



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

ORDER P-264

Appeal 900173

Ministry of Treasury and Economics



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O R D E R

BACKGROUND:

On December 12, 1989, the requester wrote to the Ministry of Treasury and Economics (the "institution") requesting the following records:

Appl. One - Briefing notes/memos to the Minister/Premier since Skydome opened in June, 1989 on its operational problems/finances/Board meetings.

Appl. Two - Correspondence, telephone notes, memos to self, since June/89 with Dome Consortium Investments Ltd. and Stadco/StadcoBoard (Skydome) on future partnership/ ownership arrangements.

The requester asked for a fee waiver.

On March 30, 1990, the institution informed the requester that the records responsive to the requests were unduly expensive to produce for inspection by the head to make a decision regarding access to the records. Therefore, a representative sampling of the relevant records was undertaken and the requester was provided with an interim notice by the head under section 26 of the Freedom of Information and Protection of Privacy Act (the "Act").

The institution advised the requester that, based on the representative sample and their experience with the records, approximately two-thirds of the records would be briefing notes and the remainder would be memoranda and other correspondence. The institution further advised that portions of the records

would be exempted from disclosure pursuant to sections 12(1), 13(1), 17(1)(a), (b), (c) and 18(1)(c) and (d) of the Act, but access would likely be granted to approximately 75 to 90% of the information contained in the records. No final decision had been made regarding access because this was an interim notice.

In addition, the head issued the following fees estimates for the two requests:

Search (28 hours x \$24.00/hour)	=	\$672.00
<u>Request #1</u>		
Preparation (10 hours x \$24.00/hour)	=	\$240.00
<u>Request #2</u>		
Preparation (2 hours x \$24.00/hour)	=	\$48.00
Reproduction (\$0.20 per page)		
Estimated Total Fees	=	\$960.00

The fees estimates were based on the rate of \$6.00 per quarter hour which was the rate permitted by Ontario Regulation 532/87 at the time the access requests were made.

On April 14, 1990, the requester appealed the institution's decision to charge what the requester deemed were "unreasonable" fees estimates.

Mediation to resolve the appeal was attempted but was not successful. Accordingly, notice that an inquiry was being conducted to review the portion of the institution's interim notice regarding the fees estimates was sent to the appellant and the institution. An Appeals Officers' Report, which is intended to assist the parties in making any representations to the Commissioner concerning the subject matter of the appeal, accompanied the Notice of Inquiry.

Written representations were received from the appellant. In response to the Appeals Officer's Report, the institution made representations on the issue of fee waiver only. The institution indicated to the Appeals Officer that, in support of its fees estimates, it wished to rely on the information contained in its original interim notice and on information shared with the Appeals Officer during mediation.

PRELIMINARY MATTERS:

At the time of the head's decision in this appeal, the relevant sections of the Act and Ontario Regulation 532/87 provided:

Section 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; [emphasis added]

Section 5(2), Ontario Regulation 532/87

Subject to section 57 of the Act, a head may require a person who seeks access to a record to pay the following additional amounts:

1. For manually searching for a record after two hours have been spent manually searching, \$6 for each fifteen minutes spent by any person.
2. For preparing a record for disclosure, including severing a part of the record under subsection 10(2) of the Act, \$6 for each fifteen minutes spent by any person. [Emphasis added.]

Section 57 of the Act was amended on January 1, 1991 by the Municipal Freedom of Information Statute Law Amendment Act, 1989. The amendment made the charging of fees to a requester mandatory, where no provision is made for a charge or fee under any other Act. On the same date, Ontario Regulation 516/90 came into force. Section 6 of this Regulation made the charging of fees mandatory and increased the amount of fees chargeable under section 57(1).

In Order P-260, dated December 19, 1991, I discussed the effect of these legislative changes on the same issues currently before me, involving the same appellant and institution. I stated at page 6 of that Order that, in order to ensure the appellant is

treated fairly, I would apply the provisions of the Act and regulations operating at the time his request was made. For the same reasons, in this appeal I am applying the provisions of the Act and regulations operating at the time of the appellant's request.

ISSUES:

The issues arising in this appeal are as follows:

- A. Whether the amount of the estimated fees was calculated in accordance with section 57(1) of the Act.
- B. Whether the head's decision not to waive fees was in accordance with section 57(3) of the Act.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the amount of the estimated fees was calculated in accordance with section 57(1) of the Act.

In appealing the amount of the fees estimates provided by the institution, the appellant maintained that the search and preparation charges were unreasonable.

Search Charges

The institution claimed that the records responsive to the requests would be unduly expensive to produce for the purposes of inspection by the head in making a final decision regarding access. As a result, a representative sample of the records was

reviewed and an interim notice was issued. The fees estimates were based on this representative sample.

I have reviewed the explanatory material provided by the institution to the Appeals Officer and a report which was prepared by this Appeals Officer following his visit to the institution in another matter involving the same filing system which contained the records at issue in this appeal. Based on this information, I accept the institution's contention that, due to the subject matter of the original requests, the records responsive to the requests were quite extensive and, therefore, would be unduly expensive to produce for inspection by the head in reaching a final decision.

A copy of the representative sample upon which the interim notice was based has been obtained and reviewed by me. The sample consists of eight records; five briefing notes and three memoranda, totalling ten pages.

The institution claimed that, based on this information and past experience with the same filing system, an estimated total of 28 hours would be required to search for the records relevant to the requests. It is expected that the search would yield approximately 40 records responsive to request Number 1 and one record responsive to request Number 2. This would include a manual search of more than 40 files held in five separate locations within the institution.

Section 57(1)(a) of the Act provides the head with discretion to charge a fee for manual search time required in excess of two hours. In the information provided by the institution during the course of this appeal, there is no indication that the

figure of 28 hours represents search time in excess of two hours. Therefore, I conclude that the institution has included the first two hours of search time in its estimate. I accept the estimated 28 hours of search time claimed. However, I have deducted two hours from the estimate to reflect the two free hours of search time allowed by the legislation.

Accordingly, the estimated search time should be adjusted to 26 hours in calculating the fees, thereby reducing the allowable search charges to \$624.00.

Preparation Charges

The institution claimed that it took approximately one hour, excluding time spent on physically severing the documents and photocopying, to prepare the representative sample of the records for disclosure [emphasis added]. Based on this sample, an estimated 12 hours of preparation time has been claimed by the institution, resulting in a total fees estimate for preparation charges of \$288.00. In addition, the appellant was advised that

there would be \$0.20 per page photocopying charge. No other information has been provided by the institution explaining what factors were considered in determining preparation charges.

At page 14 of Order 4, former Commissioner Sidney B. Linden, in considering the issue of preparation charges, stated:

While the major component of the estimated fee represents costs of locating the record for disclosure under subsection 57(1)(a), in calculating preparation costs under subsection 57(1)(b), the institution did

not make a distinction between the time involved in actually making severances within the records, and time spent reviewing records to decide whether or not an exemption applied. The fee estimate for preparation included costs associated with both decision making and severing, and I feel this is an improper 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 mailroom or arranging for courier service. In my view, "preparing the record for disclosure" under subsection 57(1)(b) should be read narrowly. ...

I agree with this view and, based on the information provided by the institution in this appeal, I do not accept the institution's claim for preparation charges. By excluding time to physically sever the records, it would appear that the institution has not followed the proper procedures in calculating preparation charges. Therefore, in my view, the fee estimates for preparation charges must be recalculated in accordance with section 57(1)(b).

Eight records were provided to this office as a representative sample. They total ten pages, only four of which contain

severances. One page has five severances, another has four, and two contain one severance. All severances are approximately one paragraph (four to five lines) in length, with the claimed exemption noted in the margin beside each severance. The pages which contain no severances must be excluded from the calculation of preparation charges.

If I were to apply the institution's claim of one hour preparation time to the four pages of the representative sample for which preparation charges may be claimed, this would equate to 15 minutes per page. Clearly this figure would be excessive if used for the purposes of physically severing the records.

The representative sample of severed records provided by the institution identifies approximately three severances per page, each being one paragraph of four to five lines in length. In my opinion, three minutes per page for physically making the severances and indicating the corresponding exemption by section number in the margin would be appropriate. Therefore, I order that the estimate for preparation time and charges in this appeal be recalculated accordingly. This will substantially reduce the fees estimates for preparation charges. Based on the representative sample provided by the institution, and the institution's estimate that approximately 41 records would be responsive to the two requests, I am able to calculate that approximately 51 pages of records would be generated. Of these, an estimated 20 would contain severances. Therefore, the fees estimate for preparation charges should be recalculated as follows:

$$\begin{array}{r} 20 \text{ pages} \times 3 \text{ minutes/page preparation time} \times \\ \$24.00/\text{hour} = \underline{\$24.00} \end{array}$$

The additional cost for photocopying charges of \$.20 per page is acceptable.

At the time the request was made, section 57(1) gave the head discretion as to whether or not fees should be charged. I have

reviewed the institution's actions 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 fees in accordance with the calculations I have made, subject to consideration of the issue of fee waiver.

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

At the time of the head's decision in this appeal, section 57(3) of the Act provided:

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 Act was silent as to who bears the burden of proof in respect of section 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 stated in Order 111, 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. In his original request the appellant stated that "A fee waiver is requested". He did not provide any other details to the institution in support of his request for a fee waiver. In addition, I have reviewed the appellant's submissions in response to the Appeals Officer's Report and they do not contain sufficient evidence to support a claim for a fee waiver under any of the provisions of section 57(3) of the Act. Therefore, in my view, the appellant has not discharged the burden of proving that he should be granted a fee waiver in the circumstances of this appeal.

I have also reviewed the institution's decision not to waive fees. It is clear from the intent of the head's decision letter and the institution's submissions that the head considered the issue of waiver and decided not to waive the fees in the circumstances of this appeal. I am satisfied that the actions of the head constitute a proper exercise of discretion under section 57(3) of the Act as it existed at the time of the decision.

ORDER:

1. I order that the amount of the fees allowable for search charges and preparation charges be in accordance with my calculations.

2. I uphold the decision of the head not to waive the fees.

Original signed by:
Tom Mitchinson
Assistant Commissioner

January 28, 1992
Date