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

ORDER 81

Appeals 880117, 880118, 880119, 880120, 881021

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I N T E R I M 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 of a head under the Act to the Information and Privacy 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 March 13, 1988, the requester wrote to the Ministry of Labour (the "institution") asking for access to, among other things, the following records:

   a. briefing notes, summary information and case examples of companies/contractors with 25 or more orders issued against them under the Occupational Health and Safety Act during 1986-88 (Appeal Number 880117);

   b. briefing notes, memos and cases described on prosecutions undertaken and completed case prosecutions during 1986-88 (Appeal Number 880119);

   c. briefing notes on work refusals or profiles/memos of such refusals and their resolution during 1986-88 (Appeal Number 880120);

   d. memos and briefing notes relating to significant occupational illness issues arising from inspections during 1986-88 (Appeal Number 880121).

   In each case, the requester sought "...public interest fee waivers

for the reasons already provided".

2. In response to the requests, the institution wrote three letters dated April 7, 1988, one letter dated April 12, 1988 and two letters dated April 22, 1988. The institution denied access to most of the requested records pursuant to several sections of the Act. Other records either did not exist or had previously been provided to the requester. With respect to certain records which the institution was prepared to disclose, the requester was provided with two fees estimates totalling $2,478.36 and $1,514.34 and advised that fee waivers were not proposed.

3. By letter dated April 28, 1988, the requester appealed the head's decisions respecting both the exemptions cited and the fees estimated (Appeal Number 880118). I gave notice of the appeals to the institution on May 19, 1988.

4. The Appeals Officer assigned to these cases attended at the institution on two occasions to review samples of the relevant records.

5. None of these appeals could be settled by way of mediation, and on September 7, 1988 I sent a notice to the parties that I was conducting an inquiry to review the decision of the head in Appeal Number 880117.

6. In accordance with my usual practice, the Notice of Inquiry was accompanied by a report prepared by the Appeals Officer. This report is 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 sections of the Act paraphrased in the report include those exemption sections

cited by the head in refusing access to a record or a part thereof. The report indicates that the parties, in making their representations to the Commissioner, need not limit themselves to the questions set out in the report.

7. By letter dated September 20, 1988, I invited the parties to make written representations on the issues identified in the Appeals Officer's Report.

8. Written representations were received from both the appellant and the institution. The institution's representations indicated a change in its original position regarding the basis for exempting the records. The institution also submitted that, although fees were not at issue in Appeal Number 880117, the substantive issues related to that appeal could not be addressed by the institution until the Commissioner issued a decision on the reasonableness of the fees estimated to complete the requests in Appeal Number 880118.

9. At a meeting held to clarify the institution's position, it was learned that the records in Appeal Number 880117 could not be retrieved and reviewed without first performing an identification exercise, the cost of which was estimated in relation to records at issue in Appeal Number 880118. For example, in Appeal Number 880117, the requester asked for briefing notes and case examples of companies or contractors with 25 or more Occupational Health and Safety Orders issued against them. The institution proposed to charge a fee only for the case examples, and not the briefing notes, but argued that until the question of fees for the case examples was decided, they were not obliged to conduct the searches
necessary to identify which companies or contractors had 25 or more orders issued against them and could not, therefore, identify which briefing notes fell within the scope of the request.

10. Following the issuance of my Order 50 (Appeal Numbers 880047, 880049, 880050 and 880051), which involved the same requester and institution and outlined the responsibilities of institutions in identifying records, the institution performed the identification exercise referred to in paragraph 9, above, at no cost to the appellant. This allowed the institution to identify the actual, as opposed to the estimated, number of records to which its fees estimate should apply, and I instructed the institution to revise its original fees estimate accordingly. I also instructed the institution to respond to the substantive issues raised in the Appeals Officer's Report with respect to those appeals in which a fees estimate was not originally contemplated. I have since received representations from the institution with respect to Appeal Numbers 880120 and 880121, and I will deal with them in my Final Order in those appeals.

These appeals raise a number of matters of general application and, in order to provide guidance to institutions presented with requests for large volumes of records, I have decided to issue this Interim Order. It will address the following issues:

A. What are the obligations imposed by the Act when an institution receives a request for records?

B. What are the responsibilities of the head when preparing a fees estimate pursuant to subsection 57(2) of the Act?

One of the purposes of the Act, as noted in subsection 1(a), is "...to provide a right of access to information under the control of institutions..." according to certain principles.

One of these principles is that decisions on the disclosure of government information should be reviewed independently of government. As the Information and Privacy Commissioner, I am responsible for reviewing a head's decision to charge a fee, as well as the amount of the fee. In discharging this responsibility, I must bear in mind that, although the charging of fees should not act as an impediment to access,

the Act does incorporate a "user pay" principle. As I stated at page 12 in my Order 6 (Appeal Numbers 880005 and 880011), I feel it is incumbent on the government to establish a fee policy that is "...fair and consistently applied by all institutions... [and] ... I feel strongly that the government must apply [section 57] in a way that is both reasonable and rational".

Upon receipt of a request, a head must first be satisfied, pursuant to subsection 24(1) of the Act, that the request is sufficiently clear that "...an experienced employee of the institution, upon a reasonable effort, [could] identify the record". If the request is not sufficiently clear, the institution is required by subsection 24(2) to offer the requester assistance in reformulating the request so as to comply with subsection 24(1). No time limit is imposed on the institution in discharging its responsibilities under subsection 24(2).

Once the request has been received, and clarified if necessary, section 26 of the Act prescribes a 30-day time limit in which the head must:

> (a) give written notice to the person who made the request as to whether or not access to the record or a part thereof will be given; and
>
> (b) if access is to be given, give the person who made the request access to the record or part thereof, and where necessary for the purpose cause the record to be produced.

For the purposes of this Interim Order, section 57 of the Act and sections 6 and 7 of the regulation are also relevant. Those provisions read 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,
>
> (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.

(2) The head of an institution shall, before giving access to a record, give the person requesting access a reasonable estimate of any amount that will be required to be paid under this Act that is over $25.

(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.

(4) A person who is required to pay a fee under subsection (1) may ask the Commissioner to review the head's decision to charge a fee or the amount of the fee.

(5) The costs provided in this section shall be paid and distributed in the manner prescribed in the regulations. Sections 6 and 7 of Regulation 532/87 as amended state that:

6. The following is prescribed as a matter for a head to consider in deciding whether to waive all or part of a payment that is required to be made under the Act:

1. Whether the person requesting access to the record is given access to it.

7.--(1) If a head gives an estimate of an amount payable under the Act and that estimate exceeds $50, the head may require the person to pay a deposit before completing the request.

(2) A deposit under subsection (1) shall be equal to 50 per cent of the estimate.

(3) A head shall refund any amount paid under subsection (1) and subsequently waived.

In this Interim Order I intend to set out what I see as the head's obligation when responding to a request for records. In doing so I am cognizant of the fact that a head may wish to charge a fee in some cases, and also that the types of requests vary dramatically, from one page of written information in some cases, to thousands of separate records in others.

Section 26 requires the head to issue a notice to the requester within a 30-day period, subject to time extensions under sections 27 and 28. After the head receives the request and any necessary clarification is done, the 30-day time period begins to run. If the head intends to provide full access, he or she must advise the requester and cause the record to be produced. In cases where access is to be granted, either totally or partially, the head may also decide to charge a fee. If so, a fees estimate must be provided to the requester. If the head determines that access can only be granted in part or not at all, section 29 of the Act stipulates that the notice must set out the specific provisions of the Act under which access is denied.
It is clear that where a record is not large or unduly expensive to produce, and where no complex consultations are necessary, it is a relatively straightforward exercise for the institution to provide the requester with both a detailed fees estimate (if fees are applicable) and a decision under section 26 regarding access in one letter within 30 calendar days. However, in more complex cases, involving multiple records and/or fees, it is necessary to read sections 26, 27 and 57, and sections 6 and 7 of Regulation 532/87 together to determine the proper procedure. The following is an outline of the steps that should be taken by institutions in dealing with these more complex cases.

Section 27 of the Act authorizes a head to extend the time limit set out in section 26 for a period of time that is reasonable in the circumstances, where, (i) 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; or (ii) consultations that cannot reasonably be completed within the time limit are necessary to comply with the request.

Section 27 is not applicable to a situation where the institution is experiencing a problem because a record is unduly expensive to produce for inspection by the head in making a decision. This is true whether the undue expense is caused by either the size of the record, the number of records or the physical location of the record within the institution.

What should the head do in these situations? In my view, the Act allows the head to provide the requester with a fees estimate pursuant to subsection 57(2) of the Act. This estimate should be accompanied by an "interim" notice pursuant to section 26. This "interim" notice should give the requester an indication of whether he or she is likely to be given access to the requested records, together with a reasonable estimate of
any proposed fees. In my view, a requester must be provided with sufficient information to make an informed decision regarding payment of fees, and it is the responsibility of the head to take whatever steps are necessary to ensure that the fees estimate is based on a reasonable understanding of the costs involved in providing access. Anything less, in my view, would compromise and undermine the underlying principles of the Act.

How can a head be satisfied that the fees estimate is reasonable without actually inspecting all of the requested records? Familiarity with the scope of the request can be achieved in either of two ways: (1) the head can seek the advice of an employee of the institution who is familiar with the type and contents of the requested records; or (2) the head can base the estimate on a representative (as opposed to a random) sample of the records. Admittedly, the institution will have to bear the costs incurred in obtaining the necessary familiarity with the

records, however, this is consistent with other provisions of the Act. For example, subsection 57(1)(a) stipulates that the first two hours of manual search time required to locate a record must be absorbed by the institution and cannot be passed on to the requester.

The head's notice to the requester should not only include a breakdown of the estimated fees, but also a clear statement as to how the estimate was calculated (i.e. on the basis of either consultations or a representative sample.) While I would encourage institutions to provide requesters with as much information as possible regarding exemptions which are being contemplated, the head must make a clear statement in the notice that a final decision respecting access has not been made. Because the head has not yet seen all of the requested records, any final decision on access would be premature, and can only properly be made once all of the records are retrieved and reviewed. However, in my view, if no indication is made at the
time a fees estimate is presented that access to the record may not be granted, it is reasonable for a requester to infer that the records will be released in their entirety upon payment of the required fees.

"Interim" section 26 decisions are not binding on the head and, therefore, cannot be appealed to the Commissioner.

I also believe that the institution's fees estimate and "interim" section 26 notice should contain reference to the fee waiver provisions of subsection 57(3) of the Act, and solicit representations from the requester regarding the head's discretion to waive fees. If a requester has already argued for a waiver in the original request, the head's decision regarding waiver should be given in this "interim" notice.

Regardless of whether the head has issued an "interim" section 26 notice (based on a representative sample or consultations) or a regular section 26 notice (based on inspection of the actual requested record), if the notice is accompanied by a fees estimate, the issuance of the fees estimate has the effect of suspending the 30-day time limit imposed by

section 26. If the institution sends a fees estimate to the requester on day 14, for example, day 15 is deemed to be the day after the institution receives the required deposit from the requester or issues a decision to waive fees pursuant to a request for waiver. If the requester appeals the issue of fees, the running of the 30-day period is suspended. It begins to run again on the day after the appeal is resolved, either by Order of the Commissioner or mediated settlement between the parties.

As soon as the question of fees is resolved and the 30-day time limit is reactivated, the institution must retrieve and review all of the requested records for the purposes of determining whether access can be given. If the records are to be disclosed, section 26(b) requires the head to "...give the person who made the request access to the record or part thereof, and where necessary for the purpose cause the record to be produced..." within the balance of the 30-day time limit.

If access is not granted, either in whole or in part, the head is required by subsection 29(1)(b) of the Act to advise the requester of:

> (b) where there is such a record,
>
> (i) the specific provision of the Act under which access is refused,
>
> (ii) the reason the provision applies to the record,
>
> (iii) the name and position of the person responsible for making the decision, and
>
> (iv) that the person who made the request may appeal to the Commissioner for a review of the decision.

By necessary inference, the provisions of subsection 29(1)(b) of the Act require that the head provide the requester with a general description of the records responding to the request, and, with respect to all records withheld by the institution, the head should clearly identify

the specific sections or subsections of the Act used to exempt specific portions of each record. These activities must also be completed within the 30-day time limit set out in section 26. In cases where the head had previously issued an "interim" section 26 notice with a fees estimate, this second notice would constitute the institution's final decision under section 26 and it is therefore appealable to the Commissioner.

The 30-day time limit referred to in my discussions is subject to the extension provisions of sections 27 and 28 of the Act, in the usual manner.

If a head requests payment of a deposit and subsequently withholds a record from disclosure, section 6 of Regulation 532/87 allows the head to waive all or part of the payment received from the requester. Similarly, the head may exercise his or her discretion and waive the payment of fees after having considered the requester's representations as to fee waiver. In that case, section 7 of the regulation authorizes the head to refund the deposit paid by the requester.

I believe that the procedures I have outlined in this Interim Order are fair and reasonable to all parties, and are consistent with the overall principles and spirit of the Act. In my view, they strike an appropriate balance between the "user pay" concept established by section 57, and the requester's right to have sufficient information on which to make an informed decision respecting payment of fees. The procedures will also eliminate a problem I have encountered in these appeals and others in which institutions were insufficiently familiar with the scope and contents of the requested records before providing requesters with fees estimates and section 26 notices.

To summarize, the following procedures should be followed by institutions in dealing with requests under the Act:

1. clarify request, as required;

2. once request is clarified, 30 day time period imposed by section 26 begins;

3. A) where record can be retrieved for consideration by the head without undue expense:

   - inspect record,
   - issue section 26 notice,
   - issue fees estimate, if appropriate; or

   B) where retrieval of all of the requested records is unduly expensive:

   - head issues "interim" section 26 notice, based on consultations or representative sample of the records,

   - head sends fees estimate together with "interim" section 26 notice and the 30 day limit is suspended;

4. if fees estimate has been sent and requester responds with an application for waiver, head considers and decides upon waiver;

5. receipt of deposit or decision to waive fees reactivates the 30-day time limit, subject to extensions under sections 27 and 28, and;

   - if final decision under section 26 notice was sent granting access in whole or in part, head provides access according to section 26(b), or

   - if an "interim" section 26 notice was sent, head reviews all of the records covered by the request and issues a final decision under section 26.

[IPC Order 81/July 26, 1989]

As noted above, a final decision under section 26 must advise the requester whether access to a requested record is to be given. If access to a record is withheld, the requirements of subsection 29(1)(b) must be satisfied, including a general identification of the record, and an indication as to the parts of the record to which any cited exemptions apply.

An "interim" section 26 notice must indicate that the notice is not final and binding on the head, and is based on consultations or a representative sample of the requested records (whichever is applicable). The head must advise the requester whether access is likely to be given. Failure to indicate that access might not be given implies that full access will likely be given.

As far as the present appeals are concerned, I order the institution to take the following action:

1. provide the appellant with a revised fees estimate for the "case examples" and "completed case prosecution lists" (Appeal Number 880118) within 14 days of the date of this Order;

2. retrieve all of the records related to Appeal Numbers 880117, 880119, 880120 and 880121 for which exemptions were originally claimed by the institution, and make a final decision under section 26 of the Act within 60 days of the date of this Order.

I realize that what I have ordered in respect of Appeal Numbers 880117, 880119, 880120 and 880121 is not consistent with the procedure I have outlined above and I am also aware that this order will be onerous to the institution but, I have decided to make it because these appeals have provided an opportunity to clarify the procedural requirements of the Act. It has taken a considerable period of time to resolve these matters, even on an interim basis, but both the institution and the Commissioner's office have benefitted considerably from this experience. Accordingly, in this case, I am requiring that the institution

bear the cost of retrieving the records for inspection by the head so that the head can make a section 26 decision in respect to Appeal Numbers 880117, 880119, 880120 and 880121. The one exception to this is the records relevant to Appeal Number 880118.

Original signed by:
Sidney B. Linden
Commissioner

July 26, 1989
Date