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

ORDER P-1259

Appeal P-9500631

Ministry of Municipal Affairs and Housing

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BACKGROUND:

The appellant, an employee of the Ministry of Municipal Affairs and Housing (the Ministry), was the respondent in a harassment complaint made by a co-worker (the co-worker). This complaint was investigated under the government's Workplace Discrimination and Harassment Prevention policy (the WDHP investigation). In the context of the WDHP investigation, the appellant made an informal request that the Ministry restore all of his electronic mail messages (e-mails) sent to and received from the co-worker for the months of July, August and September 1994.

Systems staff at the Ministry (Systems) attempted to respond to this informal request after obtaining permission from senior management to restore the e-mails from back-up tapes. Ministry policy requires permission because back-up restoration involves 4-5 hours of senior technical staff time.

Systems asked the appellant if he wanted any other employee's e-mails to be restored at the same time, and the appellant indicated that he wanted any e-mails sent to him by the co-worker during this same three-month period.

Systems succeeded in restoring the appellant's own "in" and "out" box e-mails for July and September. None of them involved the co-worker. Systems explained that, because back-up tapes are produced weekly, if an e-mail was sent, received and deleted within the week, it would not appear on the back-up tape.

Despite many attempts, Systems was unable to restore the appellant's e-mails for August because the back-up tapes for this month were damaged.

At this point in time, the situation was as follows:

1. Systems advised the appellant that it might be possible for an outside supplier to restore the August back-up tapes containing his e-mails, but there was no guarantee that restoration was possible. Systems estimated that the cost of this would range from $2,000 to over $10,000. Systems asked the appellant to indicate if he wished them to pursue this option. Who would pay for these costs was not resolved.

2. The Ministry felt that the request to restore the co-worker's "out" box e-mails raised privacy issues under the Freedom of Information and Protection of Privacy Act (the Act), and that the appellant would have to make a formal request.

NATURE OF THE APPEAL:

The appellant submitted the following request under the Act.

> I am formally requesting the restoration of the E-mail correspondence from July to September 1994 between myself and [the co-worker]. More specifically, I want access to E-mail messages that [the co-worker] had forwarded to me in July and August of 1994 that are resident in her E-mail "out box".

The request letter also referred to the unresolved cost issue concerning his August e-mails. The Ministry responded by providing the appellant with a fee estimate of $7,412.36 for processing the request. The Ministry told the appellant that this estimate was based on information provided to him by Systems for the restoration of the back-up tapes which would contain any of his August e-mails. The appellant was asked to provide written acceptance of this fee estimate, and a deposit of 50% before the Ministry would proceed.

The appellant wrote to the Ministry requesting a fee waiver. In this letter the appellant also complained that the Ministry had not responded to the portion of his request relating to the co-worker's e-mails for July through September. It seems that the Ministry did not respond to appellant's letter. The appellant provided this office with a copy of an e-mail which he had sent to the Ministry's Freedom of Information and Privacy Co-ordinator (the Co-ordinator). This e-mail purportedly summarizes a conversation concerning the appellant's letter. Assuming this e-mail is accurate, the Ministry declined the request for a fee waiver, and advised the appellant that no decision would be made regarding access to e-mails retrieved from the co-worker's "out" box until their contents had been reviewed under the Act.

The appellant appealed the Ministry's fee estimate and its refusal to waive the fee. Because the appellant had already received his e-mails for July and September, he withdrew this portion of his request during mediation.

While this appeal was in process, the WDHP investigation was completed. In the context of the WDHP investigation, the appellant was provided with a transcript of all e-mails retrieved from the co-workers "in" and "out" boxes for the months of July, August and September 1994. I subsequently confirmed this with Ministry staff in the context of my inquiry. According to the Ministry, restoration of the co-worker's August e-mails was possible because they had been backed-up from a different file server than the appellant's e-mails.

It might appear that by providing the appellant will full access to all e-mail exchanges between himself and the co-worker from both her "in" and "out" boxes, that the appellant's request has been addressed, albeit through the WDHP process and not in response to his request under the Act. However, after reviewing the co-workers e-mails, the appellant continues to feel that some critical e-mails exchanged by him and the co-worker are missing, and he confirmed that he wished to proceed with this appeal.

In my view, an argument could be made that the Ministry made all reasonable efforts to locate responsive records, and that the information the appellant is seeking access to is not a "record", as defined in section 2(1) of the Act, as it is not "capable of being produced from a machine readable record . . . by means of computer hardware and software or any other information storage equipment and technical expertise **normally used by the institution"** (emphasis added). However, the Ministry has not made this argument and decided to process the request under the Act.

Accordingly, as a result of various activities which took place during the course of this appeal, the only remaining issues to be addressed in this order are the appellant's appeal of the fee estimate, and the Ministry's denial of a fee waiver for the costs of restoring the August back-up tapes including his e-mails.

DISCUSSION:

NATURE OF THE DECISION

The Ministry issued its fee estimate before proceeding with the request. The fee estimate did not include an "interim access decision" indicating whether the records were likely to be released.

The concept of an "interim" access decision to accompany a fee estimate was first discussed in Order 81. In that order, former Commissioner Sidney B. Linden established that an interim access decision may be issued to accompany a fee estimate "... where the institution is experiencing a problem because a record is unduly expensive to produce for inspection by the head in making a decision." Order 81 goes on to provide that the undue expense may be caused by "... the size of the record, the number of records or the physical location of the record within the institution." It also sets out guidelines for the contents of interim access decisions and the preparation of fee estimates. It is clear that, in order to comply with the requirements outlined in Order 81, an interim access decision must accompany a fee estimate where an institution claims that a record is unduly expensive to produce for inspection by the head. (See also order M-555 where the principles and reasoning of Order 81 were reviewed and affirmed.)

I have already outlined the difficulties that the Ministry experienced in attempting to retrieve the appellant's e-mails for the month of August. In my view, these circumstances meet the criterion of "unduly expensive" set out by former Commissioner Linden in Order 81. In this appeal, the Ministry is faced with the computerized equivalent of records which are in a physical location which makes their production onerous. Also, assuming the restoration is successful, all e-mails on the back-up tapes for August will be restored (not just those for the appellant), and Ministry staff must also search through a large volume of records to locate the e-mails involving the appellant and the co-worker. I find that all of these factors legitimately place the Ministry in a situation where a fee estimate and interim access decision is appropriate.

As far as the fee estimate is concerned, the Ministry relied on the advice of an experienced employee, a Senior Project Manager with the Ministry's Information and Technology Services Branch. The estimate was calculated according to the restoration requirements and the estimate of computer programming time provided by this Senior Project Manager. In my view, the approach taken by the Ministry was reasonable in the circumstances. I will discuss the actual components of the estimate later in this order.

As far as the interim access decision component is concerned, this should have been communicated to the appellant at the time the Ministry responded to his request. It wasn't, although the e-mail sent by the appellant to the Co-ordinator after receiving the Ministry's decision letter indicates that the appellant was made aware that any e-mails involving the co-worker would have to be reviewed before a decision could be made regarding access. In its representations provided in response to the Notice of Inquiry, the Ministry confirms that exemption claims under sections 21 and 49 of the Act might apply, should e-mail exchanges between the appellant and the co-worker be located as a result of the restoration.

In my view, no useful purpose would be served at this stage of the appeal in my ordering the Ministry to make a formal interim access decision. The appellant is aware of potential personal privacy concerns regarding the co-worker, which the Ministry is required to consider prior to releasing any responsive records. That being said, the Ministry has already released all e-mails located in both the co-worker's "in" and "out" boxes. This could be a relevant circumstance for the Ministry to consider in assessing the application of sections 21 and 49, should any responsive records be recovered.

FEE ESTIMATE

The Ministry's original fee estimate for retrieving e-mails for July, August and September included the following items:

1.	restoration of the August tapes by an outside supplier	$6,000.00
2.	computer programming (21 hrs @ $60.00/hr.)	$1,260.00
3.	search (7 hrs - 2 free hrs = 5 hrs @ $30.00/hr.)	$ 150.00
4.	courier charges	$ 2.36
	total fees	$7,412.36

Because this appeal now only involves e-mails for August, the Ministry reduced items 2 and 3 as follows:

2.	computer programming (13 hours @ $60.00/hr.)	$ 780.00
3.	search	nil

Items 1 and 4 remain unchanged, and the total revised fee estimate is $6,782.36

Section 57(1) of the Act and accompanying regulations dealing with fees, were amended in February 1996 by the Savings and Restructuring Act (Bill 26). The request and appeal in this case were both initiated prior to these amendments. Therefore, the relevant provisions of Section 57(1) and accompanying regulations for the purposes of this appeal are those which existed at the time of the request and appeal. They read as follows:

57(1) 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, stated, in part:

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

...

5. For developing a computer program or other method of producing a record from machine readable record, $15 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 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. The burden of establishing reasonableness rests with the Ministry.

1. Restoration of the tapes by an outside supplier

In its representations, the Ministry explains that in order to retrieve a particular individual's e-mails, it is necessary to restore the back-up tapes for all individuals who used the same file server as the appellant. In essence, the entire file server must be recreated. The file server containing the appellant's August e-mails had approximately 150 users, and the back-up for this period consisted of five 2-megabyte tapes. The Ministry states that it made a number of unsuccessful attempts to restore the file server from the August back-up tapes, and concluded that the only way this might be achieved would be by hiring an outside supplier.

The Ministry states that it based the figure of $6,000 for restoring the August back-up tapes on the estimate given to the appellant by Systems before the request was formally submitted under the Act. The Ministry chose the mid-point of the range identified by Systems.

The Ministry submits that the outside supplier's fee is a recoverable cost under paragraph 6 of section 6 of Regulation 460, because it relates to computer costs that will be incurred by the Ministry in retrieving and processing the records. The cost will be specified in an invoice from the supplier hired to complete the restoration.

In its representations, the Ministry clearly states that the appellant will only be charged for costs actually incurred by the Ministry. If costs end up being less than the estimated restoration (or programming) charges, only actual costs will be charged to the appellant.

I find that costs incurred by the Ministry for restoring the August back-up tapes fall within the parameters of paragraph 6 of section 6 of Regulation 460, and may be charged by the Ministry.

2. Computer programming

The Ministry's fee estimate for computer programming is based on the Senior Project Manager's estimate of the work required to "restore the e-mails and set up security". The Ministry includes a copy of this estimate with its representations.

The programming costs relate to the following activities:

- setting up and preparing the file server to be ready to restore the information - 7 hours;
- restoring all e-mails from the restored tapes, and restoring the individual's user area and setting up security to allow the user to log on to the new server and access his own files and e-mails - 4-6 hours;
- removing the security changes and purging all information from the temporary file server - 2 hours.

The Ministry's cost estimates for the programming work associated with the August restoration is 7 + 4 + 2 = 13 hours. The 4 hours for the second component is the minimum time identified by the Senior Project Manager.

I find that all of these costs relate to "developing a computer program or other method of producing a record from a machine readable record", and therefore fall within the parameters of paragraph 5 of section 6 of Regulation 460, and may be charged by the Ministry.

3. Shipping

The Ministry has included a charge of $2.36 for courier service. This charge represents the cost of shipping the August tapes back to the Ministry, which is an allowable charge under section 57(1)(d) of the Act.

Therefore, I find that the fee estimate of $6,782.36 provided by the Ministry is in accordance with the appropriate provisions of Section 57(1) of the Act and Regulation 460, and may be charged to the appellant.

FEE WAIVER

The appellant seeks a fee waiver on the grounds that payment of the fee will cause him financial hardship. He also believes that he should not be asked to bear the cost of recovering e-mails that were lost due to "accident, negligence or improper maintenance" by the Ministry.

At the time of the request and appeal, section 57(4) of the Act stated:

(4) 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 stated:

8. 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 previous orders that the person requesting a fee waiver must justify the request and demonstrate that the criteria for a fee waiver are present in the circumstances (eg. Orders 10, 111, P-425, P-890 and P-1183). I am also mindful of the Legislature's intention to include a user pay principle in the Act, as evidenced by the provisions of section 57.

The appellant has not provided any specific evidence to indicate that payment of the fees charged by the Ministry would constitute a financial hardship. The gist of his submissions are reflected in the following passages taken from his representations:

> If the outstanding e-mail messages for August 1994 cannot be restored by [Ministry] staff and require the expertise of an outside company - I hereby request the Commissioner's office to waive these fees against me. I should not be burdened with any fees to [the Ministry] as it was [the Ministry] that initiated action against me; it was [the Ministry] that directed me to produce evidence to support my position; and it is [the Ministry] that has been negligent in properly storing official government business records. If the Commissioner's decision is not to waive these fees against me, then I would request the Commissioner permit me to allow an outside party of my choice to recover e-mail records of the August 1994 back-up tape under the supervision of [Ministry] staff to ensure there will be no breech of government security.
>
> Section 57 of the Act states that a head may charge fees for accessing a record. For example, Subsection 57(1) of the Act sets a fee of 20 cents per page for photocopies - the Act does not state that if the photocopy machine is inoperative

> that the person requesting such record is responsible for bearing the cost of repairing the photocopier and the photocopies. [A Ministry official] waived any administrative fee for Ministry staff time involved in recovery of "normally accessible" e-mail back-up tapes for July to September 1994. I should not be saddled with a financial burden due to the fact that the August 1994 e-mail back-up tape may require outside assistance to recover the contents due to accident, negligence or improper maintenance of the tape by [Ministry] staff.

The Ministry points out that it has spent a considerable amount time and effort in attempting to recover the appellant's e-mails. In the Ministry's view, any additional costs would be onerous. The Ministry points out that its policy of requiring prior approval before any deleted e-mails can be retrieved from back-up tapes was put in place precisely because of the costs and time required to undertake this exercise. The Ministry requires a cost-benefit analysis to ensure that financial and human resources are being spent in accordance with Ministry priorities.

Having carefully considered the representations of both parties, I find that the appellant has failed to establish the requirements for a fee waiver under section 57(4). Even if I were to accept that payment of the fee would constitute a financial hardship for the appellant (which the appellant has not addressed specifically in his representations), a waiver is not automatic. It is only a consideration that the Ministry must take into account in determining whether a waiver is "fair and equitable" in the circumstances.

Previous orders have set out a number of factors to be considered in determining whether denial of a fee waiver is "fair and equitable" (eg. P-890 and P-1183). 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.

(7) whether the waiver of the fee would shift an unreasonable burden of the cost from the appellant to the institution.

The Ministry points out that considerable efforts were made to accommodate the appellant, both informally and after his formal request was made under the Act. The Ministry participated in

mediation efforts to narrow the scope of the request, and provided the appellant with access to his e-mails for July and September, and a transcript of the co-workers e-mails for July, August and September, free of charge. The Ministry has also undertaken to absorb the search fees associated with locating any responsive records from the August tapes, if restoration is successful. The Ministry points out that the only compromise solution identified by the appellant in reducing the restoration costs was hiring his own systems professional to conduct the exercise. The Ministry advised the appellant that this was not possible because the Ministry's Security Policy for Electronic Mail restricts access to the Ministry's e-mail systems to suppliers conducting business with the Ministry.

Having considered all relevant factors and the requirements of section 57(4) of the Act and Regulation 460, I find that, even if payment of the fees would cause a financial hardship for the appellant, the Ministry's decision not to waive the fees was fair and equitable in the circumstances of this case.

At the time the Ministry's decision was made, section 57(2) prohibited the Ministry from requiring a person to pay a fee for access to his or her own personal information. The appellant's request does not specify that he is seeking access to only his own personal information, and he has not raised the application of this section. The Ministry has, however, indicated that the exemptions found in section 49 of the Act might apply, which would suggest that some of the records, if they are recoverable, may contain the appellant's personal information. If the appellant proceeds with his request by paying the deposit on the fee estimate, the Ministry must review any records recovered to determine whether they contain the appellant's personal information, and adjust the actual fee accordingly (Order M-514).

ORDER:

1. I uphold the Ministry's fee estimate in the amount of $6,782.36.

2. I uphold the Ministry's decision to deny a fee waiver.

Original signed by: September 11, 1996
Tom Mitchinson
Assistant Commissioner