



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

ORDER P-502

Appeal P-9300123

Ministry of Finance



80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Télééc: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

ORDER

BACKGROUND:

A request was made to the Ministry of Financial Institutions (now the Ministry of Finance) (the Ministry) under the Freedom of Information and Protection of Privacy Act (the Act) for access to "copies of all claims, correspondence, proposals, offers to settle, defence to the claim and all related documents and reports" which relate to a claim advanced by a named law firm on behalf of a number of investors (part 1). These investors were individuals or companies who had lost monies in the collapse of certain companies involved in the mortgage brokerage business. The requester also sought access to certain correspondence and billings involving the law firm and the Ministry (part 2).

The Ministry did not issue a decision within the 30 day time period as set out in the Act, and the requester appealed the deemed refusal as set out in section 29(4) of the Act. The Ministry subsequently issued a decision letter.

The Ministry located and disclosed the records responsive to part 2 of the request. As far as part 1 of the request was concerned, the Ministry provided the appellant with a fee estimate of \$1,833.60. Although the Ministry indicated in its decision letter that exemptions might be applied to the records responsive to part 1 of the request, no specific exemptions were cited. The Ministry indicated that it required a deposit of \$916.80 (50% of the fee estimate) in order to process the request.

Upon receipt of the Ministry's decision, the appellant advised the Appeals Officer assigned to the appeal that he objected to the payment of any fees for processing part 1 of his request. The appeal was continued as an appeal of the amount of the fee estimate. The appellant claims that, as the information contained in the responsive records consists of his personal information, pursuant to section 57(2) of the Act, a fee should not have been charged. In the alternative, he claims that the fee was not calculated in accordance with section 57(1) of the Act.

Mediation was not possible, and notice that an inquiry was being conducted to review the Ministry's decision was sent to the appellant and to the Ministry. Representations were received from both parties.

PRELIMINARY ISSUE:

The Ministry has not yet made any decision on whether (or not) access will be given to the records responsive to part 1 of the request. In my view, until an institution issues a decision on whether access will or will not be granted to the requested records, it cannot provide the requester with a fee estimate. In most cases, the decision will be a final decision pursuant to section 26 of the Act. In those unusual cases in which the records are "unduly expensive to retrieve for inspection by the head in making a decision under section 26 of the Act," the institution should issue an "interim decision" according to the criteria set out in Order 81.

In my view, the following provisions of the Act relate to the relationship between the provision of a fee estimate by an institution and its obligation to issue a decision on whether access will or will not be granted:

Section 57(3) of the Act states:

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. [emphasis added]

Moreover, section 8(1) of Regulation 460 made under the Act, provides that one of the matters the head should consider in deciding whether to waive all or part of a fee is whether the person requesting access to a record is given access to it.

In my opinion, these two provisions of the Act presuppose that an institution has made a decision on whether (or not) access will be granted when it issues a fee estimate. A requester should be in a position to know whether he or she will receive access to the requested records upon payment of the fee estimate. If the requester applies for a fee waiver pursuant to section 57(4) of the Act, the head must know whether access has been granted in order to consider this factor when deciding whether to waive the fee.

Although not specifically stated in its decision 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. It states:

... you will receive an index of all relevant material that will identify whether records are to be released, severed, or exempted pursuant to the FOI Act.

The Ministry has not specifically indicated the reasons for the lack of a final decision on access. It appears that the Ministry felt that it had issued an "interim" decision on the basis that the records would be unduly expensive to retrieve for inspection by the head in making a decision under section 26 of the Act.

In my view, this is not a situation in which the Ministry should have issued an "interim" decision. All of the records in the custody of the Ministry which deal broadly with the collapse of the mortgage brokerage companies are physically located in two Ministry offices. The records responsive to this request are included in that group of records. In my view, it cannot be said that the records are unduly expensive to retrieve for the purpose of making a final access decision under section 26 of the Act.

In my opinion, the Ministry should have issued a final access decision under section 26 of the Act within 30 days after it received the appellant's request. Once the Ministry has issued this decision, the appellant will be able to decide whether to pay the 50% deposit requested by the Ministry.

ISSUES:

- A. Whether section 57(2) of the Act applies in the circumstances of this appeal.
- B. If the answer to Issue A is no, whether the amount of the estimated fee was calculated in accordance with section 57(1) of the Act.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether section 57(2) of the Act applies in the circumstances of this appeal.

Section 57(2) of the Act states:

Despite subsection (1), a head shall not require an individual to pay a fee for access to his or her own personal information.

Personal information is defined, in part, in section 2(1) of the Act, as follows:

"personal information" means recorded information about an identifiable individual, including,

...

- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

...

- (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

In order to satisfy the requirements of the introductory wording of the definition of personal information, the record must contain information about **an identifiable individual** (Order P-316).

In his representations, the appellant states that he is a creditor of the companies that are now being administered by the trustee. He further indicates that, because the law firm was appointed

to represent the interests of investors, including himself, the information he requested would necessarily be his personal information.

I have reviewed all of the records that would include those responsive to part 1 of the request. There is nothing in the records which identifies information about the appellant. Accordingly, even if the appellant were an investor in this company, there is nothing in the records that constitutes his personal information.

In my view, an interest in the subject matter and possible outcome of events which led to the creation of a record is not sufficient, on its own, to bring the contents of the record within the definition of personal information as set out in section 2(1) of the Act. The record itself must contain personal information about the requester.

I am, therefore, of the view that section 57(2) of the Act has no application in the circumstances of this appeal. Accordingly, the Ministry was entitled to charge a fee to the appellant under section 57(1) of the Act and to issue a fee estimate under section 57(3).

ISSUE B: If the answer to Issue A is no, whether the amount of the estimated fee was calculated in accordance with section 57(1) 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.

Section 6 of Regulation 460 made under the Act states, in part:

The following are the fees that shall be charged for the purposes of subsection 57(1) of the Act:

- 1. For photocopies and computer printouts, 20 cents per page.
- ...

3. For manually searching for a record after two hours have been spent searching; \$7.50 for each fifteen minutes spent by any person.
 4. For preparing a record for disclosure, including severing a part of a record, \$7.50 for each fifteen minutes spent by any person.
- ...

In reviewing the Ministry's fee estimate, my responsibility under section 57(1) of the Act is to ensure that the amount estimated by the Ministry is reasonable in the circumstances. In this regard, the burden of establishing the reasonableness of the estimate rests with the Ministry. In my view, the Ministry discharges the burden by providing me with detailed information as to how the fee estimate was calculated, and by producing sufficient evidence to support its claim.

In its decision letter, the Ministry indicates that its fee estimate is for both search and preparation time. However, in its representations, it has only provided evidence in support of the search charge. Accordingly, I will only consider whether the search charge is reasonable.

In support of the search charge, the Ministry has provided an affidavit sworn by the Branch Co-ordinator with the Mortgage Brokers Section of the Loan and Trust Corporations Branch of the Ministry. This individual indicates that she "conducted a search" of the Ministry's files to determine which files might contain records which are responsive to the request. She attests that four areas of the Ministry "must be searched" in order to locate the responsive records: the Mortgage Brokers Section, the Superintendent of Deposit Institutions Office, the Investigations Branch, and the Legal Services Branch.

The Branch Co-ordinator subsequently clarified the Ministry's position as it was unclear whether the Ministry **had conducted a search** for the records responsive to **this** request. The Branch Co-ordinator explained that fees for search time were based on the search the Ministry **had conducted** for **any and all** records in its custody that relate in any way to the collapse of the named companies. That search was conducted in response to another request by the same appellant. The search was not limited to records responsive to the narrower request which lead to this appeal. It follows therefore, that the fees estimated by the Ministry in support of the search charge are related to the much broader request.

Based on the explanation provided by the Branch Co-ordinator, I am of the view that the figures provided by the Ministry in support of its fee "estimate" represent the number of hours and corresponding costs associated with the **actual**, as opposed to **estimated**, search time. Accordingly, I must consider whether the Ministry has provided me with sufficient evidence to support the search time of a total of 177.75 hours at a cost of \$5,332.50.

The Ministry has broken down these figures in the following fashion:

Location	Number of Hours of Search Time	Cost
----------	-----------------------------------	------

Investigations Branch	56.5	\$1,695.00
Mortgage Brokers Branch	87	\$2,610.00
Superintendent of Deposit Institutions Office	34.25	\$1,027.50
Legal Services Branch	2	\$ 60.00
SUB TOTAL	179.75	\$5,392.50
(Less 2 Hours free)	- 2	- \$ 60.00
TOTAL SEARCH TIME	177.75	\$5,332.50

While the Ministry calculated the fees for search time at \$5,332.50, the fee "estimate" that was actually sent to the appellant was \$1,833.60. In the circumstances of this case and based on my independent review of the records, I believe that the evidence provided by the Ministry is sufficient to substantiate the fee that was **actually** provided to the appellant.

Accordingly, the \$1,833.60 fee for search time complies with section 57(1) of the Act. As the Ministry has provided me with no evidence to justify fees for preparation time, the Ministry may not claim any fees for these charges. Pursuant to the Regulations, the Ministry may, however, charge photocopying costs of \$0.20 per page for each page of the record that is provided to the appellant.

ORDER:

1. I order the Ministry to make a final access decision with respect to the appellant's request within 20 days of the date of this order.
2. I uphold the Ministry's decision to charge a fee for search time in the amount of \$1,833.60. The Ministry is precluded from charging any fees for preparing the records for disclosure. I allow the Ministry to charge photocopying costs at a rate of \$0.20 per page for each page of the record to be disclosed to the appellant.
3. In order to verify compliance with this order, I order the Ministry to provide me with a copy of the access decision which has been issued to the appellant in accordance with Provision 1, **only** upon request.

Original signed by:
Anita Fineberg
Inquiry Officer

July 21, 1993