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

ORDER 31

Appeal 880015

Ministry of Financial Institutions
Pension Commission of Ontario

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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, (the "Act") 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 and the procedures employed in making this Order are as follows:

1. On January 12, 1988, the Ministry of Financial Institutions' Freedom of Information Co_ordinator received a request for access, on a computer disc, to copies of the following forms for pension plans registered in Ontario with over 100 members:

   (a) Form 1 _ Application for Registration of a Pension Plan; and

   (b) Form 2 _ Annual Information Return.

   The Freedom of Information Co_ordinator for the Ministry of Financial Institutions also acts as Co_ordinator on behalf of the Pension Commission of Ontario ("the institution") which is an agency designated as an institution in Ontario Regulation 532/87, as amended, under the Freedom of Information and Protection of Privacy Act, 1987. The

Pension Commission of Ontario is the institution referred to in this Order and the Minister of Financial Institutions is the head of the Pension Commission of Ontario for purposes of the Act.

2. By letter dated February 11, 1988, the institution provided the requester with a fee estimate of $21,000 for the requested records. This letter also explained that access could not be provided in the format requested as the institution was "currently replacing its computer system, and it will likely be 18 months before we could produce an accurate computerized listing such as you have requested."

However, the institution also advised that the information could be provided manually and, _

> "this would take approximately 8 to 10 months to do, at an estimated cost of $21,000. This figure is based on the following assumptions: 2,000 registered pension plans with 100 or more members; 6 pages of documentation per plan @ 50 cents per page (rate prescribed in subsection 41(2) of Regulation 708 under the Pension Benefits Act); 20 minutes processing time per plan @ $6.00 per quarter hour (subsection 5(2) of Regulation 532 under the Freedom of Information and Protection of Privacy Act). The time estimate is based on an employee of the Pension Commission spending one_half of their working hours on your request."

3. By letter to me dated February 19, 1988, the requester appealed the fee estimate stating that "the PCO is willing to provide this information but at a cost of $21,000 and this process will take 8 _ 10 months. I feel this is unreasonable and ask that you review this decision."

4. By letter dated February 23, 1988, I gave notice of the appeal to the institution.

5. By letter dated April 6, 1988, the institution advised the appellant that with respect to the records in issue in this appeal, the estimated cost of $21,000 had been revised: _

> "The current estimate is $18,400, based on copying charges of 20 cents per page (rather than 50 cents per page) for 12,000 pages plus search time for 669 hours (less 2 hours free) at $24.00 per hour."

6. By letter dated August 26, 1988, I notified the appellant and the institution that I was conducting an inquiry into this matter and enclosed a copy of the Appeals Officer's Report that was prepared by my office.

7. By letter dated October 4, 1988, I invited the appellant and the institution to make written representations to me. I received written representations from the institution. The representations received from the appellant did not address the issues arising in this appeal.

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

A. Whether the head exercised his 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) (fee waiver) without any of the specific

considerations enumerated thereunder being raised by the appellant;

C. Whether the amount of the estimated fees was properly calculated; and

D. Whether the head's decision that access to the records could not be provided for 8 _ 10 months was reasonable.

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

Subsection 57(1) reads as follows:

> 57.__(1) 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,
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> (a) a search charge for every hour of manual search required in excess of two hours to locate a record;
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> (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.

In my Order in Appeal No. 880009 released July 18, 1988, I stated at page 4 that "the language of subsection 57(1), couched permissively as it is, provides the head with discretion not to charge a fee, without taking into account subsection 57(3)." (Subsection 57(3) provides for a waiver of payment). Further at page 5 of my Order, supra, I indicated that, "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)..."

In this case, the head has submitted that he "properly exercised the discretion afforded him by the permissive language of subsection 57(1) of the Act by examining the actual costs, revising them and suggesting alternative means to satisfy the Requestor (sic) on a less costly and time consuming basis."

In its representations, the institution states that the Superintendant of Pensions met with the appellant on April 11, 1988, to discuss whether or not the appellant could conduct his study under the research mandate of the Pension Commission set out in section 98 of the Pension Benefits Act, 1987. Further, the institution indicated that "[t]his proposal would have provided the Requestor (sic) with ready access to the records in question at little or no fee and would have permitted the requester to use his resources to conduct his research in the most expeditious fashion possible." By letter dated April 12, 1988, the appellant advised, in apparent reference to this offer, that he "would like to generate the information on a private basis." As the appellant has made no submissions on this issue, although he has been given the opportunity to do so, this is the extent of my knowledge of this matter.

The institution has cited the "user pay" principle that is incorporated into the Act and has submitted that "the fact that the fee estimate is large is not sufficient to shift the cost burden to the government from the Requestor (sic)."

In my view, the head has properly exercised his discretion under subsection 57(1) and this should not be disturbed on appeal.

ISSUE B: Whether the head has a duty to consider the application of subsection 57(3) (fee waiver) without

any of the specific considerations enumerated thereunder being raised by the appellant.

As I stated at page 7 of my Order in Appeal No. 880009, supra, "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." It is not clear in this case whether the conduct of the appellant raised the issue of waiver either implicitly or explicitly. However, I agree with the head "that the subsection requires the Requestor (sic) to provide adequate evidence to support a claim for a fee waiver."

In this case, in the absence of any submissions from the appellant on this issue, I accept the submission of the head that "the Requestor (sic) has offered no evidence to support a claim for a fee waiver." In the circumstances of this case, I accept the decision of the head that there is no basis to justify a fee waiver.

ISSUE C: Whether the amount of the estimated fees was properly calculated.

With respect to the appellant's position that the fee estimate is too high, the Act provides in subsection 57(1) that a head may request a person who makes a request for access to a record to pay a fee.

In this case, the institution explains that the average location time of twenty minutes per plan was reached having regard to the following factors, among others:

(a) five minutes retrieval for files in the file room;

(b) ten minutes retrieval for files not in the file room, with an "out" card;

(c) thirty minutes for files not in the file room, without an "out" card.

The major component of the estimated fee is the costs related to locating the record for disclosure (subsection 57(1)(a)). In calculating these search costs, the institution took into account the time involved in locating files which are properly filed and/or accounted for and the number that are currently in use whether properly accounted for or not. While the institution's filing system may not be the most efficient, I accept the institution's submission that the Act does not mandate a requirement on the part of the institution to keep records in such a way as to be able to accommodate any of the myriad of ways in which a request for information might be framed.

In addition to subsection 57(1) previously referred to in this Order, 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 $0.20 for each page of photocopying. As I stated at page 5 of my Order in Appeal No. 880003 released June 9, 1988:

> "...the purpose of the 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 $0.20 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 $0.20 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 $0.20 per page for photocopying of the record in question is upheld."

I uphold the head's decision to charge $0.20 per page for photocopying and find that the fee estimate has been properly calculated.

ISSUE D: Whether the head's decision that access to the records could not be provided for 8 _ 10 months was reasonable.

The decision that retrieval of the information would take 8 to 10 months was, implicitly, a decision of the head under subsection 27(1)(a) of the Act which reads as follows:

> A head may extend the time limit set out in section 26 for a period of time that is reasonable in the circumstances, where,
>
> (a) the request is for a large number of records or necessitates a search through a large number of records and meeting the time limit would unreasonably interfere with the operations of the institution;

It would have been preferable for the head to have specifically cited subsection 27(1)(a) as the basis for this decision. I would also suggest that, as a matter of practice, when a decision has been made that a time limit for response must be extended, it would be preferable to be specific with respect to the time required as opposed to stating a broad range of time. However, in this case, I have accepted the institution's submission with respect to the estimated number of hours it would take an employee of the institution to search for the

records. Accordingly, I find that the plan of the institution to have one employee spend one_half of his or her working hours on this request is reasonable. Although this will result in the request taking 8 to 10 months to process, this factor, in and of itself, does not lead me to conclude that the institution has acted unreasonably.

The facts supporting the extension appear to fit squarely within subsection 27(1)(a) in that the request "necessitates a search through a large number of records and meeting the time limit [30 days] would unreasonably interfere with the operations of the institution". In the absence of any convincing argument to the contrary, I believe that the institution, in offering the services of a full_time employee for half of his or her working hours, has allocated its personnel in a reasonable way to the processing of this labour intensive request.

Accordingly, I uphold the decision of the head to extend the time limit to respond to the request.

In summary, my Order is to uphold the decision of the head and to dismiss the appeal.

Original signed by: December 21, 1988
Sidney B. Linden Date
Commissioner