



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

ORDER P-1628

Appeal P_9800118

Ministry of Education and Training



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NATURE OF THE APPEAL:

On December 24, 1997, the Ministry of Education and Training (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for:

1. Calculations and background documents pertaining to the new funding formula for Ontario public schools. Including memoranda to Ministers concerning this topic;
2. Background material and related documentation, calculations, memoranda, etc. related to the determination of the funding formula for the Ottawa-Carleton District Public School Board.

The Ministry assigned Request No. MET-970054 to this request.

On March 2, 1998, the Ministry informed the requester that in response to Part 1 of the request, an estimated fee of four thousand, seven hundred and eighty dollars (\$4,780) would be applied. The estimate was based on records that were in existence up to and including the date of the request (December 24, 1997). With respect to Part 2 of the request, the Ministry advised the requester that records do not exist which respond to that part of the request.

On March 11, 1998, the requester narrowed the request, now in three parts, based on correspondence from the Ministry, to:

1. BRIEFING NOTES/HOUSEBOOK NOTES
2. ISSUES
3. Models of funding formulae that are found in the 500 pages of electronic data to which your letter [March 2, 1998] referred. This information we would like to view in electronic format on a computer. Please do not make paper copies.

On the same date, the requester also submitted the following new request:

This request is related to request no. MET- 970054.

For the period 24 December 1997 to date [March 11, 1998] please provide the following records related to the development of the provincial funding formula for public education:

1. Briefing notes and housebook notes
2. Issues papers or notes
3. electronic data, specifically models of funding formulae

The Ministry did not respond to the requester's narrowed request. On April 9, 1998, the requester appealed the Ministry's decision with respect to the original request (MET-970054).

The Ministry assigned request no. MET-980011 to the latest request. The Ministry combined both requests (MET-970054 and MET-980011) as they relate to the same information. Both requests are included in this appeal.

On April 16, 1998, the requester (now the appellant) wrote to the Ministry asking for a list of topics found in the files relating to:

1. BRIEFING NOTES/HOUSEBOOK NOTES
2. ISSUES

The appellant also requested that the Ministry's search be focussed on a number of named public boards of education; that for each of these boards, the appellant would like to view examples of the draft or model funding formulae at two-month intervals, working backwards from the date the Ministry received the second request, to the beginning when work began on the funding formula; with respect to format, the appellant would like to see how the data was incorporated, over time, into eleven named funding model grants, and given that names and categories may have changed, any related format, arrangement, combination or other illustration of the information that is relevant to the request(s).

The appellant asked that this material be available in electronic format on computer as opposed to paper copies.

On May 6, 1998, the Ministry issued a revised fee estimate addressing the appellant's March 11, 1998 letter and combining both requests. The fee estimate was based on records in existence on March 13, 1998, the date the Ministry received the appellant's second request.

The revised fee estimate of seven hundred and forty-five dollars (\$745) was applied only to Part 1 (Briefing Notes/Housebook Notes) and Part 2 (Issues) in the appellant's March 11, 1998 letter. The Ministry also informed the appellant that a preliminary review of the records indicates that the exemptions found in sections 12, 13, 17, 18 and 21 of the Act may apply to deny access to records.

Part 3 (Models of Funding Formulae in Electronic Data) was not included in this revised fee estimate because the scope of responsive documentation was changed in the appellant's April 16, 1998 correspondence. A revised fee estimate for Part 3 was to be provided by the Ministry in separate correspondence.

On August 14, 1998, the Ministry issued a revised decision with respect to Part 3 of the requests as detailed in the appellant's April 16, 1998 letter. It informed the appellant that no records exist in response to Part 3 of the requests as detailed in his April 16, 1998 correspondence. It advised the appellant, however, that there are records which may deal with the kind of information that he is seeking. The Ministry also informed him that these records may be exempt under sections 12 and 13 of the Act.

In subsequent discussions with this office, the appellant agreed to proceed to inquiry, within the scope of this appeal, on Parts 1 and 2 of the requests. The appellant and the Ministry will work

together in dealing with Part 3 of the requests and if the appellant wishes to appeal the Ministry's decision with respect to Part 3, he will file a separate appeal.

At issue in this appeal, therefore, is the fee estimate of seven hundred and forty-five dollars (\$745) for Parts 1 and 2 of the requests (Briefing Notes/Housebook Notes and Issues).

DISCUSSION:

FEES

The charging of fees is authorized by section 57(1) of the Act, which states:

A head shall require the person who makes a request for access to a record to pay fees in the amounts prescribed by the regulations for,

- (a) the costs of every hour of manual search required 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;
- (d) shipping costs; and
- (e) any other costs incurred in responding to a request for access to a record.

Section 6 of R.R.O. 1990, Regulation 460 also deals with fees. It states, in part, as follows:

The following are the fees that shall be charged for the purposes of subsection 57(1) of the Act for access to a record:

1. For photocopies and computer printouts, 20 cents per page.
2. For floppy disks, \$10 for each disk.
3. For manually searching a record, \$7.50 for each 15 minutes spent by any person.
4. For preparing a record for disclosure, including severing a part of the record, \$7.50 for each 15 minutes spent by any person.
5. For developing a computer program or other method of producing a record from machine readable record, \$15 for each 15 minutes spent by any person.

6. The costs, including computer costs, that the institution incurs in locating, retrieving, processing and copying the record if those costs are specified in an invoice that the institution has received.

Preliminary issues

In his representations, the appellant expresses concern about the Ministry's filing system with respect to the funding formula and surmises that assembling the records was, in all likelihood, a time consuming and costly exercise. He states that he should not be charged for any time required to organize the material because, as a taxpayer, he has already paid for this basic work. He acknowledges, however, that the fee estimate originally provided to him was amended significantly. In fact, the appellant has not been charged any fee relating to the time required to search for or organize responsive records. In my view, the Ministry's records management practices are not at issue and I will not deal with this issue further.

In another vein, the appellant believes that it is "simply not right to charge a citizen this much money for information that should be readily accessible to the public". The appellant describes the frustration and alienation felt by parents as a result of the processes involved in government decision-making relating to funding cuts and school closings. He concludes that: "All citizens have a right to a clear and rational explanation of government policy, regardless of the government in power. That such explanations appear to be based on the ability of citizens to pay is abhorrent to democratic principle."

While I sympathize with the appellant's desire to understand the policy-making process behind the government's funding formula relating to education as well as to be able to participate effectively in decisions which affect his children's education, the Act stipulates that, with certain exceptions, records in the custody and control of government are subject to the Act. Moreover, the Act clearly contemplates, in accordance with section 57(1) and Regulation 460, the charging of fees in access requests for records falling under the purview of the Act.

In my view, the appellant's arguments on this issue relate to whether the Ministry should waive the fees in the circumstances of this appeal. Section 57(4) of the Act provides that:

A head shall waive the payment of all or any part of an amount required to be paid under subsection (1) if, 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 provides 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.
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.

The Ministry advises that it has not received a request from the appellant that the fees be waived, nor has it received any evidence that any of the circumstances in which a fee may be waived exist. In Order P-31, former Commissioner Sidney B. Linden examined whether the head has a duty to consider the application of the former section 57(3) (which dealt with fee waiver) without any of the specific considerations enumerated thereunder being raised by the appellant. In that order, he stated:

As I stated at page 7 of my Order in Appeal No. 880009, *supra*, “I believe it is the responsibility of the requester to raise the question of fee waiver under subsection 57(3). However, I do not feel that the Act requires this request to be explicit or in writing.” It is not clear in this case whether the conduct of the appellant raised the issue of waiver either implicitly or explicitly. However, I agree with the head “that the subsection requires the Requestor (sic) to provide adequate evidence to support a claim for a fee waiver.” In this case, in the absence of any submissions from the appellant on this issue, I accept the submission of the head that “the Requester (sic) has offered no evidence to support a claim for a fee waiver.” In the circumstances of this case, I accept the decision of the head that there is no basis to justify a fee waiver.

I agree that initially, there must either be a request to the head that the fees be waived, or at least, some evidence that the requester is raising this issue. I would go further, however, and suggest that, unless the head has had the opportunity to turn his or her mind to the issue of waiver and make a decision in this regard, a request that the Commissioner address this issue would be premature. In this case, the appellant has not raised this issue with the Ministry expressly. Nor is there any indication in the correspondence between the appellant and the Ministry that it has been raised by implication. Therefore, because the head has not made a decision on the question of waiver, it is not a matter which is properly before me on appeal, and I am precluded from addressing it in this appeal.

That being said, however, the appellant may yet request a fee waiver from the Ministry and would be able, thereafter, to appeal the Ministry's decision if he did not agree with it.

Fee estimate

The Ministry provides a detailed description of the manner in which the fees relating to this request were calculated. It indicates that it has based the estimated fee of \$745 on the costs associated with the preparation of the records for disclosure, photocopying and shipping costs. I will deal with each of these costs below.

Preparation costs

Section 57(1)(b) of the Act and paragraph 6(4) of Regulation 460 provide that fees may be charged for preparing the records for disclosure, including the costs relating to severing the records at a rate of \$7.50 for each 15 minutes. The Ministry indicates that, based on the size of the files which contain responsive records, it has estimated that 400 pages of records respond to part 1 of the amended request and that 2500 pages would be responsive to part 2, for a total of 2900 pages. The Ministry indicates further that a representative sample of each category of records was provided to the head who then determined that the exemptions in sections 12, 13, 17 and 21 would apply to over half of the portions of those records responsive to part 1 and that sections 13, 17 and 21 would apply to those responsive to part 2 of the amended request.

The Ministry advises that it has calculated that it will require 5 seconds per page to scan and sever the exempt portions of the records. The Ministry clarifies that it has not included any time spent in making a decision as to the application of the exemptions in this calculation. Finally, the Ministry points out that previous orders of this office have held that two minutes of preparation time per page for the severing of exempt information was reasonable (Orders M-811 and M-858). I agree that two minutes per page would not be unreasonable in cases where there are multiple portions of each page of the records which must be severed. In this case, the Ministry has provided a considerably lower estimate for the time required. In my view, the Ministry's estimate is entirely within the bounds as identified in previous orders and, in and of itself, is quite reasonable. Therefore, I uphold the Ministry's estimate of \$120 for preparation time.

Photocopying

Section 57(1)(c) of the Act and paragraph 6(1) of Regulation 460 collectively provide that an institution may charge 20 cents per page for photocopying records for disclosure. The Ministry indicates that it has applied this permitted charge to the photocopying of the estimated 2900 pages of records. Further, the Ministry acknowledges that should the actual number of responsive pages be less than estimated, the appellant would only be charged for the actual number of copies provided.

The appellant states that he is prepared to go the Ministry's office to read the documents in question, whether in paper form or directly from the computer screen. He does not believe that this would require a great deal of organizing or photocopying. While the appellant's offer to reduce the costs relating to his request is commendable, it would not be possible to accommodate

such a request in the circumstances because the Ministry has claimed the application of a number of exemptions to the records. In order to allow the appellant to see the records they would have to be photocopied and severed in any event.

That being said, I am satisfied that the Ministry has properly applied the provisions of the Act and Regulation in calculating the costs associated with providing photocopies of the records to the appellant.

Shipping costs

Section 57(1)(d) provides that fees may be charged for shipping records. The Ministry indicates that it has estimated that based on the size and weight of the records, it would cost \$25 to ship the records to the appellant. The Ministry advises that it has not included any costs relating to arranging for the shipping and/or time for packaging the records. In my view, the Ministry's estimate is not unreasonable, however, should the actual cost be less, the Ministry should reimburse the appellant accordingly.

As I indicated above, the appellant has indicated that he is willing to go to the Ministry's offices to review the records. It may be that he would also be willing to pick the records up. The Ministry should canvas this with him and adjust the fees accordingly if he decides to pick the records up.

In summary, I find that the fees estimated by the Ministry for the preparation, photocopying and shipping of records have been calculated in accordance with the fees provisions of the Act and Regulation.

ORDER:

I uphold the Ministry's fee estimate in the amount of \$745.

Original signed by: _____

Laurel Cropley
Adjudicator

November 4, 1998