



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

ORDER P-265

Appeal 900335

Ministry of Treasury and Economics



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O R D E R

BACKGROUND:

On January 20, 1989, the requester wrote to the Ministry of Treasury and Economics (the "institution") requesting the following records:

Appl. One _ reports/issue sheets 1987-89 on the proposed national sales tax, including the basis of Mr. Nixon's public statements that this tax will result in over \$14 billion revenue, \$6 billion revenues for Ontario.

The requester asked for a fee waiver and stated that he wished to view the records in Ottawa as they became available.

On February 27, 1989, the requester narrowed his request to "records which reflect how the Province regards the idea of a national sales tax."

The institution denied access to the 275 records which were responsive to the request, and the requester appealed this decision. During mediation, the request was further narrowed to include only five records which focused on the differences of views between the Ontario and the federal governments on the revenue yield and inflationary impact of the NST. The institution notified the requester that fees of \$101.24 would be charged in order to provide access to these records. The

requester appealed these fees as being "unreasonable", and Appeal number 900206 was opened. During the course of further mediation, six additional records were identified as being responsive to the appellant's request, bringing the total number of records at issue to 11. The institution issued the following adjusted fees estimate to cover all 11 records:

Total No. of hours/Total No. of Records x \$24.00 per
hour = Search Charge per record x No. of Relevant
Records

or

$$232/275 = 0.84 \times \$24.00 = \$20.24 \times 11 = \$222.64$$

On July 5, 1990, the requester appealed the institution's decision to charge the adjusted fees. Appeal Number 900206 was closed, and the appeal file which is the subject of this order was opened. The issues involving the adjusted fees are the subject of this appeal.

The fees estimate was based on the rate of \$6.00 per quarter hour, which was the rate permitted by Ontario Regulation 532/87 at the time the request was made. The formula used in calculating the fees reflects the institution's intention to attribute search time only to the eleven records which had been identified as responsive to the request.

Mediation to resolve the appeal was attempted but was not successful. Accordingly, notice that an inquiry was being conducted to review the institution's decision regarding the fees 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 appeals, accompanied the Notice of Inquiry.

Written representations were received from the institution and the appellant.

PRELIMINARY MATTER:

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 the 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.

The appellant appealed the amount of the fees estimate provided to him by the institution. In particular, he suggested that the search charges related to all documents, not just the eleven which had been identified as responsive to the narrowed request.

The institution claimed that it took 232 hours, beyond the initial two hours of free time provided by section 57(1) of the Act, to locate and identify the 275 records responsive to the original request.

Because the wording of the original request was broad in scope, the institution searched all of its record holdings on the national sales tax, which encompassed 30 cubic feet.

However, as previously explained, the appellant narrowed his request which eventually resulted in only eleven records being responsive to the request. According to the institution, it would not have been appropriate to charge the full fee attributable to 232 hours of search time, so it issued a revised fees estimate attributable only to the eleven records.

I have reviewed the institution's submissions and a report which was prepared by this Appeals Officer following his visit to the institution to examine the records pertaining to the original request. Based on this information, I accept the institution's contention that, due to the nature of the original request and the extent of the search required to identify records responsive to the request, the 232 hours of search time was reasonable.

Because the eleven records at issue in this appeal were part of the original search, in my opinion, the institution's method of calculating fees of \$222.64 is reasonable, in the circumstances of this appeal.

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 fees. Accordingly, I uphold the decision of the head to charge fees of \$222.64, 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 these appeals, 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 former Commissioner Sidney B. 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 support his request for a fee waiver, to the institution. 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 the fees in this request. 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 his decision.

ORDER:

1. I uphold the decision of the head to charge fees in the amount of \$222.64.

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

Original signed by: _____
Tom Mitchinson
Assistant Commissioner

January 29, 1992
Date