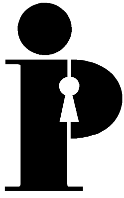

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER 2

Appeal 880003

Ontario Hydro

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This appeal was received pursuant to subsection 50(1) of the Freedom of Information and Protection of Privacy Act, 1987 which gives a person who has made a request for access to a record under subsection 24(1) a right to appeal to the Commissioner any decision of a head under the Act. Further, subsection 57(4) allows a person who is required to pay a fee under subsection 57(1) to ask the Commissioner to review the head's decision to charge a fee or the amount of the fee.

The facts of this case are as follows:

1. On November 20, 1987, Ontario Hydro (the "institution") received a request for access to the Board of Directors minutes for 1986 and 1987. The requester asked to examine these records in Ottawa.

2. On January 4, 1988, the request was processed as a formal request under the Freedom of Information and Protection of Privacy Act, 1987. The deadline of February 2nd for response was extended 30 days in accordance with subsection 27(1)(a) of the Act.

3. On January 29, 1988, the institution provided the appellant with a fee estimate of $120 for the requested records. The

fees notification also explained that providing access to original records "was not

reasonable in the circumstances, as the records required severing and original Board Minutes cannot leave head office".

4. On February 3, 1988, the appellant sent a letter to the Information and Privacy Commissioner appealing the decision to charge a fee and the amount of the fee, as well as the decision not to make the record available for examination in Ottawa.

5. On February 4, 1988, the appellant was sent a final fee notice requesting payment of $115. This fee was based on a charge of $.20 per page for 575 pages.

6. The appellant submitted a cheque for $115 and an application for a waiver of fees. The request for waiver was based on subsection 57(3)(c) which permits the head to waive fees if dissemination of the record will benefit public health or safety. On February 18, 1988, a severed copy of the Board of Directors minutes was forwarded to the

appellant. (The appellant has also appealed the severances made which matters are the subject of a separate appeal.)

7. On March 2, 1988, the institution wrote to the appellant, denying his request for a waiver of fees and explaining the reasons for the denial. The letter to the appellant states that:

> "You do not, however, explain how the release of this information will impact on the public's health or safety. The fact that you intend public dissemination of the data does not, in itself, justify a waiving of the fee."

8. On March 4, 1988, the appellant responded with a letter to the institution restating his position that a fee waiver should be granted "on the grounds of public health and safety."

9. By letter dated March 31, 1988, I sent a notice to the appellant and the institution stating that I was conducting an inquiry into this matter to review the decision of the head of the institution and requesting that written representations be made to me prior to April 29, 1988. I received written submissions from both parties. While these submissions addressed numerous issues, this order deals only with the issues that arise in the context of this appeal, that is:

A. whether the head's decision to deny an opportunity to examine the record in Ottawa was in accordance with the terms of the Act,

B. whether the amount of the fees charged in this case is proper,

C. whether the head's decision not to waive fees is proper in the circumstances of this case.

ISSUE A:

The head's position is that it is not "reasonably practicable" to permit the appellant to examine the record because it is subject to a substantial amount of severing, pursuant to subsection 10(2) of the Act, which requires the head to provide as much of a record as can be reasonably severed without disclosing information that falls under one of the exemptions set out in the Act.

In this case the Board Minutes for 1986 and 1987 contain over 95 separate severances. The head's position is that the record cannot be provided for examination where it has been so substantially severed.

The head also states that subsection 304(1) of the Ontario Corporations Act requires the minutes of Board of Directors' meetings be kept at the head office of the corporation and open to inspection by any director during normal business hours of the corporation. The head's position is that the Board of Directors minutes are a vital record of the corporation and, as such, are to be maintained in a secure environment. The head's position is that the risk of loss or damage in transporting these records to another location for examination, if the originals could be viewed, is unacceptable.

Subsection 30(2) of the Freedom of Information and Protection of Privacy Act, 1987 states as follows:

> Where a person requests the opportunity to examine a record or a part thereof and it is reasonably practicable to give the person that opportunity, the head shall allow the person to examine the record or part thereof in accordance with the regulations.

I have reviewed the record in question in its entirety including those parts which the head intends to sever which are interspersed throughout the record.

In the circumstances, I agree with the decision of the head that it is not reasonably practicable to provide the appellant an opportunity to examine the record, whether it be in Ottawa or

Toronto, while at the same time ensuring that exempt information is not disclosed. Accordingly, the
decision of the head not to allow the appellant to examine the record or parts thereof under subsection 30(2) is upheld.

Having found that it is not reasonably practicable in the circumstances of this case to provide an opportunity to examine the record, it is not necessary for me to deal with the issue of where the record might be examined. However, I do not preclude the possibility in a proper case where it is "reasonably practicable" to examine a record, that arrangements could be made to transfer the record from a government office in one city or location to a government office in another city or location to make it more convenient for a requester to examine a record.

ISSUE B:

With respect to the appellant's objection that a photocopy charge of $.20 per page is too high, the Act provides in subsection 57(1) that a head may require a person who makes a request for access to a record to pay a fee. Subsection 57(1) states as follows:

> Where no provision is made for a charge or fee under any other Act, a head may require the person who makes a

request for access to a record or for correction of a record to pay,

(a) a search charge for every hour of manual search required in excess of two hours 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; and

(d) shipping costs.

Subsection 5(1) of Ontario Regulation 532/87, as amended, issued pursuant to the Act, provides that a head may require a person who seeks access to a record to pay $.20 for each page of photocopying.

In this case, the head explains that the process of severing involves making a copy of the record, blanking out the portions of the record for which exemptions are claimed and then producing a photocopy of the record with severances for the requester. The head argues that a requester may be charged the cost of photocopying a record that is sent to the requester. In this case, the appellant has been charged for photocopies in accordance with the limit established by Regulation, and apart from considering the issue of fee waiver, neither the head nor the Commissioner may alter the fee schedule as determined by Regulation.

The appellant argues that the charging of photocopy fees where a requester has not been given an opportunity to view the record and choose what portions of it he wants copied, invites "abuse and arbitrary administration".

This argument relates to Issue A and the ability of a requester, where possible, to examine the record. Unfortunately, as set out above, it is not reasonably practicable for the requestor to examine the record and choose what pages he wanted photocopied in the circumstances of this case.

I assume as a matter of policy that the institution does not wish to make any profit from charging for photocopies. Rather, the purpose of fees is to permit the institution to recover some of the actual costs and to have the people who use the system pay their fair portion. That being the case, in my view, the institution should consider $.20 per page as a maximum and make an effort to determine the actual cost of photocopying. This is contemplated by subsection 57(3)(a) of the Act which refers to the "actual cost of processing, collecting and copying the record." If the actual cost is less than $.20 a page then that is all requesters should be charged. It is important that every effort be made by an institution to prevent fees from being used as a deterrent or impediment to use of the Act. Until

such time as there has been more experience with the Act, the head's decision to follow the Regulation and charge $.20 per page for photocopying of the record in question is upheld.

ISSUE C:

With respect to the question of waiver of fees, the appellant wrote to Ontario Hydro's Freedom of Information Co_ordinator on February 24, 1988 stating:

> "First the waiver is sought given the public interest in the meeting minutes. Second I have indicated intended public dissemination of the data. Third the data contains data on public safety and is a type of data that should be regularly released and available in the province."

On March 4, 1988, after receiving a copy of the record the appellant wrote to the co_ordinator again, providing further reasons why the fees should be waived. He stated,

> "Your board is discussing matters such as nuclear plant safety problems and the Bridlewood safety concerns with hydro lines, your approach to PCB safety, fly ash discharge, acid rain, etc. These matters clearly qualify under section 57 and my intended use is for public dissemination."

Section 57(3)(c) of the Act states:

> A head may waive the payment of all or any part of an amount required to be paid under this Act where, in the head's opinion, it is fair and equitable to do so after considering,

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

The head considered the factors set out in the Act pertaining to fee waiver and the circumstances of this case and, in his discretion, determined there was no basis for a fee waiver. The head based the fee charged on the fees which have been authorized by the regulations, namely $.20 per page for 575 pages.

In this case, the relevant criterion for waiver of fees contained in subsection 57(3)(c) is whether or not dissemination of the record will "benefit public health or safety". While there is no definition of that term, in my view, it does not mean that fees will be waived where a record simply contains some information relating to health or safety matters. The head acknowledges that portions of the records deal with health and safety matters. However, the head's position is that it would be difficult to find any health or safety_related information contained in these Board of Directors minutes which is not already known to the public. The institution submits that the appellant must show some "causal connection" between the dissemination of the record and any substantive benefit to "public health or safety". In most cases this would be

difficult for an appellant to do, even where, as in this case, the appellant has viewed the record.

The United States Department of Justice has issued guidelines to federal agencies in the United States on how to process fee waiver requests. These guidelines suggest that a waiver is appropriate among other considerations, "if the information released meaningfully contributes to public development or understanding of the subject.

If the information is only of marginal value in informing the public, then the public benefit is diminished accordingly." (Common Cause V.IRS, 1 GDSP 79188 (D.D.C. 1979); Shaw v. CIA 3 GDSP. 183, 009 (D.D.C. 1982).

After a careful review of the record in question and after considering the arguments of both parties, I am not satisfied that the dissemination of the record in this case will benefit public health or safety in a manner contemplated by subsection 57(3)(c). Accordingly, the head's decision not to waive fees, or part thereof, is upheld.

This being the first case decided by the Commissioner on the question of fees, the appellant has requested that the

Commissioner consider the issue of a threshold or minimum fee. He recommends that $100 be established as the threshold and that any fee under that amount be automatically waived by the institution. His submission,

is that any amount less than $100 as a threshold amount would be unreasonable. The government, on the other hand, has recently amended Ontario Regulation 532/87 to allow a head to waive any fee where the amount of the payment would be $5 or less. I am aware that several institutions had, on their own, established a higher minimum level than $5 prior to the amendment to Regulation 532\87.

It is important at the outset of the administration of this Act that all institutions covered by the Act apply a consistent set of guidelines which reflect the institutions rationale for charging fees, which I believe is to recover some of the costs of the administration of the Act and to ensure that people who use the Act assume their fair share of costs. In my view, the institution should determine the point at which the administrative cost of collecting fees exceeds the amount of the fees claimed, and that figure should be used as a threshold or minimum fee for all institutions. There has not yet been sufficient experience to make this determination, but I urge the

government to undertake the effort. This issue has been addressed in the 1986 amendments to the United States Freedom of Information Act (subsection 4(A)(iv)(I)) which provides as follows:

> No fee may be charged by any agency under this section
>
> (I) if the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee.

It is important to establish a fee policy that is fair and consistent and it is equally important that fees not be used to deter users of the Act.

These comments on the issue of a threshold or minimum fee have no bearing on the decision in this case, and are made simply because they may be helpful to the parties in a number of other appeals.

Original signed by:
Sidney B. Linden
Commissioner

June, 9, 1988