



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

ORDER P-425

Appeal P-911146

Ministry of Education



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ORDER

BACKGROUND:

The Ministry of Education (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to "copies of government documents, records, memos, letters, studies, notes or reports pertaining to the integration, mainstreaming and/or segregation of mentally and/or physically disabled children in the Ontario school system." The requester also sought the same materials "pertaining to the provision of 'special education' for the above group." The requester further stated that she is "a parent of a mentally handicapped child who requires the information to lobby to have his future education needs met" and requested that all fees associated with the request be waived.

The Ministry provided the requester with some records, and advised her that "since most of [the records] are publicly available documents which do not fall under the FOI Act, the total fee involved in processing this request is waived." The requester appealed this decision on the basis that she was not provided with complete access to all records responsive to her request in the custody or under the control of the Ministry.

During mediation of the appeal, the Ministry indicated that background material specifically related to the records released to the requester did exist in its custody and control, and that they represented approximately 10,000 pages in 26 boxes of files. The Ministry issued a fee estimate of a total of \$3040.00 (\$2040.00 for 68 hours of search time and \$1000.00 for copying severed pages of the record). The Ministry also suggested to the requester that she narrow the scope of her request with a view to minimizing the amount of the fees, and invited her to meet with program area officials to discuss any concerns she may have with respect to the area of her request. Other than agreeing to examine the records rather than receive copies, the requester did not wish to narrow the scope of her request, nor did she want to meet with Ministry officials. The Ministry then sent her a new decision letter outlining the details of the fee estimate, and denying her request for a fee waiver.

Further mediation was not successful, and notice that an inquiry was being conducted to review the decision of the Ministry was sent to the Ministry and the appellant. Written representations were received from both parties.

During the processing of the appeal, it appeared that the Ministry had made its fee waiver decision without obtaining the requester's specific reasons for waiver and any evidence she might provide. Therefore, the Appeals Officer asked the appellant to send to the Ministry her reasons for requesting a fee waiver, with supporting evidence. The Ministry was also asked to provide more details as to the calculation of the fee estimate, and the nature of the severances contemplated with the applicable exemptions.

After receiving additional information from the appellant with regard to the fee waiver, the Ministry issued a revised decision, providing details of the calculation of the fee estimate and the grounds for declining to waive the fees. The Ministry also submitted additional representations and documents supporting its decision.

ISSUES:

The issues arising in this appeal are:

- A. Whether the amount of the estimated fee under section 57(1) of the Act was calculated in accordance with the terms of the Act.
- B. Whether the Ministry's decision not to waive the fee under section 57(4) of the Act was in accordance with the terms of the Act.

SUBMISSIONS/CONCLUSIONS:

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

Section 57(1) of the Act reads:

Where no provision is made for a charge or fee under any other Act, a head shall require the person who makes a request for access 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 revised decision letter, the Ministry explained the fee estimate as follows:

Due to the volume of records involved and the complexity of the subject matter of your request, the ministry estimated the following costs:

- a) approximately 70 hours of manual search time, of which two hours are provided free, leaving 68 hours at \$30.00/hour for a total of \$2,040.00;
- b) the cost of preparing the record for disclosure, which is the time required to sever materials from the files (estimate of 416 hours at \$30.00 an hour). The total cost for severing the materials is \$12,480.00. Please note that in consideration of the very broad nature of your request, we decided not to charge you these costs. Therefore, this amount did not appear in our letter to you of May 29, 1992 [the first fee estimate].
- c) The cost of copying the records includes both the cost of time spent copying the record for the purpose of severing and the cost of the actual photocopies for you to review. Please note that while the total cost of the photocopying for the ministry is \$1,578.00, we are charging you for the cost of the photocopies only, the amount of approximately \$1,000.00. Should you decide that you want your own copies of any of the material that you have viewed, the cost for the copies will be twenty cents per page, as set out in the Regulation to the FOI Act.

In this letter the Ministry also informed the appellant that the total cost to the Ministry of processing the request, which included the cost of supervising the appellant's examination of the records, exceeded \$34,000.00, an amount "equivalent to hiring one staff member full-time for a year."

In addition, the Ministry advised the appellant that the anticipated severances in the record would be effected pursuant to the exemptions under sections 12, 13 and 21 of the Act.

Although not specifically stated in the letter, the Ministry implied that a final decision on access will be issued once all of the responsive records have been retrieved and reviewed by the Ministry.

The Ministry reiterated its earlier offer to provide to the appellant one of the Ministry's specialists in the field of special education, to assist her in determining the most effective means of locating the appropriate materials for meeting her goals. The appellant declined the offer and wished to continue with the appeal.

In reviewing the Ministry's fee estimate, my responsibility under subsection 57(5) of the Act is to ensure that the amount estimated by the institution is reasonable in the circumstances. In this regard, the burden of establishing the reasonableness of the estimate rests with the Ministry [Order 86]. In my view, the Ministry discharges this burden by providing me with detailed information as to how the fee estimate has been calculated, and by producing sufficient evidence to support its claim.

The Ministry's position is that it would be unduly expensive to retrieve all of the records responsive to the request for the purpose of making a final decision on access under section 26 of the Act.

The procedure to be followed by an institution when responding to requests involving records which are unduly expensive to retrieve for inspection by the head in making a decision under section 26 of the Act was established in Order 81. In that order, former Commissioner Sidney B. Linden stated:

In my view, the Act allows the head to provide a requester with a fees estimate pursuant to section 57(2) of the Act [now section 57(3)]. 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.

How can the head be satisfied that the fee estimate is reasonable without inspecting all of the records responsive to the request? In the same order, the former Commissioner stated:

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.

... 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.)

The Ministry indicates that, in preparing the fee estimate, it had consulted the Freedom of Information Liaison Representative from the program area, the Director of Special Education and Provincial Schools Branch, and an Education Officer of the Ministry with 34 years experience in the subject matter of the appellant's request, and familiar with the type and contents of the records requested.

In a memorandum attached to the Ministry's representations, the Director of Special Education and Provincial Schools Branch states that the request covers a wide range of information on a

topic that has been a major function of the Branch for the past decade. Consequently, he indicates that the request would necessitate "a massive search" through most of the files maintained by the branch as well as through files located off-site and in other branches.

In a further memorandum attached to the representations, the Education Officer outlines the activities he carried out in arriving at the fee estimate:

First, to determine the number of files that need to be searched, I reviewed the 1993, 1992 and 1991 files and the Records Management Files which are located in the Special Education and Provincial Schools Branch, 17th Floor, Mowat Block. The Records Management Files lists the number of boxes of files and the titles of the files that have been transferred to storage at the Records Centre Services in Mississauga, Ontario. The Branch maintains on its premises the files of the current and the previous two years (1993-1991). From the three day review of these files, it was determined that there are sixty-four boxes containing 353 files stored at the Records Centre Services in Mississauga pertaining to the information asked for by the requester.

The Education Officer then reviewed 52 files to determine the number of hours required to search the 353 files for responsive records. He estimated the search time to be between 25 to 30 minutes per file. He indicates that the 52 files are similar in size and subject matter to the 353 files. He states that in determining the search time "a very conservative" estimate of 15 minutes per file was used. The total search time of 88 1/4 hours (15 minutes X 353), was then reduced to 70 hours.

Finally, with respect to the severances that are anticipated, the Education Officer indicated that based on his review of a representative sample of the records, "50% of the 10,590 pages ... would need to be severed. The file contains advice to senior officials and personal information."

The appellant submits in her representations that it should not take a new and extended effort on the part of the Ministry to gather the material requested. She believes that the Ministry has already sorted through all of its policy and background documents on the relevant topics in order to prepare for the Ministry's defence in various human rights and court challenges.

I acknowledge that the appellant is at a disadvantage in making representations on this issue, as she cannot know the content or extent of the records existing within the Ministry. However, in my opinion, the appellant's request is extremely broad and appears to aim at being exhaustive on two large subjects. I accept the Ministry's position that such a request would necessitate an equally exhaustive search to locate all of the kinds of records which she has indicated.

In my view, taking into account all of the Ministry's representations and the nature of the request, I am satisfied that the estimated search time of 70 hours is reasonable in the circumstances and is calculated in accordance with section 57(1)(a) of the Act and section 6 of Regulation 460, under the Act. I also find that the fee estimate for the cost of preparing the records for disclosure is reasonable and properly calculated under section 57(1)(b) of the Act and section 6 of the same

Regulation. If pages of a record are to be severed to remove exempt information, in my view, it would not be reasonably practicable to provide the requester an opportunity to examine these pages, while at the same time ensuring that the exempt information is not disclosed. In such cases, it is appropriate that the requester pay the photocopy costs for those pages [Order 2].

ISSUE B: Whether the Ministry's decision not to waive the fee under section 57(4) of the Act was in accordance with the terms of the Act.

The appellant requested a fee waiver under sections 57(4) of the Act. This section reads as follows:

- (4) A head shall 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; and
 - (d) any other matter prescribed in the regulations.

Section 8 of Regulation 460, under the Act, reads:

The following are prescribed as matters for a head to consider in deciding whether to waive all or part of a payment required to be made under the Act:

- 1. Whether the person requesting access to the record is given access to it.
- 2. If the amount of a payment would be \$5 or less, whether the amount of the payment is too small to justify requiring the payment.

It has been established in a number of orders that the person requesting a fee waiver has the responsibility to provide adequate evidence to support a claim for a fee waiver [Orders 4, 10, 111].

The appellant submits that it is in the public interest that the education integration issue be resolved, and that, if the information were in the public domain, the resolution of the issue would be hastened. She added that she is affiliated with several associations representing the interests of the developmentally handicapped, and would actively share the information gained from this request.

Further, the appellant claims that the mental and emotional health of children with special needs who are excluded from the regular school system and from interaction with peers is at stake, and maintains that it is unfair for the Ministry to use the fee provisions of the Act as a financial barrier to prevent parents and lobbyists from acquiring necessary information.

The appellant added that payment of the fee would pose a financial hardship to her, as she has had to leave her job to take care of her child, whose needs are costly.

The appellant's representations appear to raise the types of considerations relevant to the criteria listed under sections 57(4)(b) and(c) above.

The Ministry's position is that the appellant did not demonstrate financial hardship and did not present any evidence that dissemination of the record would benefit public health or safety.

I am sympathetic to the position of the appellant; however, in my view, in a very broad request such as the one in this appeal, where the responsive records have not yet been retrieved and their contents cannot be ascertained with any degree of specificity, it is not reasonable to conclude that the dissemination of the records would benefit public health or safety.

Considering that the appellant's request is for records relating to educational matters, I also think that it would not be reasonable to expect that records responsive to this request would relate in any significant way to health or safety issues. In my view, the mere fact that the responsive records may contain some information in some way relating to health or safety matters is not sufficient to warrant a fee waiver under section 57(4)(c).

In addition, the "public interest" is not one of the criteria for a fee waiver listed in section 57(1) of the Act, which has been found to be an exhaustive list [Order 5].

With regard to the factor under section 57(4)(b), although requested to do so, the appellant has provided no evidence, either to this office or to the Ministry, to support her claim that payment of the fees will cause her financial hardship. She has provided no specific information to assist me in determining the issue. Therefore, I am unable to conclude that payment of the fee would cause her financial hardship.

ORDER:

I uphold the Ministry's decision.

Original signed by:
Asfaw Seife
Inquiry Officer

March 2, 1993