.00/page	\$ 120.00
Delivery	\$ 3.00
Total	\$ 543.00
Deposit Received	-\$ 121.50
Remaining balance	\$ 421.50

In order to view the records at the ministry and receive a copy of the flip charts please forward \$421.50 to our office...

The *Act* provides that all or part of the fee can be waived if the fee will cause you financial hardship or if dissemination of the record will benefit public health or safety, in accordance with Section 57. You will be required to provide evidence to support any waiver claim in writing to the ministry...

[8] The appellant then appealed the fee. In his appeal, he asked for a fee waiver on the basis of section 57(4)(c) of the *Act*. He also appealed the exemptions applied to the records in the final access and fee decision.

[9] I sought representations initially from the ministry regarding the basis for its fee and the fee waiver request. I provided the ministry's representations¹ to the appellant and sought and received representations in response.

[10] In this order, I partially uphold the ministry's fee. I also find that the basis of a fee waiver under section 57(4)(c) has not been established.

ISSUES:

- A. Should the fee of \$543.00 be upheld?
- B. Should the fee be waived?

DISCUSSION:

A. Should the fee of \$543.00 be upheld?

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

[12] 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].

[13] 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.

¹ Except for one portion that contained confidential information and that was not relevant to the determination of the issues in this order.

[14] 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.

[15] 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.

[16] The ministry states that when the request was initially received, the ministry's Freedom of Information (FOI) Office sent it to the Environmental Programs Division, which identified responsive records located in staff email folders, staff electronic files and folders and branch files and folders.

[17] The ministry also states that there was no additional charge for the time required to search for the approximately 6,800 pages of records over the search time in appeal file PA11-189 as it had completed that exercise as part of the processing of that request.² As a result, the appellant was not charged any search time to process the request in this appeal file.

[18] The ministry states that:

From a security and confidentiality perspective, [the appellant] cannot view the emails and files/folders where they were originally located as those repositories also contain other unrelated records, personal information, as well as records that will be redacted in accordance with the exemptions available to the ministry...

Based on review of the approximately 6,800 pages by [the] FOI Analyst of the FOI Office and [the] Briefings and Issues Coordinator, Office of the Assistant Deputy Minister, Environmental Programs Division, there are 330 pages where partial access is granted.

² See Order PO-3074.

At a redaction time of 2 minutes per page, as allowed in numerous orders of the IPC, the estimated total amount of time to remove exempt information is 2 X 330 pages = 660 minutes. This is equal to 11.0 hours.

In order to copy the 24 pages of flip charts, the ministry will require the services of a private vendor. Based on an estimate of records of a similar size, the FOI Office has been informed that the vendor, [name] charges \$5.00 per page as well as HST at 13%.

[The appellant] will be charged the actual amount of the invoice rather than the estimate provided to date.

[The appellant] has already viewed these pages at no charge.

To send the flip charts to [the appellant] will be by courier which has been estimated based on standard courier rates to be \$3.00. Should [he] wish to pick up these records from ministry offices, the delivery charge will be eliminated.

[The appellant] was also informed that should he wish a copy of any of the pages to which he will receive access, he will be charged \$0.20 per pages based on Regulation 460.

[19] The appellant states that he should not be charged for the 6,800 pages of records as "...none of the 6,800 pages have anything to do with [his] request". He also states that he should not have been charged three hours preparation time for the 24 page flip chart that he reviewed. He also appears to be willing to pay the photocopy costs for the flip charts.

Analysis/Findings

[20] The appellant was not charged a search fee by the ministry for locating the records. The \$543.00 fee relates solely to the time required to prepare the records for disclosure and the amount to be invoiced for copying the flip charts.

[21] Section 57(1)(b) includes time for severing a record.³ Generally, this office has accepted that it takes two minutes to sever a page that requires multiple severances.⁴ Section 6 of Regulation 460 allows an institution to charge for preparing a record for disclosure, including severing a part of the record, at \$7.50 for each 15 minutes spent by any person.

³ Order P-4.

⁴ Orders MO-1169, PO-1721, PO-1834 and PO-1990.

[22] In this appeal, the ministry has charged the appellant, to sever 330 pages,⁵ preparation time of 14 hours at \$30.00 per hour for a total of \$420.00. However, as stated by the ministry, in accordance with the provisions of the *Act* and Regulation 460,⁶ set out above, the preparation time for severing 330 pages equals 11 hours. The preparation fee for 11 hours is \$330.00,⁷ not \$420.00. I will, therefore, allow the ministry to only charge the appellant \$330.00 for its preparation fee.

[23] The appellant was not charged a preparation fee for preparing the 24 pages of flip charts for disclosure. The ministry will charge the appellant its invoiced cost for copying the flip charts, at \$5.00 (plus HST) per page of flip chart, as it is unable to copy these records itself.

[24] Under section 57(1)(c) of the *Act*, the ministry can recover the cost set out in an invoice for copying records. The ministry has provided me with information as to the cost it will be invoiced. In Order MO-2471, it was determined that invoiced costs must describe in detail the work that was done before it can be recovered from a requester under the *Act*.⁸ In this appeal, the ministry has provided a detailed description of the work that is required to be done that is to be reflected in an invoice. Taking into account the size of the flip charts, I accept this invoiced cost as reasonable and will allow the ministry to recover this amount from the appellant should he want copies of the 24 pages of flip charts.

[25] In terms of responsiveness, as stated above and in Order PO-3074, the appellant was informed in appeal file PA11-189 that the ministry had located approximately 5,000 pages of records⁹ and 24 pages of flip charts that it considered not to be responsive to his request. Nevertheless, the appellant decided that he wanted access to this information; as a result, this appeal has arisen. If the appellant does not want to view or have a copy of the records at issue in this appeal, he need not do so.

[26] As I stated in Order PO-3074:

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.

⁵ Out of the 6800 pages it has located.

⁶ See section 57(1)(b) of the *Act* and section 6 of Regulation 460.

⁷ Section 6 of Regulation 460 allows for preparing a record for disclosure, including severing a part of the record, \$7.50 for each 15 minutes spent by any person.

⁸ See also Order MO-2776.

⁹ This ultimately turned out to be 6800 pages of records.

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.

[27] I adopt this analysis in this order and find that if the appellant elects to view or receive copies of the records, despite these records not being responsive, a fee is properly chargeable in this appeal.

[28] In conclusion, I uphold the ministry's preparation fee in the amount of \$330.00. I also uphold the ministry's invoiced cost of \$120.00 plus HST for copying the 24 pages of flip charts, should the appellant wish to have copies of these flip charts. I also uphold the ministry's courier fee of \$3.00, should the appellant elect to have the flip charts delivered to him.¹⁰ Similarly, the ministry is entitled to charge the appellant \$0.20 per photocopy, if the appellant elects to obtain copies of any of the 6800 pages of paper records.

[29] As referred to above, the appellant states in his representations that the 6,800 pages of records do not have anything to do with his request. However, after payment of the preparation fee, if he decides to view or receive copies of the 330 severed pages from these 6800 pages of records, the appellant may then advise this office if he still wishes to obtain access to the withheld portions of these pages. At that time, an appeal may proceed on the application of exemptions to the withheld portions of the 330 pages of records.

[30] Therefore, the fee in this appeal is \$453.00 plus the HST¹¹ charge for copying the 24 pages of flip charts, for a total fee of \$468.60.¹² As I have upheld a fee in this appeal, I will now determine if this fee should be waived.

B. Should the fee be waived?

[31] 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;

¹⁰ Section 57(1)(d) of the *Act* allows the ministry to recover shipping costs.

¹¹ HST on \$5.00 is \$0.65. For 24 pages of flip charts this would equal \$15.60.

¹² \$330.00 preparation time and \$120.00 for copying the flip charts and \$3.00 for shipping (plus any photocopies of the paper records at \$0.20 per page).

[32] 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.¹³

[33] 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.¹⁴

[34] The institution or this office may decide that only a portion of the fee should be waived.¹⁵

[35] Concerning a fee waiver, in his representations the appellant relies on the same representations as he provided in appeal file PA11-189.¹⁶ The records in this appeal arise out of the request in appeal file PA11-189.¹⁷ The appellant has not made a specific request to the ministry for a fee waiver in this appeal file, nor has he provided me with any specific representations concerning a fee waiver in this appeal file. Therefore, relying on my findings in Order PO-3074, I maintain my decision as set out in that order, and find that it is not fair and equitable in the circumstances to waive the fee of \$468.60 in this appeal.

ORDER:

I uphold the ministry's fee in the amount of \$330.00 for preparation time, \$5.00 plus HST per page for copying the 24 pages of flip charts, and \$3.00 for shipping, for a total of \$468.60 and I do not waive this fee.

Original Signed by: _____
Diane Smith
Adjudicator

_____ November 8, 2012

¹³ Order PO-2726.

¹⁴ Orders M-914, P-474, P-1393, and PO-1953-F.

¹⁵ Order MO-1243.

¹⁶ See Order PO-3074.

¹⁷ See above and also see Order PO-3074.