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

ORDER 50

Appeals 880047, 880049, 880050 and 880051

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O R D E R

These appeals were 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 any decision under the Act to the Commissioner. Further, subsection 57(4) allows a person who is required to pay a fee to ask the Commissioner to review the head's decision to charge a fee or the amount of the fee.

The facts of these cases and the procedures employed in making this Interim Order are as follows:

1. On January 28, 1988, the requester made four requests to the Ministry of Labour (the "institution") for various occupational health and safety data (see pages 3_5 for a description of each request). In each case, the requester sought a fee waiver "in the public interest".

2. On February 7, 1988, the requester wrote to the institution's Freedom of Information and Privacy Co_ordinator (the "Co_ordinator") asking for a fee waiver for the following reasons:

   "(1) The data is on public health and safety i.e. in the public interest; the data is not now known in this form publicly and should be.

   (2) The record would be widely disseminated via the media/this researcher has a track record in providing data for public release to community groups/media/

labour groups.

(3) Costs can create a barrier to this researcher using the Act."

3. On February 25, 1988, the institution responded to the four requests by providing four fee estimates totalling $9,165.00, and advising that fee waivers were denied.

4. By letter dated March 23, 1988, the requester appealed the head's decisions regarding the amount of the estimated fees and the denial of fee waivers. I gave notice of the appeal to the institution. The appellant included with his appeal copies of two recent letters addressed to the head of the institution: one from the appellant dated March 17, 1988, outlining his reasons for believing that the data is "clearly of a public safety nature"; and the other from a health and safety director of a major Canadian union dated March 10, 1988, supporting the appellant's fee waiver request.

5. An Appeals Officer attempted to mediate the issues, but a settlement was not effected. Both parties sought resolution of the matter by way of an inquiry.

6. By letter dated July 18, 1988, I notified the appellant and the institution that I was conducting an inquiry to review the decision of the head. Enclosed with this letter was a report prepared by the Appeals Officer, intended to assist the parties in making their representations concerning the subject matter of the appeal. The Appeals Officer's Report outlines the facts of the appeal and sets out questions

which paraphrase those sections of the Act which appear to the Appeals Officer, or any of the parties, to be relevant to the appeal. The Appeals Officer's Report indicates that the parties, in making representations to the Commissioner, need not limit themselves to the questions set out in the Report.

7. By letter dated August 2, 1988, I invited the appellant and the institution to make written representations on the issues arising from the appeal.

8. Written submissions were received from both parties and I have taken them into consideration in making this Order.

The issues that arise in the context of these appeals are as follows:

A. Whether a "record" (as defined by the Act) that would respond to each request is in the custody or control of the institution;

B. If the answer to Issue "A" is in the affirmative, whether the head exercised his discretion under subsection 57(1) not to charge a fee as well as to charge a fee;

C. If the head exercised his discretion in favour of charging a fee, whether the amount of the estimated fees were properly calculated; and

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

For ease of reference, the four requests at issue are set out below, together with the institution's response:

Request #1: (Appeal Number 880047)

"1. For the years 1986 and 1987... tombstone printout data for companies/contractors with more than 25 orders against them, preferably with the location of the violation and if possible, the nature of the orders (even if in explainable code form)."

Response #1

This information is stored in the Ministry computer database but the specific report requested has not been generated."

Request #2: (Appeal Number 880049)

"1. For the years 1986 and 1987... a list of companies (and their locales if possible) broken down by:

(i) had stop work orders issued
(ii) prosecutions undertaken
(iii) completed case prosecutions and the conviction/non conviction status, fines in these cases where convictions led to fines."

Response #2

(i) "...the information is stored in the Ministry database but a program would have to be developed to generate a record to list the companies."

(ii)/(iii) "This information is a manual record format... it will require a total of 4_6 weeks clerical time to locate and compile the information and a time extension will be required."

Request #3: (Appeal Number 880050)

"1. For the years 1986 and 1987... a list of all specifically named cases of work refusals and

2. for the same years all cases of arbitration in such work refusal situations or other outcomes."

Response #3

"The record requested is not currently available however a computer search of the data base will produce a list of companies where work refusals occurred. A manual search of the relevant files would produce the information requested. This will involve the development of a computer program together with approximately 10 days clerical time to manually search and compile records. A time extension would be necessary."

Request #4: (Appeal Number 880051)

"1. For the years 1986 and 1987... any statistics/reports compiled on section 26(2) of the OHS Act preferably

broken down by occupational illness or category of illness, location, company."

Response #4

"The actual record... is not available in the format requested. However, the information is stored in the computerized data bases. Presently, the reports produced are as shown in the appendices to the Ninth Annual Report of the advisory council on Occupational Health and Occupational Safety. This published report is available from the government book store at 880 Bay Street, Toronto.

A computer program could be developed to produce the record in the format requested..."

ISSUE A: Whether a "record" (as defined by the Act) that would respond to each request is in the custody or control of the institution.

The institution's response to the requests was to provide the appellant with four detailed fee estimates. However, in its written submissions the institution claims that none of the requested records currently exist, and that the Act imposes no obligation on the institution to create such records. That being the case, the institution argues, section 57 of the Act does not apply, and the head's decision to charge a fee is not one which is subject to review by the Commissioner.

The argument made by the institution raises a question that has far_reaching implications for the administration of the Freedom of Information and Protection of Privacy Act, 1987: when an

institution receives a request for information which exists in some recorded format within the institution, but not in the format asked for by the requester, what duty is imposed on the institution?

The Act does not address this question directly. An answer can only be determined by considering all relevant provisions of the Act.

Subsection 10(1) of the Act sets out a person's general right of access to records:

> Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless the record or the part of the record falls within one of the exemptions under sections 12 to 22.

The term "record" is defined in subsection 2(1) of the Act as follows:

> "record" means any record of information however recorded, whether in printed form, on film, by electronic means or otherwise, and includes,
>
> (a) correspondence, a memorandum, a book, a plan, a map, a drawing, a diagram, a pictorial or graphic work, a photograph, a film, a microfilm, a sound recording, a videotape, a machine readable record, any other documentary material, regardless of physical form or characteristics, and any copy thereof, and
>
> (b) subject to the regulations, any record that is capable of being produced from a machine readable record under the control of an institution by means of computer hardware and software or any other information storage equipment and technical expertise normally used by the institution.

Subsections 24(1) and (2) describe procedures for making a request under the Act:

> (1) A person seeking access to a record shall make a request therefor in writing to the institution that the person believes has custody or control of the record and shall provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record.
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

In the present appeals, the records at issue are various lists containing occupational health and safety data. The information is not recorded in the format requested by the appellant. However, records (as defined by the subsection 2(1) of the Act) which contain the information do exist in other formats which are in the custody or control of the institution. A record in the format requested by the appellant could be created from information stored in files (Appeal Numbers 880049 and 880050) or produced from information stored in computer databases (Appeal Number 880047, part of Appeal Number 880049, and Appeal Number 880051). To provide the appellant with access to the information stored in files, a manual search followed by

collation would be required. For information stored in the computer, a computerized search and subsequent record production would be necessary.

The term "record", as defined in subsection 2(1) of the Act, encompasses two types of recorded information. The first is material which currently exists in some physical form, such as a book, microfilm, computer tape, etc. The other is a record which does not currently exist, but is "...capable of being produced from a machine readable record...", as outlined in paragraph (b) of the definition.

In my view, the duty of the institution differs according to which part of the definition of "record" applies.

In cases where a request is for information that currently exists, either in whole or in part, in a recorded format different from the format asked for by the requester, in my view, section 24 of the Act imposes a responsibility on the institution to identify and advise the requester of the existence of these related records. It is then up to the requester to decide whether or not to obtain these related records and sort through and organize the information into the originally desired format. [This is the approach, in fact, taken by the institution in response to request #4 (Appeal Number 880051); the appellant asked for statistical reports broken down in a certain format, and the institution directed him to published reports of this information in a different format.]

The Act requires the institution to provide the requester with access to all relevant records, however, in most cases, the Act does not go further and require an institution to conduct searches through existing records, collecting information which responds to a request, and then creating an entirely new record in the requested format. In other words, the Act gives

requesters a right (subject to the exemptions contained in the Act) to the "raw material" which would answer all or part of a request, but, subject to special provisions which apply only to information stored on computer, the institution is not required to organize this information into a particular format before disclosing it to the requester.

The Act imposes additional obligations on institutions when dealing with computer generated information. When a request relates to information that does not currently exist in the form requested, but is "...capable of being produced from a machine readable record..." [paragraph (b) of the definition of "record" under subsection 2(1)], the Act requires the institution to create this type of record, "subject to the regulations".

Section 10 of Ontario Regulation 532/87, as amended, provides that:

> A record capable of being produced from machine readable records is not included in the definition of "record" for the purposes of the Act if the process of producing it would unreasonably interfere with the operations of an institution.

Further, paragraph 3, of subsection 5(2) of the same Regulation clearly provides for a fee to be charged by an institution "for developing a computer program or other method of producing a record from a machine readable record...".

What constitutes an "unreasonable interference" is a matter which must be considered on a case_by_case basis, but it is

clear that the Regulation is intended to impose limits on the institution's responsibility to create a new record.

Thus it appears that, subject to the Regulation, the Act does place an obligation on an institution to locate information and to produce it in the requested format whenever that information

can be produced from an existing machine readable record, and providing that to do so will not unreasonably interfere with the operation of the institution.

Having concluded that the Act does not give the requester the right to insist that non_computerized information be produced in a format in which it does not presently exist, I do not wish to be understood as promoting an attitude of rigidity on the part of the institution. There will be situations in which, for example, the requester wants a list of certain types of information currently stored in two or three "paper files." Rather than release the records from which the requester could create a list, the institution may, in some circumstances, prefer simply to create the list. However, as noted above, I do not find that the Act requires that this be done.

Turning to the information at issue in these appeals, it is clear that, with respect to some of the requests, the only way of producing a record that would disclose the requested information in the desired format, is by searching a large number of paper files, locating the specific items of information needed, and transferring that information to another record in the form of a list. The requested items that would fall under this category are as follows:

Appeal Number 880049

(1) List of companies who were prosecuted with respect to stop work orders in 1986 and 1987; and

(2) List of completed case prosecutions including conviction/non_conviction status and fines for 1986 and 1987.

Appeal Number 880050

(3) List of arbitrations and other outcomes resulting from work refusals in 1986 and 1987.

The following four items from the requests are capable of being produced from a machine readable record, and therefore the Act imposes a duty (subject to the Regulation) to produce these records:

Appeal Number 880047

(1) Computer printout for 1986 and 1987 for all companies with more than 25 orders against them, including location and nature of order.

Appeal Number 880049

(2) A list of companies which had stop_work orders issued in 1986 and 1987.

Appeal Number 880050

(3) A list of companies where work refusals occurred for the years 1986 and 1987.

Appeal Number 880051

(4) A list of statistics/reports compiled pursuant to subsection 26(2) of the Occupational Health and Safety Act, by occupational illness or category of illness, location and company.

Applying the reasoning outlined above, the institution has certain obligations arising under the Act in respect of the existing records. Therefore, I order the institution to advise both the appellant and me in writing within (30) thirty days of the date of this Order as to what records are within its custody or control which contain information that would respond to all or part of the above noted requests and to provide fee estimates, if any.

Because the fee estimates originally provided for the records capable of being produced from machine readable records appear to be interdependent with the estimates provided for locating and collating existing paper files, I order the institution to

reassess those fees as well. The institution is ordered to advise both the appellant and me in writing within (30) thirty days of the date of this Order as to the sufficiency of these original estimates.

Further, should the institution intend to rely on any of the exemptions contained in the Act with respect to the disclosure of records that respond to the appellant's requests, I order that notice as provided for in section 29 of the Act be included with the aforementioned fee estimates.

As I have ordered the institution to review and reassess the fee estimates, I will not deal with Issues B, C and D at this time. I remain seized of the Issues involving fees and intend to make a subsequent Order addressing the fees issues in the context of these appeals.

In summary, my Order is as follows:

1. The head is ordered to advise the appellant and me, in writing, within (30) thirty days of the date of this Order, which records relate to the following parts of the requests and to provide fee estimates, if appropriate, for records relating to:

   (a) companies who were prosecuted with respect to stop work orders in 1986 and 1987; and

   (b) completed case prosecutions including conviction/non_ conviction status and fines for 1986 and 1987; and

   (c) arbitrations and other outcomes resulting from work refusals in 1986 and 1987.

2. The head is ordered to advise the appellant and me, in writing, within (30) thirty days of the date of this Order, the results of his reassessment of fees for:

   (a) tombstone printout data for companies with more than 25 orders against them in 1986 and 1987, including the location of the violation and the nature of the orders;

(b) a list of companies (and locations) which had stop work orders issued in 1986 and 1987;

(c) a list of companies where work refusals occurred in 1986 and 1987;

(d) a list of statistics/reports compiled in 1986 and 1987 on section 26(2) of the Occupational Health and Safety Act, broken down by occupational illness or category of illness, location and company.

3. The head is ordered to advise the appellant and me, in writing, within (30) thirty days of the date of this Order which exemptions, if any, are being claimed for the records at issue.

4. The Issues relating to fees shall be disposed of by way of a subsequent Order.

Original signed by: April 10, 1989
Sidney B. Linden Date
Commissioner