



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

ORDER P-741

Appeal P_9400202

Ministry of Natural Resources



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NATURE OF THE APPEAL:

This is an appeal under the Freedom of Information and Protection of Privacy Act (the Act). The Ministry of Natural Resources (the Ministry) received a request for access to information regarding lands covered by specified Crown timber licences. The Ministry granted partial access to the responsive records and provided a fee estimate of \$1,755 to the appellant.

The appellant then made an application for a fee waiver which the Ministry denied. The appellant appealed the amount of the fee estimate and the decision of the Ministry to deny waiver of the fees.

A Notice of Inquiry was provided to the Ministry and the appellant. Representations were received from both parties to the appeal.

In its representations, the appellant claims that it is a "closely held small family corporation" and that the request was for information relating to the family's personal assets and, therefore, no fees are chargeable under section 57(2) of the Act. I will address this issue as a preliminary matter.

PRELIMINARY MATTER:

PERSONAL INFORMATION

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**. [emphasis added]

Under section 2(1) of the Act, "personal information" is defined to mean recorded information about an identifiable individual.

I thus have to determine whether the appellant is an "identifiable individual".

The appellant, a named corporation, submits that it is a "closely held small family corporation". The appellant further submits that the request is for information relating to the family's personal assets and, therefore, the family should not be prejudiced under section 57(2) simply because it has chosen to hold its assets through a corporation rather than as individuals.

Previous orders have determined that information which outwardly relates to a business entity can also be categorized as relating to an "identifiable individual" and, consequently, qualify as personal information for the purposes of the Act (Orders 113, P-364, P-515, M-277 and P-705). In my view, however, it is clear from the use of the term "individual" in section 57(2) of the Act that the exception to paying a fee for access to

personal information only applies to natural persons. Had the Legislature intended that section 57(2) apply to exempt an entity such as a corporation from paying a fee for access, it could have and would have used the appropriate language to make this clear. In addition, the language of section 57(2) requires that the "personal information" relate to the individual who is requesting the information. In my view, a corporation cannot be considered an "identifiable individual" for the purpose of the definition of "personal information" in section 2(1) of the Act.

In my view, the appellant in this appeal is a corporation. Section 57(2) cannot exempt a corporation from the requirement of a fee payment for access to information. Accordingly, I find that section 57(2) has no application in the circumstances of this appeal.

DISCUSSION:

FEE ESTIMATE

I will now consider whether the amount of the estimated fee was calculated in accordance with section 57(1) of the Act which 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.
- ...
6. For any costs, including computer costs, incurred by the institution in locating, retrieving, processing and copying the record if those costs are specified in an invoice received by the institution.

In its representations, the Ministry provided the following breakdown of the fee estimate:

Search Costs Beyond the Initial 2 Hours: ([50 hours of search time - 2 hours] @ \$30/hour)	..	\$1,440
Reproduction Costs:		\$ 50
Severance of Records: (8 hours @ \$30/hour)		\$ 240
Shipping Costs:	..	\$ 25

The Ministry indicated that the request required searches in six different locations and that 1,659 pages of responsive records were located. The Ministry provided sworn affidavits from the three Ministry employees who conducted the searches. The affidavits indicate the specific dates and the time spent in reviewing files for the various searches.

The Ministry states it made 261 severances to the records and that it took approximately 8 hours to prepare the records for disclosure for a total cost of \$240. In addition, 261 pages, including copies of licences, were photocopied at a cost of \$0.20 each for a total of \$50. One of the affidavits indicates that some of the records were received from Management Board Secretariat and Legal Services and the fee estimate includes shipping costs estimated at \$25. Another affidavit indicates that the fee estimate includes 6 hours spent on preparing an index for the purposes of responding to the request.

In reviewing the Ministry's fee estimate, my responsibility under section 57(5) of the Act is to ensure that the amount estimated is reasonable in the circumstances. In this regard, the burden of establishing the reasonableness of the estimate rests with the Ministry. In my view, this burden will be discharged if the Ministry provides the Commissioner's office with detailed information as to how the fee estimate has been calculated, and if it produces sufficient evidence to support its claim.

Given the nature of the request and the number of documents responsive to the request, I accept that the search time indicated by the Ministry in its representations is reasonable in

the circumstances of this appeal with the following exceptions. I do not accept the 6 hours charged for preparing an index as part of search time under section 57(1) of the Act and section 6 of the Regulations. As set out in the IPC Practices, Issue Number 1, where a request involves numerous records, an index should be provided in an institution's decision letter. The time spent preparing an index is a necessary part of an institution's obligations in administering the Act. The time cannot be charged as part of search time and, therefore, the 6 hours are not allowed.

I accept the evidence in the affidavit of one employee who conducted the search that the total search time of that employee was 4 and 1/4 hours and not 4 and 1/2 hours as suggested elsewhere in the Ministry's representations. Accordingly, in calculating the fees in accordance with section 57(1) of the Act and section 6 of the Regulations, the estimated search time should be adjusted to 43 and 3/4 hours, thereby reducing the allowable search charges to \$ 1,312.50.

I also accept the preparation time of 8 hours for making 261 severances in 1,659 pages of records with the resulting charge of \$240 and the photocopying charge for photocopying the severed pages of \$50.

The Ministry has also claimed an estimated cost of \$25 shipping costs to recover the cost of records retrieved from Management Board Secretariat, Legal Services and the Archives. In my view, section 57(1)(d) allows the Ministry to recover shipping costs for records sent to the requester. This is not the case in this appeal.

The only other manner in which the Ministry can recover the costs of retrieving records is under section 6(6) of the Regulations. However, the Regulations clearly stipulate that an invoice received by the Ministry must accompany claims for additional expenses such shipping costs. The affidavit states that the amount charged is an "estimate" and since no invoice has been provided, I presume that an invoice was not received by the Ministry. Therefore, I find that the shipping cost of \$25 is not allowable under the Act.

In conclusion, I have reviewed the evidence before me together with the representations of the parties. Pursuant to the Act and the Regulations thereto, I find as follows:

- (1) that the total allowable search time chargeable by the Ministry is 43 and 3/4 hours @ \$7.50 per 15 minutes which amounts to \$1, 312.50;
- (2) that the preparation time of 8 hours @ \$7.50 per 15 minutes amounting to \$240 charged by the Ministry to sever the records is reasonable;
- (3) that the photocopying charge of \$50 for 261 pages is reasonable; and
- (4) that the shipping cost of \$25 is not reasonable and, therefore, not allowed.

FEE WAIVER

Section 57(4) of the Act states:

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, made under the Act, reads in part, as follows:

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.

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 and 111).

The appellant submits, in its representations, that "the fee is surprisingly high and would, in effect, create a hardship on the corporation." Beyond this general statement, the appellant has provided no evidence, either to this office or to the Ministry, in support of this claim. Consequently, I am not able to conclude that payment of the fee would cause the appellant financial hardship.

The appellant also submits that waiver of the fee would be in the "public interest." The "public interest" as described by the appellant, however, is not one of the criteria listed in section 57(4) of the Act.

Previous orders have established that the phrase in the opening paragraph of section 57(4) "in the head's opinion" means that the head of an institution has a duty to determine whether it is fair and equitable in a particular case to waive a fee and that the Commissioner or his delegate has the statutory authority to review the correctness of that decision. A number of factors have also been identified for consideration in determining whether a denial for a fee waiver is "fair and equitable" (Order M-220).

These factors are (1) the manner in which the institution attempted to respond to the appellant's request, (2) whether the institution worked with the appellant to narrow and/or clarify the request, (3) whether the institution provided any documentation to the appellant free of charge, (4) whether the appellant worked constructively with the institution to narrow the scope of the request, (5) whether the request involves a large number of records, (6) whether or not the appellant has advanced a compromise solution which would reduce costs and (7) whether the waiver of the fee would shift an unreasonable burden of the cost from the appellant to the institution, such that there would be significant interference with the operations of the institution.

In considering the factors listed above, I acknowledge that the appellant has worked with the Ministry to narrow the scope of the request and has also agreed to view the majority of the records in an effort to reduce its costs. I find that the Ministry has also been reasonable in the manner in which it has responded to the request. In the particular circumstances of this case, the nature of the request generated an extensive search in different locations and the volume of records found to be responsive to the request is also large. In view of the foregoing, and being mindful of the user pay principle of the legislation, I find that waiving the fees would shift an unreasonable burden from the appellant to the Ministry. For these reasons, I find that the decision of the Ministry not to waive the fees is fair and equitable and, therefore, proper in the circumstances of this appeal.

ORDER:

1. I allow the Ministry to charge \$1,312.50 for search time.
2. I uphold the Ministry's decision to charge \$240 for the preparation of the record.
3. I uphold the Ministry's decision to charge \$50 for photocopying.
4. I do not uphold the Ministry's decision to charge \$25 for shipping costs.
5. I uphold the Ministry's decision not to waive the fee.

Original signed by: _____
Mumtaz Jiwan
Inquiry Officer

_____ August 16, 1994