



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

ORDER P-608

Appeal P-9300429

Ministry of Environment and Energy



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ORDER

BACKGROUND:

The Ministry of Environment and Energy (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for:

Copies of all studies prepared by the Ministry of Natural Resources, the Ministry of Environment and Energy, and outside consultants relating to the site for the new Ministry office in Peterborough, Ontario (site located at Charlotte and Water Streets).

The Ministry acknowledged the request and provided a fee estimate of \$90 comprised of \$60 for the photocopying of 300 pages at \$0.20 per page and \$30 for record preparation time of one hour at \$30 per hour. In its fee estimate, the Ministry advised the requester of his right to request a waiver of the fees.

The requester replied that, as a Member of the Legislative Assembly, he should not be required to pay for access to records responsive to his request and requested a waiver of the fee.

The Ministry responded that neither section 57 of the Act nor the Regulations promulgated under the Act provide that Members of the Legislative Assembly are exempt from the payment provisions contained in the legislation. Consequently, the Ministry refused to waive the fee. The requester appealed this decision to the Commissioner's office.

During the mediation stage of the appeal, it was established that the appellant also wished to appeal the Ministry's decision respecting the amount of the fee charged to him.

Further mediation was unsuccessful and notice that an inquiry was being conducted to review the decisions of the Ministry was sent to the appellant and the Ministry. Representations were received from both parties.

In its representations, the Ministry indicated that it would be prepared to grant to the appellant full access to the requested records once the required fee was paid.

ISSUES:

The issues arising in this appeal are as follows:

- A: Whether the amount of the fee charged was calculated in accordance with section 57(1) of the Act.

B: Whether the Ministry's decision to refuse to waive the fee was made in accordance with section 57(4) of the Act.

SUBMISSIONS/CONCLUSIONS:

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

Section 57(1) of the Act states as follows:

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 section 57(1) of the Act:

- 1. For photocopies and computer printouts, 20 cents per page.
- 4. For preparing a record for disclosure, including severing a part of the 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 this burden by providing me with detailed information as to how the fee estimate was calculated and by providing sufficient evidence to support its claim.

In its representations, the Ministry indicates that the record which is responsive to the appellant's request total some 300 pages. On this basis, I find that the fee of \$60 for the photocopying of the responsive record is in accordance with section 6(1) of Regulation 460.

The Ministry, in its representations, also describes the efforts undertaken by the staff of its Peterborough office to prepare the record for disclosure. As the original record was cerlox bound, it was necessary to disassemble the bindings in order to photocopy them. Copies of maps also had to be taped together as the Peterborough office is not equipped with a sufficiently large photocopier to reproduce full size copies of maps. I am satisfied that the estimate provided by the Ministry for the preparation of the record for disclosure is reasonable in the circumstances.

Based on the representations of the Ministry, I am satisfied that the fee estimate provided by the Ministry is in accordance with section 57(1) of the Act.

ISSUE B: Whether the Ministry's decision to refuse to waive the fee was made in accordance with section 57(4) of the Act.

Section 57(4) of the Act reads as follows:

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 states:

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 payment.

It has been established in a number of orders that the person requesting the fee waiver has the responsibility to provide adequate evidence to support such a claim (Orders 10, P-425 and P_463).

In its representations, the Ministry indicates that its decision not to waive the fee was based, in part, on the following considerations:

1. At the time the request for a fee waiver was made, the only reason given by the requester for such a waiver was that his status as a Member of the Legislature placed him in a category of persons who should not be required to pay fees for obtaining access to information under the Act.
2. There does not exist in the Act or the accompanying Regulations any exception for Members of the Legislature for the waiver of fees. Factors such as government accountability or the fact that the taxpayer will ultimately be responsible for the cost of processing the request whether the fee is waived or paid from a political party's research budget are not enumerated in either section 57(4) or the Regulations.
3. The user pay principle in the Act applies to all requesters, regardless of their position or status.
4. The requester has available to him other means of accessing the requested information, whether by Order Paper Question in the Legislature or by viewing the record in person at the Ministry's offices.

In his representations, the appellant agrees that no specific privilege exists in the Act or the Regulations for the waiving of fees for members of the Legislature. The appellant argues, however, that as a Member of the Legislature, it is his duty to represent the people of Ontario in a responsible, well-informed and critical manner. Without access to information, he submits, it is impossible for him to carry out these duties. The appellant further indicates that the requirement that fees be charged limits significantly his ability to effectively monitor the activities of the Government.

The appellant also takes issue with the fact that the Minister, who is the head of the institution and may be viewed as a political opponent, may have made a decision with respect to the waiving of fees solely on the basis of political considerations. The appellant also relies upon the

fact that other requests have been filed by the appellant and responded to by other Provincial Government institutions in the past, without the imposition of fees.

Section 57(4) of the Act describes the procedure to be followed where a request for a fee waiver has been made to the head of an institution. It prescribes that the payment of the fee shall be waived in situations where, in the opinion of the head, after considering the enumerated factors in the section and in the Regulations it is fair and equitable to do so.

In Order P-474, Assistant Commissioner Irwin Glasberg addressed the appropriate standard of review available to the Commissioner's office in cases where the head has found, under section 57(4), that it is not "fair and equitable" to waive the required fee. He stated that:

In Ontario, an appellant, by virtue of section 57(5) of the Act, has the right to ask the Commissioner to review an institution's decision not to waive a fee. The Commissioner may then either confirm or overturn this decision based on a consideration of the criteria set out in section 57(4) of the Act.

In my view, the standard of review which should apply to the review by the Commissioner or his delegate to decisions issued under section 57(4) of the Act is one of correctness ...

In his representations, the appellant raises two factors which he feels ought to have been considered by the head when the decision not to grant a fee waiver was made. One of these factors is the appellant's position as a Member of the Legislative Assembly, and the other is the appellant's view that the dissemination of the record will benefit public health under section 57(4)(c) of the Act. I will deal first with the application of section 57(4)(c) of the Act to this case.

In Order P-474, Assistant Commissioner Glasberg formulated a four-part test to establish whether the dissemination of a record will benefit public health or safety within the meaning of section 57(4)(c) of the Act. The test is set out as follows:

1. Whether the subject matter of the record is a matter of public rather than private interest;
2. Whether the subject matter of the record relates directly to a public health or safety issue;
3. Whether the dissemination of the record would yield a public benefit by (a) disclosing a public health or safety concern or (b) contributing meaningfully to the development of understanding of an important public health or safety issue;

4. The probability that the requester will disseminate the contents of the record.

I will now apply this list of factors to the records at issue in this appeal. The appellant is seeking access to a report concerning the environmental condition of the site of the new Ministry of Natural Resources offices in Peterborough. I agree that the subject of the record is a matter of public interest relating directly to a public health issue and that the requester will most likely disseminate the contents of the record. I cannot agree, however, that the disclosure of the record would yield a public benefit as it would neither disclose a public health concern nor contribute to the development of understanding of an important public health issue. Based on the test outlined in Order P-474, therefore, the appellant has not demonstrated that the dissemination of the record will benefit public health such that the Ministry would be obliged to waive the fee otherwise payable under section 57(1) of the Act.

The second consideration raised by the appellant relates to his position as a Member of the Legislative Assembly. Section 42(j) of the Act contains an express provision which grants to Members of the Legislative Assembly certain rights to access the personal information of their constituents, when authorized by that constituent, which are not available to other individuals. By granting such a right, the Legislature recognized the need for some special status to be conferred upon Members when pursuing the interests of the citizens they represent. This special status was not extended, however, to include the right to access information without the requirement that fees be paid. In my view, if the Legislature had intended to grant such a right to its Members in the Act, it would have expressly done so, as it did in section 42(j).

I find, therefore, that the appellant's status as a Member of the Legislative Assembly is not a factor which must be considered in determining whether it is fair and equitable to waive a fee respecting an access request. It follows, that in the present case, the Ministry's decision not to waive the fee was based on fair and equitable grounds.

ORDER:

I uphold the decision of the Ministry.

Original signed by: _____
Donald Hale
Inquiry Officer

January 12, 1994