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

ORDER P-1101

Appeal P_9500651

Ontario Insurance Commission

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/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

The appellant submitted a request under the Freedom of Information and Protection of Privacy Act (the Act) to the Ontario Insurance Commission (the OIC). The request was for a copy of any delegations of powers or duties by three officials at the OIC (namely, the Commissioner, the Superintendent and the Director).

In response to this request, the OIC issued a fee estimate of $120, based on time required to search for responsive records and prepare them for disclosure.

The appellant filed an appeal of this fee estimate. As a result, Appeal P-9400765 was opened. For administrative reasons, this file number has now been changed to Appeal P-9500651.

A Notice of Inquiry was sent to the OIC and the appellant. In response to this notice, both parties submitted representations.

PRELIMINARY ISSUE:

The representations submitted by the OIC raised a new issue by arguing that the appeal is frivolous, vexatious and/or an abuse of process. Subsequent to the receipt of the OIC's representations, similar issues were canvassed in some detail in Order M-618, issued by Commissioner Tom Wright. Accordingly, a copy of Order M-618 was sent to both parties to this appeal, and they were invited to submit supplementary representations. In response to this invitation, both parties submitted representations.

The appellant objected to the fact that the OIC was permitted to argue, at a late stage in the appeals process, that the appeal is frivolous, vexatious and/or an abuse of process. In the appellant's view, this is similar to the late raising of discretionary exemptions, which is usually not permitted. In my view, an argument that an appeal is an abuse of process is not analogous to an attempt to claim a new discretionary exemption. If sustained, an argument that an appeal is an abuse of process could undermine the legitimacy of the appeal itself, whereas the question of whether a new exemption can be claimed may be characterized as a process issue **within** a properly constituted appeal. On this basis, it can be seen that the abuse of process question is of a more fundamental character, and I am therefore prepared to consider it in this case.

In Order M-618, the Commissioner considered whether, under the present wording of the statute, it would be appropriate to apply the concepts of "frivolous" and/or "vexatious" in deciding whether requests and/or appeals should be permitted to go forward. In that regard, Commissioner Wright commented as follows:

> In my view, the concepts of "frivolous" or "vexatious" do not sit comfortably with a freedom of information regime which grants an open-ended or unqualified right of access to public information of which government institutions are only the stewards.

He went on to find that a legislative amendment would be required to permit him to apply these concepts. I agree. Although such an amendment is currently being considered by the legislature,

it has not been passed into law, and therefore I will not consider whether the request which led to the appeal, or the appeal itself, is "frivolous" or "vexatious".

However, in the same order (M-618), Commissioner Wright made a finding that the requester in that case had abused the access process, and imposed conditions on future requests by that individual. Therefore, in this appeal, I will consider whether the appellant has abused the access process.

The OIC's arguments in this regard relate primarily to the volume of requests it has received from the appellant, and the varied nature of those requests. The OIC also refers to litigation undertaken against it by the appellant, a number of privacy complaints submitted by the appellant to this office concerning the OIC, the number of appeals filed by the appellant from OIC access decisions, and the volume of faxes and telephone calls received from the appellant. The OIC also refers to the appellant's visits to its premises.

In Order M-618, the Commissioner stated that "I am not prepared to say that this fact of volume alone would necessarily amount to an abuse of process." Later in the order, he stated that "[t]aken together with other factors, however, the excessive volume of requests and appeals may amount to an abuse of process." The "other factors" which were found to justify a conclusion that the appellant in that case had abused the access process included:

- the varied and broad nature of the requests together with the fact that identical requests were submitted to a number of different government organizations;
- a dramatic increase in the number of requests submitted after the institution applied for an injunction based on the requests being "frivolous, vexatious and an abuse of process"; and
- the association of the requester with an individual whose stated purpose in making freedom of information requests was to "... harass government and to burden or break the system".

In my view, these factors are not the only ones which could lead to a finding of abuse of process, but they provide examples of such factors.

I also note the Commissioner's comment in Order M-618, that "[o]ther instances of abuse of process may arise in the future. However, from my experience in administering the Acts, I believe such instances would be extremely rare."

In my view, the only factors mentioned by the OIC which suggest that the appellant may be abusing the access process relate to the volume and variety of requests he has submitted to the OIC. I do not agree that the other factors mentioned by the OIC indicate that the appellant is abusing the access process.

The circumstances here are very different from those described in Order M-618. The number of requests submitted by the appellant (as referred to in the OIC's submissions) is dramatically smaller than the volume submitted by the requester in Order M-618. In addition, they were all submitted to the same institution. Moreover, the appellant is a former arbitration client of the

OIC's, who has instituted a lawsuit relating to the arbitration, suggesting a possible reason for some of his requests.

For these reasons, I am not prepared, at present, to find that the appellant is abusing the access process.

DISCUSSION:

FEE ESTIMATE

The OIC's representations indicate that there is no central file where delegations are kept. They also state that, since the three individuals referred to in the request may delegate their authority under the Insurance Act and other legislation administered by the OIC, delegations may appear in files throughout the OIC. Based on the reporting structure of the OIC, as it relates to the three individuals, there are twelve branches which would have to conduct a search. The search time estimated for each branch is fifteen minutes, for a total of three hours. However, the OIC indicates that additional time could be required, and on this basis, the OIC estimates its search time as being three to four hours.

Fees for search time are authorized by section 57(1)(a) of the Act, which states:

> 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 search charge for every hour of manual search required **in excess of two hours** to locate a record. (emphasis added)

Section 6 of R.R.O. 1990, Regulation 460 (made under the Act) also contains a relevant provision. This section states, in part, as follows:

> The following are the fees that shall be charged for the purposes of section 57(1) of the Act:
>
> 3. For manually searching for a record **after two hours have been spent searching**, $7.50 for each fifteen minutes spent by any person. (emphasis added)

I am satisfied that the OIC's representations on the fee estimate are sufficient to justify an estimated total search time of three hours. However, the OIC has not deducted the two free hours contemplated by the Act and Regulation. Once this time is deducted, the total chargeable search time is one hour. Based on section 6 of the Regulation, this would result in an estimated search fee of $30.

The Ministry has not provided any representations to support charges for preparing records for disclosure and I do not uphold any estimated amount in that regard.

ORDER:

I uphold a fee estimate for search time in the amount of $30.

Original signed by: January 17, 1996
John Higgins
Inquiry Officer