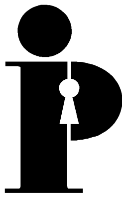

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER 5

Appeal 880091

Archives of Ontario

80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

Appeal Number 880091

O R D E R

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 any decision of a head under the Act to the Commissioner. 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 and the procedures used to decide the issues are as follows:

1. On February 8, 1988, in accordance with subsection 25(1) of the Freedom of Information and Protection of Privacy Act, 1987, a portion of a request made to the Office of the Premier under the Act was transferred to the Archives of Ontario (the "institution"). The request was for correspondence from June 1983 to June 1985 between the Premier and Ministries, the general public and religious

leaders relating to the decision to extend government funding to separate schools.

2. By letter dated February 16, 1988, the institution extended the deadline for a response to the request for 60 days to April 15, 1988, in accordance with subsection 27(1) of the Act.

3. On March 11, 1988, the institution provided the appellant with a fee estimate of $5,100 for the records requested, broken down as follows: $36 search time; $4,320 preparation time; $720 reproduction costs; and $60 shipping costs. The requester was asked to make a deposit of $2,550 at that time.

4. On March 29, 1988, the appellant and the institution discussed the fee estimate after which the appellant narrowed the scope of his request.

5. The institution conducted a supplementary search and by letter dated April 12, 1988 provided the appellant with a revised fee estimate of $600. A $300 deposit was requested.

6. By letter dated April 18, 1988, the requester appealed the decision to charge a fee on the basis that: "...the restrictions required to reduce the fee were too extensive and could have defeated the purpose of requesting access to the information".

7. By letter dated May 30, 1988, I sent a notice to the appellant's counsel and the institution stating that I was conducting an inquiry into this matter to review the decision of the head of the institution.

8. On June 13, 1988, an oral inquiry was held jointly with another appeal (see appeal number 880009) involving similar issues. Representations were received from the appellant and the institution. On the consent of all parties, representations were also received from Management Board of Cabinet (the "Board").

The issues that arise in the context of this appeal are as follows:

A. Whether a head has the discretion under subsection 57(1) not to charge a fee as well as to charge a fee;

B. Whether the head has a duty to consider the application of subsection 57(3) without any of the specific considerations enumerated thereunder being raised by the appellant;

C. Whether the grounds enumerated under subsection 57(3) are exhaustive of the circumstances under which a fee may be waived;

D. Whether any of the considerations listed in subsection 57(3) apply in this case;

E. Whether the charging of fees infringes section 2(b) of the Charter of Rights and Freedoms;

F. Whether the amount of the estimated fee was properly calculated.

ISSUE A: Whether a head has the discretion under subsection 57(1) not to charge a fee as well as to charge a fee.

Subsection 57(1) reads 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.

The appellant submits that the language of subsection 57(1) gives the head a discretion not to charge a fee, as well as to charge a fee, without recourse to subsection 57(3).

The position of the institution (which was argued by counsel for the Board and adopted by the institution) is that the proper interpretation of the word "may" in subsection 57(1) is "...to ensure that the head is empowered to waive fees, if appropriate, under subsection 57(3)." The institution's position is that a fee must be charged unless one of the considerations in subsection 57(3) applies.

I agree with the appellant that the language of subsection 57(1), couched permissively as it is, provides the head with the discretion to not charge a fee, without taking into account subsection 57(3). In my view, a head must make an initial decision to charge a fee or not to charge a fee based on all

relevant factors in a particular case, which are not confined to the reasons set out in subsection 57(3) dealing with waiver. These factors might include such considerations as a pressing need to disseminate a particular piece of information; the administrative costs of collecting the fee compared with the total fee to be collected; the utility of making a particular type of information available given the nature of an individual institution; the need to facilitate use by those living outside the municipality where the records are located; etc. This list is by no means meant to be exhaustive.

I think this discretion under subsection 57(1) is important and consistent with one of the overall purposes of the Act, which 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 in my view it is incumbent on heads in each instance to satisfy themselves that there is a sound basis for charging a fee which does not raise unreasonable barriers to public access to information otherwise obtainable under the Act. The critical question for a head to ask should be: are these costs legitimate, and ones which the requester should bear? I emphasize that the discretion under subsection 57(1) rests with the appropriate head in each case, and as long

as it has been exercised reasonably it should not be disturbed on appeal.

Because the head in this case has argued throughout that he does not have the discretion under subsection 57(1) to not charge a fee, I feel it is appropriate for the request to be sent back to him for a decision based on the exercise of this discretion.

I think it is fair to say that the submissions made by the head throughout the various stages of this appeal give a strong indication that he feels a fee should be charged. There appears to be a rational basis for this position, which may well remain

unchanged after further consideration by the head. However, the actual exercise of the discretion under subsection 57(1) ought to be performed by the head and, accordingly, I order that the request be returned to the head for reconsideration and the appropriate exercise of discretion within 20 days of the date of this order.

A number of other issues, B through F, were addressed in this appeal. If the head exercises his discretion not to charge a fee, that will dispose of the appeal. However, if the head exercises his discretion in favour of charging a fee, issues B

through F are germane. In any event, these other issues were argued before me and they do contain elements of general application. Accordingly, I have dealt with them in this order.

ISSUE B: Whether the head has a duty to consider the application of subsection 57(3) without any of the specific considerations enumerated thereunder being raised by the appellant.

I believe it is the responsibility of the requester to raise the question of fee waiver under subsection 57(3). However, I do not feel that the Act requires this request to be explicit or in writing. Obviously, it is in the requester's best interest to state with as much precision and clarity as possible which grounds for waiver he feels are applicable and the basis for

requesting a waiver of fee. However, it is satisfactory for a requester to invoke the provisions of subsection 57(3) by any conduct which could reasonably be expected to make the institution aware that the fee estimate is being questioned.

In this case all parties agree that while there was never a formal written waiver request submitted by the appellant to the institution, the conduct of the appellant was sufficient to

raise the issue of fee waiver under subsection 57(3). The waiver issue was raised on appeal and the head did consider the waiver provisions of subsection 57(3) in his submissions. If the issue of fee waiver is not raised by an appellant then a head does not have a duty to consider waiver. However, this is not to say that a head may not consider waiver, even in the absence of a request for waiver, in the circumstances of a particular case. For example, the head is in a position to know when requested information is the personal information of the requester, and that, therefore, subsection 57(3)(d) may apply.

ISSUE C: Whether the grounds enumerated under subsection 57(3) are exhaustive of the circumstances under which a fee may be waived.

Subsection 57(3) of the Act provides that:

> 57 (3) 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 the 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 appellant's position is that subsection 57(3) simply contains guidelines for arriving at a fair and equitable decision respecting a fee waiver, and that the considerations listed in subsection 57(3) are not exhaustive.

The institution's position (which was argued by counsel for the Board and adopted by the institution) is that subsection 57(3) of the Act provides an "exhaustive enumeration of the matters which the head may consider in determining whether it is fair and equitable to waive all or any part of a fee".

I find that the wording of subsection 57(3) creates an exhaustive list of the matters to be considered by the head in determining if a waiver of all or any part of a fee is appropriate. The fact that subsection 57(3)(e) permits

additional matters for consideration to be added by regulation reinforces my view and, in fact, two additional matters for consideration have been added by regulation to date (see s.6 Ontario Regulation 532/87 and s.1 Ontario Regulation 263/88).

Subsection 57(3)(e) is, therefore, the means for the categories of waiver to be expanded and the Legislature has assigned this function to the Lieutenant Governor in Council.

This part of my order may be concluded by summarizing my view of the relationship between subsections 57(1) and 57(3). I feel that the permissive wording of subsection 57(1) gives the head a general discretion to charge or not to charge a fee based on all the relevant factors in a given request. If this discretion is exercised in favour of charging a fee and a requester, in some manner, requests a waiver, the head must then consider whether or not any of the enumerated categories of subsection 57(3) apply. The discretion under subsection 57(1) alerts the head that, while he may decide to do so, he is under no obligation to charge a fee in each case. The discretion under subsection 57(3) on the other hand speaks to more specific categories where a fee may be waived when the head has otherwise determined that a fee should be charged.

ISSUE D: Whether any of the considerations listed in subsection 57(3) apply in this case.

The appellant submits that: "The Globe and Mail simply cannot afford to spend (the amount of the fees) when it does not have any indication as to what the documents will contain", thereby implicitly qualifying under the terms of subsection 57(3)(b). No evidence of financial hardship was submitted other than an affidavit from the Assistant Managing Editor of the Globe and Mail which states that a fee such as the one requested in this case would only be paid "...if the story was of extraordinary and immediate significance. In fact it would be highly unusual for the costs incurred in covering an immediate front page story to approach half of the amount now requested by the Ontario Government."

On the basis of the evidence submitted, I do not accept the argument of financial hardship, and find that the grounds for waiver under subsection 57(3) do not apply in this case. Although the amount of money involved in this case is significant and may produce nothing of value to the requester, in my view, this is not adequate to shift the cost burden from the requester to the government and ultimately, of course, to the public.

The appellant also advanced an argument for waiver of fees based on the special role of the media in educating and informing the public. While I have some sympathy for this argument, at least

in some form, I have already stated my view that the considerations for waiver listed in subsection 57(3) are exhaustive and do not include any specific recognition of a special status for the media.

The United States Freedom of Information Reform Act, 1986 recognizes the special role of the news media by treating them as a special class of requester[0]. In addition, there is a waiver provision which, while not expressly mentioning the media, is

[0]U.S. Freedom of Information Act 5 U.S.C. 552, as amended by Public Law No. 99-570 s.1801-1804. Amended 4(A)(ii) states:

. . .[A]gency regulations shall provide that-

. . .(II) fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media;

couched in terms conducive to use by it[0]. The Ontario Act does not contain any similar provisions and, in

fact, the language of the Act gives no indication that the Legislature intended any special status to be given to the media. It is open to the Legislature by way of amendment to the Act, or the Lieutenant Governor in Council under the regulatory authority of subsection 57(3)(e) to address this issue. After further experience in the administration of the Act, either or both of these bodies may feel it is appropriate to deal with this matter, but at present, in my view, neither the Act nor Regulations allow for a fee waiver in the circumstances of this case.

ISSUE E: Whether the charging of fees infringes s. 2(b) of the Charter of Rights and Freedoms.

Counsel for the appellant briefly raised a Charter argument to the effect that charging of fees infringes upon freedom of the

[0] Ibid Section (4)(A)(iii) states:

(iii) Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) [referred to in footnote 1] if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

press. As I understand the argument, section 10 of the Act provides a right of access which would be restricted by the charging of fees. In the case of the media, the appellant contends that such a qualification offends section 2(b) of the Charter of Rights and Freedoms as it relates to freedom of the press.

It is unquestioned that freedom of the press is a bulwark of liberty to this society and has been enshrined as such in the Charter. However, to argue that, as a matter of principle, the concept of a fee which is reasonably calculated and rationally

connected to the requested service is a wrong of constitutional dimensions is extravagant. This is not to say that, in particular circumstances, the media cannot argue that a case has been made for providing information at no or reduced cost, for example, because of the purposes for which the information will be utilized.

ISSUE F: Whether the amount of the estimated fee was properly calculated.

The institution should be commended for the thorough manner in which the fee estimate was prepared. At the inquiry the institution noted that the estimate contained two errors: the total sum had been miscalculated and should read $5,136; further, as the appellant had requested to view the documents, the $720 reproduction cost estimate was unnecessary, thereby reducing the estimate to $4,416. After hearing representations from the institution, I find that the revised fee estimate was properly calculated in accordance with the provisions of subsection 57(1).

The major component of the estimated fee represents costs of preparing the record for disclosure under subsection 57(1)(b). In calculating preparation costs, the institution made a

distinction between the time involved in actually making severences within the records, and time spent reviewing records to decide whether or not an exemption applied. The fee estimate included costs associated with the former but not the latter, and I feel this is the proper interpretation of subsection 57(1)(b).

In my view, the time involved in making a decision as to the application of an exemption should not be included when

calculating fees related to preparation of a record for disclosure. Nor is it proper to include time spent for such activities as packaging records for shipment, transporting records to the mail room or arranging for courier service. In my view, "preparing the record for disclosure" under subsection 57(1)(b) should be read narrowly. In the circumstances of this case, having heard detailed testimony as to how the fees estimate was calculated, it appears that there are some records which may not require severing and these records should be made available for examination by the appellant. Upon examination of these records by the appellant, he will be able to determine which pages he wants to have photocopied and the proper fee for

this can be determined at the time. This may further reduce the overall cost estimate that was provided to the appellant at the outset of this case, but other than that I agree with the manner in which the cost estimate was arrived at in this case.

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