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

ORDER 8

Appeal 880014

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Appeal Number 880014

O R D E R

This appeal was received under 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) of the Act, 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 December 20, 1987, Ministry of Revenue (the "institution") received a request for access to "records prepared in response to the last three Provincial Auditors Reports before or after release of these reports, as they relate to your agency." The appellant asked to examine the records in Ottawa and to have fees waived. Although the request pre-dated the proclamation of the Act, it was processed as a formal request under the Freedom of Information and Protection of Privacy Act, 1987.
2. By letter dated January 25, 1988, the Freedom of Information and Privacy Co-ordinator for the institution replied to the appellant: "Please be advised that the original documents can be made available for your review in the Freedom of Information and

Privacy Office in Oshawa....I cannot send the original documents to Ottawa, nor can I determine any reason as to why the cost of providing you with a photostat copy be waived". The letter contained a fees estimate of $18.97, consisting of $13.80 for photocopying charges and $5.17 for shipping.

3. On February 22, 1988, the appellant sent a letter to the Information and Privacy Commissioner appealing the decision to charge fees as well as the decision not to make the record available in Ottawa for examination.

4. On March 31, 1988, I sent 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 the submissions address 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 was in accordance with the terms of the Act; and

C. Whether the head's decision not to waive fees was in accordance with the terms of the Act.

This is a companion order to Appeal No. 880005. Both appeals involve the same appellant and deal with similar issues.

ISSUE 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.

Subsection 30(2) of the Act governs the method of access to records. The subsection reads 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". (Emphasis added)

The head's position is that the documents could not be sent to Ottawa because: "It is not practical for the ministry to transmit source documents throughout the province because their security and survivability cannot be guaranteed. To do so would be inconsistent with good records management and business practices".

The head also indicated that to grant access to the record in Ottawa the institution would be required to produce a copy of the record, because one does not currently exist. This would result in copying charges to the appellant.

The appellant submits that he should have the right to view the record in Ottawa before deciding what information he requires to have copied. He argues that: "Either you can view documents or you lose a basic user approach to FOI. The number of copies made of most records makes a farce of the original copy concept... Photocopying fees at the previewing stage invites abuse and arbitrary administration".

Subsection 30(2) does not specifically require an institution to provide requesters with an opportunity to view the record at the location of their choice in the province. Whether or not a requester's preferred location for viewing is acceptable is
based on an assessment of whether or not it is "reasonably practicable" in the circumstances of a particular case. In this appeal, I must determine whether or not it is reasonably practicable for the institution to ship the record to Ottawa.

In keeping with the overall principles of the Act, I believe it is the responsibility of a head to demonstrate that the means of viewing suggested by a requester is not reasonably practicable. I am generally sympathetic with the position taken by the appellant in this case. The head, while no doubt genuinely attempting to discharge his responsibility under the Act, seems to be unduly cautious about what appears to be a reasonable request by the appellant for an opportunity to view a record where he resides which will involve little cost to the institution when balanced against the substantial inconvenience or cost

to the appellant if this opportunity is denied.

The sole reason offered by the head in his submission is that the security and survivability of the record cannot be guaranteed if it is shipped from Oshawa to Ottawa. He gives no indication that the record must remain in Oshawa for active use, or that the operations of the institution would be compromised if the record was sent to Ottawa for the short time it would take for the appellant to view it. There is also no indication in the head's submission of undue inconvenience or unreasonable expense in shipping the record to Ottawa.

As far as security of the record is concerned, I agree with the importance identified by the head. The security and integrity of the record will always be of paramount importance in determining whether or not a record should leave the Ministry offices. This is particularly true when no copies of a record exist or when it is necessary to view the original of the record. Adequate security provisions must exist from the time the record leaves the institution's offices until it is returned after viewing.

In the circumstance of this appeal, I find that the head has not established that it would not be reasonably practicable to ship the record in question to Ottawa for viewing by the appellant. The appellant has asked to see the record but has not indicated he needs to see the original of the record. I am confident that methods exist to ensure secure transportation between Oshawa and Ottawa, and that adequate arrangements can be made for viewing the record in offices of

the Ontario Government in Ottawa. The institution has a regional office in the Ottawa area, which would perhaps be the most appropriate location for viewing. This would satisfy the concern raised by the head in his submissions.

The head has submitted that the institution has only one copy of the record in question. That being the case, the head may wish to consider the advisability of producing a second copy of the record for shipping. He may conclude that the relatively minor copying charges of $13.20 identified by the institution are warranted. However, in my view copying is not necessary in this case, and any costs associated with this copy are not covered by the terms of subsection 57(1). This decision should not be read to mean that it is necessary for an institution to ship originals of records all over the Province for viewing by requestors on demand. What it does mean is that there is an onus on a head to demonstrate in each particular case why it may not be "reasonably practicable" to do so. In some cases the cost alone might justify requiring a requester to view the record where it is situated.

ISSUE B: Whether the amount of the fees charged in this case was proper.

With respect to the costs associated with sending the record to Ottawa for viewing and subsequent selective copying, the relevant question is whether the Act contains authority for charging the requester for these

costs.

Section 57 of the Act governs the instances where the cost incurred in providing access be charged to the requester:

Subsection 57(1) states:

> 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.

I find that under this subsection, regardless of the method of access and the location where access is provided, the head is entitled to charge fees for costs incurred in circumstances outlined in subsection 57(1). The shipping charges claimed by the head in this case fall within the scope of subsection 57(1)(d) and are allowable. If, after viewing the record in Ottawa, the appellant requests photocopies of the record or any part thereof, these costs would be allowed under subsection 57(1)(c), subject to consideration of the fee waiver provisions of subsection 57(3).

Subsection 57(1) provides the head with discretion as to whether or not a fee is charged in an individual case (see my order in Appeal No. 880091). I find no error in the exercise of his discretion in favour of

charging a fee in this case, again, subject to consideration of the issue of fee waiver, below. However, I do believe that the fact that a requester resides outside of the municipality where the records are located should be a relevant factor in the head's exercise of discretion under subsection 57(1).

ISSUE C: Whether the head's decision not to waive fees was proper.

Subsection 57(3) of the Act provides:

> 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,
>
> (a) the extent to which the actual cost of processing, collecting and copying the record varies from the amount of the payment required by subsection (1);
>
> (b) whether the payment will cause a financial hardship for the person requesting a record;
>
> (c) whether dissemination of the record will benefit public health or safety;
>
> (d) whether the record contains personal information relating to the person who requested it; and
>
> (e) any other matter prescribed in the regulations.

The head has indicated that the institution "reviewed clauses 57(3)(a) through (e) and was unable to determine any reason for waiving the fees permitted by legislation." The head also confirmed that the actual cost of reproducing and forwarding the record to the appellant is $18.97.

The appellant submitted that the threshold level of $5.00 established by the government under Ontario Regulation 532/87 "is far too low", and

urges me to "...come to a more sensible and 'true cost' threshold...". The appellant also expressed the opinion that the processing and collecting of the $18.97 fee
would cost the institution more than the fee itself. The appellant's submissions do not refer to any of the specific criteria for waiver listed under subsection 57(3).

I find that there are insufficient grounds for a waiver of fees under subsection 57(3), and the decision of the head to charge the fee is upheld. The actual amount of the fee will be calculated on the basis of actual shipping costs plus photocopy charges at $.20 per page for those portions of the record requested by the appellant after viewing in Ottawa.

I have dealt with the issue of a threshold or minimum fee in a previous order (Appeal No. 88003). I stated in that order that I felt it was incumbent on the government to establish a fee policy that is fair and consistently applied by all institutions. I pointed out that the government "...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."

The maximum fee chargeable in this case is $18.97, and this figure in all likelihood will be reduced after the appellant has had an opportunity to view the record and select the portions he wishes to have

copied.

In my opinion, one of the fundamental purposes of the Act is to facilitate access to government information promptly and at the lowest cost to the public. The Legislature's intention to include a "user pay" principle in the Act is clear from the wording of section 57, but I feel strongly that the government must apply this section in a way that is both reasonable and rational. It is incumbent on an institution to demonstrate that the actual fee ultimately determined meets this reasonable and rational test. The government may still lack sufficient experience in administering the Act to reconsider the threshold or minimum fee issue but, this and other similar appeals, emphasize the need for prompt consideration and attention by the government.

The institution is ordered to produce the record for viewing by the appellant in Ottawa within 20 days of the date of this order.

Original signed by: July 18, 1988
Sidney B. Linden Date
Commissioner