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

ORDER 185

Appeal 890256

Ministry of Health

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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, as amended (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 of a head under the Act to the Commissioner.

On January 5, 1990, the undersigned was appointed Assistant Commissioner and received a delegation of the power to conduct inquiries and make Orders under the Act.

The facts of this case and the procedures employed in making this Order are as follows:

1. On July 10, 1989, the Ministry of Health (the "institution") received a letter from the requester seeking the following information:

> Drug Quality and Therapeutics Committee meeting minutes for 1989.

2. By letter dated July 26, 1989, the institution's Freedom of Information and Privacy Co_ordinator wrote to the requester as follows:

> Please be advised that the estimated fee for the record you have requested is $765.00. Your written acceptance of this fee and a deposit of $191.25 is required before we can proceed with the request... a breakdown of the estimate is attached...when we receive your cheque/money order processing will resume and you will be notified whether or not access will be granted, in whole or in part, to the record(s). If access is refused, your money will be refunded. If the

> final fee is less than the estimated amount, you will be informed. Please note that under the Act the 30 day timeframe for processing your request is suspended until we hear back from you.

3. The head broke down the fee estimate as follows:

> Photocopies, 165 pages @ 20 cents per page..$ 33.00
> Record preparation, including severances
> 122 x 15 minutes _ 30 1/2 hours.....$732.00
> TOTAL.....$765.00

4. The requester appealed the head's decision by letter to this office which was received on August 4, 1989. In his letter of appeal, the appellant stated:

> After Appeal 0007 and your recent Order, it is ironic that Health has tried another means of denial. I believe that once data is handed out without fees albeit with exemptions, a ministry cannot then reverse the practice, and particularly in light of the history of this type of request. Besides, I asked for a waiver and [the] data does affect public safety. Otherwise I will have no choice but to abandon the requests given excessive fees, primarily there to prepare data for exemptions, a treatment that discourages access.

5. Notice of the appeal was given by this office to the institution and to the appellant.

6. Upon receipt of the letter of appeal and of a copy of the head's decision the Deputy Director of Legal Services/Appeals wrote to the institution. In her letter the Deputy Director noted that an access decision conforming to section 29 of the Act had not appeared in the institution's letter to the appellant dated July 26, 1989. Accordingly, the Deputy Director requested that the

institution identify the requested record and make a decision as to access under section 26 of the Act.

7. Upon receipt of the letter of appeal and a copy of the head's decision, the Deputy Director also wrote to the appellant. The Deputy Director requested the appellant to provide the institution with his reasons for believing that the fee waiver provisions of subsection 57(3) applied in the circumstances of this appeal.

8. On September 5, 1989, the institution responded to the appellant as follows:

> [The] request[s] for general records involve the minutes of the Drug Quality and Therapeutics Committee meetings. An employee of the institution, in the program area in which these records are stored, counted the number of minutes in question for each request. One set of minutes that was representative of all minutes was chosen and the document was prepared for disclosure under the Act and as per Order #68 of the Information and Privacy Commissioner of Ontario. The employee then calculated the cost of processing these two requests for access according to Ontario Regulation 532/87.
>
> The interim decision in this case... is that access will be granted with severances...

9. On October 23, 1989, the Office of the Information and Privacy Commissioner received from the appellant a copy of his representations to the head with respect to the issue of fee waiver.

10. On December 5, 1989, the Appeals Officer assigned to the case received a copy of the head's decision regarding fee

waiver. The head declined to grant a fee waiver and stated:

> ..the fees estimate...is fair and equitable under the Act and are in accordance with Ontario Regulation 532/87, section 5 which state the amount a head may charge for copying and disclosure of the record.
>
> You do not provide any details as to how and why the fee for the general records would cause financial hardship. While the fees estimates are high, they are accurately based on the information requested.
>
> You have stated that the "data touches on public interest and safety matters" and an attempt will be made to disseminate the information to the public of this safety related issue. You have not indicated exactly how this information will be disseminated and how disclosure of this information will increase public awareness. It is not clear to what "safety related issue" you are
> referring or how the waiving of fees, in this case, will "contribute to further opening the records and to improve public interest in freedom of information legislation." It is also not clear how the waiving of costs, in these cases, would improve government record keeping systems.

11. Notice that an inquiry was being conducted was given to the institution and the appellant by letter dated February 13, 1990. Enclosed with the Notice of Inquiry was copy of 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, need not limit themselves to the questions set out in the Report.

12. Representations have been received from the appellant and the institution, and I have considered them in making my Order.

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

A. Whether the amount of the estimated fee was calculated in accordance with the terms of the Act.

B. Whether the head's decision not to waive fees under subsection 57(3) of the Act was in accordance with the terms of the Act.

ISSUE A: Whether the amount of the estimated fee was calculated in accordance with the terms of the Act.

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 to 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.

In its representations, the institution provides a revised fee estimate as follows:

165 page record

3 pages to be completely severed

= 162 pages

* severances, 4 minutes per page

  = 648 minutes

* fee of $24.00 per hour ($6.00 for each 15 minutes) of work as prescribed in Ontario Regulation 532/87 under the Act

  =$259.20

* photocopying time of approximately 90 minutes, at $24.00 an hour

  = $36.00

* severances.....$216.00
  photocopies.....36.20
  Total.....$295.20

The institution adds at page 14 of its representations that "Photocopying is included in the above fees."

This revised estimate is considerably lower than the original estimated provided to the appellant. The institution acknowledges in its representations that the original fee estimate was miscalculated, and apologizes for any inconvenience this may have caused. I note that the institution, in its

representations, has claimed that the record contains 165 pages. However, the record which was provided to me, and which contains the minutes of the meetings of the Drug Quality and Therapeutics Committee from January 1989 up to and including the minutes for July 5, 1989, contains only 131 pages.

The head has claimed that it would take four minutes per page to sever the record. I accept that physically making the severances comes within the confines of "preparing the record for disclosure" as set out in subsection 57(1)(b) of the Act. The head has indicated that severing the record involves the use of both "post_it notes" and white tape.

I have examined a copy of the requested record, in which the head has indicated the proposed severances. Of the 131 pages contained in the record submitted to me, the institution has indicated that seven pages are entirely exempt and on 61 pages the head is claiming no exemptions at all. Of the remaining pages, 38 contain five or more severances, eight contain three or four and 17 contain only one or two severances. The "severances" vary, some consist of a paragraph, and some are isolated words or phrases. It appears to me, in the circumstances, that a claim for fees for four minutes severance time per page is excessive. I propose to eliminate from the fee estimate those pages for which no exemption is claimed. Further, given that of the remaining 70 pages, seven pages are exempt in their entirety, 38 contain more than five severances and 25 contain fewer than five severances, in my view, three minutes per page for making the severances on the remaining 70 pages would be proper.

The institution also proposes to charge for 90 minutes of photocopying time, estimating that it will occupy a staff person

for that amount of time to photocopy the pages and, as its states in its representations, at page 14, to "feed the machine".

Regulation 532/87 sets out the amount that may be charged by the head in responding to a request under the Act. In its representations, the institution submits the following regarding its charges for photocopying:

> Section 5 of the Regulation...provides the head with a discretionary power to charge $.20 per page for photocopying. It does not stipulate that a fee of **no more than $.20 per page** can be charged or that **$.20 is the maximum charge**. The section does not indicate that any amount other than $.20 may be charged. Had the Lieutenant Governor in Council intended that $.20 was to be a maximum then the regulation would have stated that **no more than $.20** could be charged.

I do not agree with the institution's submission in this regard. In Order 2, (Appeal Number 880003) dated June 9, 1988, Commissioner Sidney B. Linden canvassed this question, and stated the following at page 5:

> 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 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 share. 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

> than that is all requesters should be charged. It is important that every effort be made by an institution to prevent fees being use as a deterrent or impediment to use the Act.

I agree with Commissioner Linden's view of this matter, and adopt it in the present case. I feel that $.20 per page is the maximum amount that may be charged for photocopying, which charge includes the cost of an individual "feeding the machine". In the present case, the institution has not provided me with any information indicating its actual cost of photocopying per page, although it

argues that in fact the cost exceeds $.20 per page. Accordingly, I am prepared to allow $.20 per page for photocopying 131 pages.

In conclusion, I find that the fees chargeable in this appeal are as follows:

> For time preparing the record for disclosure:
> 70 pages at 3 minutes per page = 210 minutes
> 3.5 hours at $24.00 per hour.....$ 84.00
> Photocopying charges _ 131 pages @ $.20 per page..$ 26.20
> TOTAL.....$110.20

The appellant has pointed out that the charging of a fee is a discretionary matter. I have reviewed the institution's representations and I find no error in the exercise of discretion in favour of charging a fee. Accordingly, I uphold the decision of the head to charge a fee in accordance with the calculation which I have made, subject to consideration of the issue of fee waiver.

ISSUE B: Whether the head's decision not to waive fees under subsection 57(3) of the Act was in accordance with the terms of the Act.

Subsection 57(3) of the Act reads as follows:

> A head may waive 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 the 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 Act is silent as to who bears the burden of proof in respect of subsection 57(3). However, it is a general rule that the party asserting a right or duty has the onus of proving its case.

As Commissioner Linden has stated in Order 111, (Appeal Number 890029), dated November 6, 1989, the Legislature's intention to include a "user pay" principle in the Act is clear from the wording of section 57.

The appellant submits that his request would qualify for a fee waiver for two reasons, both included in the considerations

outlined in subsection 57(3). His reasons are that the dissemination of the requested record would benefit public health or safety, and that payment of the fee would occasion him financial hardship.

In regard to the question of financial hardship, the appellant states:

> ...there are public health groups and media people who have been reviewing public safety programs that I am in touch with. None of them or myself are going to pay prohibitive fees that go beyond their budget and these amounts are beyond my personal means.

Beyond the very general statement as set out above, the appellant has provided no other details to support his request for a fee waiver. For example, the appellant has not provided any information concerning his financial position such as income, expenses, etc. Accordingly, in my view, the appellant has not discharged the burden of proving that the payment of a fee would cause him financial hardship. As an aside, I note that as a result of my decision under Issue A, the fee estimate has been reduced to an amount slightly in excess of $100.

The appellant also submits that the dissemination of the record would benefit public health or safety. He states:

- an attempt will be made to widely disseminate the information received that can help public awareness of this safety related issue.

- the data itself touches on public interest and safety matters.

The appellant went on to say that it was difficult to make representations regarding the benefits of disseminating the record without seeing the record itself, but that he was relying on Commissioner Linden's recognition of the importance of the data contained in similar records in Order 68 (Appeal Number 880007), dated June 28, 1989 and on his own track record as a public interest researcher who disseminates the results of his research.

As I appreciate the difficulties faced by an appellant who must make representations as to the importance of records without having seen them I have reviewed the severed record. After considering the representations of both parties and the severed record, I am not satisfied that the dissemination of the severed record will benefit public health or safety in a manner contemplated by subsection 57(3)(c). Accordingly, I uphold the head's decision not to waive the fee, or part thereof.

Before concluding, I would like to address a matter arising from the decision of the head of September 5, 1989, which was written in response to the letter of the Deputy Director, Legal Services/Appeals. The institution states in the closing paragraph of its letter that:

> The interim decision in this case, in accordance with Orders 68 and 81 and in keeping with the spirit of the Act, therefore, is that access will be granted with severances to both files

It appears that the institution is under the misapprehension that whenever a fee estimate is issued, the institution may issue an interim decision. In Order 81 (Appeal Numbers 880117 to 880121) dated July 26, 1989, Commissioner Linden set out

those situations where an interim decision was proper, but confined them to cases

where the record would be unduly expensive for the head to produce in order to make a decision with respect to access to the record. Such is not the situation in the circumstances of this request - the record at issue is neither particularly large, nor expensive to produce.

It is my view that an interim decision by the head was not proper in the circumstances of this case and the institution has not fulfilled its obligations under the Act in its response to the appellant of September 5, 1989. Accordingly, I order the head to issue to the appellant a proper access decision which conforms to the requirements of section 29 of the Act within ten (10) days of the date of this Order and to provide me with a copy of this decision within five (5) days of the date that the decision is
made. Such copy should be forwarded to the attention of Maureen Murphy, Registrar of Appeals, Information and Privacy Commissioner/ Ontario, 80 Bloor Street West, Toronto, Ontario, M5S 2V1.

Original signed by: July 10, 1990
Tom A. Wright Date
Assistant Commissioner