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

ORDER P-696

Appeal P-9300590

Ministry of Labour

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ORDER

BACKGROUND:

The Ministry of Labour (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to all Ministry correspondence regarding the interpretation of section 42 of the Employment Standards Act which in any way touches on the issue of vacation accrual in pregnancy and parental leave situations. The requester also asked for any correspondence, memoranda or comments on a Private Member's Bill (Bill 82) to amend section 42 of the Employment Standards Act.

The Ministry located records responsive to the request, which were "precisely on point", and disclosed these records to the requester. The Ministry then stated that, should the requester wish the Ministry to review approximately 200 remaining letters for any information responsive to the request, a fee of $300 would be charged for manual search time.

The Ministry did not indicate whether access to the 200 letters would be granted upon payment of the fee. Rather, it stated that "... records that would be considered to be caught by the personal privacy provisions in the FOIPPA would have to be severed" and that severances would be charged at $30/hour. The Ministry indicated that a deposit of $150 would be required in order to proceed with the search. The requester appealed the fee estimate.

Mediation was not successful and notice that an inquiry was being conducted was sent to the Ministry and the appellant. Representations were received from the Ministry only. In its representations, the Ministry reduced the fee estimate to $240, indicating that the two hours of free search time were not deducted at the time that the original fee estimate was issued.

PRELIMINARY ISSUE:

Because of the nature of the Ministry's decision on the 200 remaining letters, the preliminary issue in this appeal is whether the Ministry fulfilled its obligations under the Act when it responded to the request for access to the records.

The Ministry has not yet made a decision on whether (or not) access will be given to these letters. 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 where the records are unduly expensive to retrieve for inspection by the head in making a decision, the institution may provide the requester with an interim decision and fee estimate.

Order 81 addresses the situation in which a record may be "unduly expensive to produce for inspection by the head in making a decision ... whether the undue expense is caused by either the size of the record, the number of records or the physical location of the record within the institution." In this case, the head can issue an interim decision indicating to the requester the degree of access which he or she is likely to receive, together with a reasonable estimate of the proposed fees. In addressing this issue, former Commissioner Sidney B. Linden made the following comments in the body of Order 81:

> How can a head be satisfied that the fees estimate is reasonable without actually inspecting all of the requested records? 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. Admittedly, the institution will have to bear the costs incurred in obtaining the necessary familiarity with the records, however, this is consistent with other provisions of the Act. For example, subsection 57(1)(a) stipulates that the first two hours of manual search time required to locate a record must be absorbed by the institution and cannot be passed on to the requester.
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> 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).

While the Ministry's representations acknowledge that the conditions necessary for an interim decision as set out in Order 81 are not present in this appeal, it submits that there are situations where "a final decision is not practical but an interim decision is not viable", and that this is such a case.

The Ministry submits that this is an appeal in which it is unclear whether the search will result in any responsive records being located, since the 200 letters it identified deal with the subject matter of the request **in general**. The Ministry believes that if no additional responsive records are located, the requester may not pay for the expended search time.

The Ministry further submits that the amount of search time that would be required to process the request is "well above average" and that "these types of searches border on the frivolous". The Ministry takes the position that it should be entitled to receive a deposit from the requester prior to proceeding with the search.

The Act presupposes that an institution has made a decision on access when it issues a fee estimate (Order P-502). 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 a 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.

As indicated previously, the Ministry agreed that the records at issue are not unduly expensive to produce for inspection such that the Order 81 procedures should apply. I agree that a search through 200 letters is not an unusual situation in which the Ministry may issue an "interim" decision. Nor do I believe that this type of scenario should warrant the creation of an additional special category of decisions and/or fee estimates.

Furthermore, in my view, the fact that the search **may** not produce any records responsive to the request is not a proper consideration in issuing a decision. It is always possible that an institution may undertake an unsuccessful search for responsive records. In such circumstances, the

institution will issue a decision that "no records exist". In such a case, an institution will generally not charge or waive the fees associated with search time, on the basis of section 8 of Regulation 460 made under the Act. This section provides, in part, that in considering whether to waive payment requested under the Act, the head should consider whether access is granted to the records.

Generally, this same situation will occur when an institution denies access in full to the records responsive to a request. In both instances, the institution will have expended search time in locating the records and will not recover the associated fees.

Accordingly, it is my view that the Ministry has not fully complied with its obligations under the Act in response to the request. On this basis, I order the institution to issue to the appellant a final access decision which conforms to the requirements of section 29 of the Act.

ISSUE:

In order that the requester's appeal may proceed as expeditiously as possible once the Ministry issues its new decision letter, I will now consider whether the amount of the estimated fee for the production of the 200 letters was calculated in accordance with section 57(1) of the Act.

SUBMISSIONS/CONCLUSIONS:

Section 57(1) of the Act reads 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.

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.

SEARCH TIME

In its representations the Ministry indicates that it identified 200 letters which could be searched. The Co-ordinator estimated that, based on a number of considerations, it would take approximately three minutes to review each letter, in order to determine whether it was responsive to the request. This would result in approximately ten hours of search time, less the two free hours, yielding a total cost of $240.

Since the actual search for additional responsive records was not conducted, the Ministry did not provide any evidence as to what actions were actually necessary to locate and retrieve the requested records. In particular, the Ministry provided no evidence as to the nature of these records, the manner in which they are filed or the possible length of each letter. Accordingly, because there is no evidence before me to justify the fees for search time, I disallow this portion of the fees charged.

PREPARATION TIME/PHOTOCOPIES

In its decision, the Ministry indicated that severance time, i.e. preparing the record for disclosure, is billed at $30 per hour. It did not include in its representations any submissions on the specific charges which would be levied to remove the personal information of other individuals from the responsive letters. The Ministry has provided no explanation as to why the remaining 200 letters, as opposed to those already disclosed to the appellant, would likely contain personal information, other than to say that those disclosed involved institutions rather than individuals. In these circumstances, the Ministry may not claim any fees for preparation 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 twenty (20) days of the date of this order. This decision should be made in accordance with section 29 of the Act and without recourse to a time extension.

2. I do not uphold the search time or preparation time costs charged by the Ministry.

3. 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.

4. I order the Ministry to provide me with a copy of the access decision letter issued to the appellant pursuant to Provision 1 of this order, within twenty-five (25) days of the date of this order. This copy of the decision letter should be forwarded to my attention, c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.

Original signed by: June 9, 1994
Anita Fineberg

Inquiry Officer