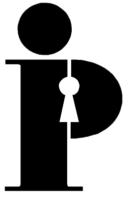
Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-1662

Appeal PA-980185-1

Ontario Human Rights 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

BACKGROUND:

Under the Human Rights Code (the Code), the Ontario Human Rights Commission (the Commission) investigates complaints that a right of a person under the Code has been infringed. Subject to section 34 of the Code, the Commission is obliged to investigate a complaint and endeavour to effect a settlement. Section 34(1) gives the Commission discretion to decide not to deal with a complaint where it appears to the Commission that:

> (a) the complaint is one that could or should be more appropriately dealt with under an Act other than [the Code];
>
> (b) the subject-matter of the complaint is trivial, frivolous, vexatious or made in bad faith;
>
> (c) the complaint is not within the jurisdiction of the Commission; or
>
> (d) the facts upon which the complaint is based occurred more than six months before the complaint was filed, unless the Commission is satisfied that the delay was incurred in good faith and no substantial prejudice will result to any person affected by the delay...

NATURE OF THE APPEAL:

The Commission received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to information described as follows:

> 1. Statistical information which would indicate the number of cases in which the Commission has declined jurisdiction pursuant to s. 34 of the Human Rights Code (the Code) over the past five years, as an absolute number, if possible with particular reference to s. 34(1)(c), being those cases in which the Commission has itself decided that the complaint is not within the jurisdiction of the Commission although also not more appropriately pursuable under some other Act or through the courts.
>
> 2. Statistical information as described above, but as a percentage of the total number of complaints received.
>
> 3. Statistical information which would indicate whether the Commission declines jurisdiction more or less frequently than other provincial human rights commissions in Canada. I note for example that the Quebec Human Rights Commission 1996 Annual Report indicates that jurisdiction is declined in about 6% of complaints received and that the Canadian Human Rights Commission maintains such statistics.

4. Policy information which may have a bearing on this issue, and in particular any direction with respect to formal or informal internal policy or procedure which may have encouraged the Commission to increase the number of instances in which it has declined jurisdiction pursuant to s. 34 as a cost savings measure or to expedite treatment of the backlog of cases which has slowed processing of complaints through the Commission over the past five years.

5. Policy information which may provide a formal or informal procedure whereby Commission staff, including counsel employed by the Commission, direct the investigative officer to prepare a report in which the investigative officer recommends that the Commission decline jurisdiction.

6. Policy information which may require a separation of functions between the investigative and the decision making aspects of a s. 34 decision.

7. Policy information which may indicate that the Commission has decided not to collate and include in its annual report statistical information disclosing the number of cases, as a percentage of the total number of complaints received, in which it declines jurisdiction in accordance with s. 34, together with any reasons set out for such a policy.

The requester also asked the Commission for an interim estimate of the costs of searching and preparing the requested records. The requester further asked the Commission, if the estimate exceeded $25, to waive the fee on the grounds that "it is fair and equitable to do so, given that this is factual information of the type contemplated in s. 13 [of the Act] which ought to be readily available to the public and easily retrievable by the Commission."

The Commission responded to the various components of the request as follows:

1. The Commission referred to s. 57 of the Act, provided a fee estimate of $7440 to prepare the information for disclosure, and asked the requester to pay 50% of this amount should she continue to seek the information.

2. [Decision above also applies to this part of the request].

3. The Commission stated that it does not have in its possession comparative statistical information relating to the disposition of cases of the other provincial human rights commissions. Also, the Commission stated that its annual report contains statistics about the Ontario Commission which report can be purchased for $7.

4. The Commission provided the requester with a portion of its Enforcement Procedures Manual (the Manual) dealing with the application of s. 34 of the Code to complaints handled by the Commission.

5. The Commission provided the requester with a portion of the Manual addressing the procedures for investigating cases. The Commission further stated that "the information provided by counsel in the preparation of any report that may be used in litigation is exempted" under s. 19 of the Act.

6. In responding to this part of the request, the Commission relied on its response to part 4 of the request above.

7. The Commission referred to s. 32 of the Act, which requires institutions to publish annually an index describing the organization and its responsibilities, listing the general classes of records prepared or held by the institution, listing the title and other information about the head of the institution and any amendment of information referred to above. The Commission indicated that in producing general statistical information in its annual report it complies with the requirements of the Act.

The Commission further stated that since the numbers of pages responsive to parts 4, 5 and 6 of the request were below 40, the photocopy fees would be waived. However, the Commission further stated that it would not waive the fees for parts 1 and 2 of the request.

The requester, now the appellant, appealed the Commission's decision to this office.

During the mediation stage of the appeal, the Commission issued a revised decision to the appellant as follows:

1. The Commission referred to s. 57 of the Act, provided a fee estimate of $2,196.50 to prepare the information for disclosure, and asked the requester to pay 50% of this amount should she continue to seek the information.

   The Commission further explained that this information is not contained in a computer database and would have to be manually compiled. Also, the Commission stated that this fee estimate applies to the statistics requested "for all subsections of section 34 of the Code or only for sub-section 34(1)(c)."

   Finally, the Commission provided a detailed breakdown of the fee for preparing the information for disclosure, as follows:

   440 pages/year x 2 minutes/page

= 14.66 hours x $30/hour	=	$439.30/year
440 pages x 5 years	=	2,200 pages
2,200 pages x 2 minutes/page = 73.33 hours	=	$2,196.50 total

[The Commission explained in its representations that the 2 minute figure consisted of time to photocopy each page and to delete information from the minutes as necessary].

2. The Commission indicated its understanding that the appellant had revised her request to cover "the overall percentage of cases where a section 34 decision has been made in relation to the number of complaints taken for a five year period." The Commission explained that "complaints taken by the Commission in a given year may or may not close in the same year. The Commission does not have a record with such a breakdown."

   The Commission provided the appellant with "the closing disposition of the cases closed each year by the Commission for the time period requested. This may be of interest to you since it provides information on the percentage of cases closed under section 34 in comparison with the other closing dispositions."

3. The Commission stated that it does not have records "comparing whether or not it declines jurisdiction more or less frequently than other provincial human rights commissions".

4. The Commission stated that it is "not in possession of such records" and, further, that "it has never been and it is not now the policy of the Commission to use the provisions of section 34 to save costs and expedite the case load." The Commission also indicated that in its initial decision it had provided a copy of the portion of the Manual dealing with the application of s. 34. Also, the Commission provided the appellant with a copy of the Commission's "Section 34 Guidelines".

5. The Commission stated that in its initial decision it had provided the appellant with a portion of the Manual addressing the procedures for investigating cases. The Commission further stated that it "does not have any policy information or procedures whereby Commission counsel or staff can direct or not direct officers to decline jurisdiction. The Commission applies the above mentioned procedures and guidelines when processing a case under section 34 of the Code. Further, Commission staff can only make a recommendation to the Commissioners with respect to whether or not a complaint is within the jurisdiction of the Commission. It is only the Commissioners who can make a decision with respect to jurisdiction. Section 34 of the Code outlines the decision making function of the Commission with respect to dealing or not dealing with complaints. Section 34 does not

authorise the Commission to empower an employee to make a decision to deal or not deal with a complaint." The Commission withdrew its reliance on the exemption in s. 19 of the Act.

6. In responding to this part of the request, the Commission reiterated that it had already provided the appellant with a copy of the portion of the Manual dealing with the application of s. 34. Further, the Commission stated that "section 33 of the Code outlines the investigative function of the Commission and provides the Commission with the power to authorise an employee to conduct an investigation . . . The section 34 authorisation mentioned in item 5 addresses the Commission's decision making ability with respect to complaints processed under section 34. Section 36 of the Code outlines the decision making function of the Commission to refer or not refer the subject matter of a complaint to the Board of Inquiry. Section 36 does not authorise the Commission to empower an employee to make a decision to refer or not refer a complaint to the Board of Inquiry. There are no other records that address the issue of the separation of functions."

7. The Commission stated that it "has no record or policy information whereby any discussion or decision was taken to collate or not collate statistical information on cases where the Commission has decided to decline jurisdiction."

The Commission also stated that since the numbers of pages responsive to parts 4, 5 and 6 of the request were below 40, the photocopy fees would be waived. However, the Commission further stated that it would not waive the fees for assembling the information responsive to parts 1 and 2 of the request.

The appellant subsequently advised this office that she was maintaining her appeal with respect to the Commission's revised decision, with the exception of parts 2 and 3 of her request, and the Commission's decision not to waive the fee for part 1.

I sent a Notice of Inquiry setting out the issues in the appeal to the appellant and the Commission. I received representations from both parties.

DISCUSSION:

FEE ESTIMATE: PART 1 OF THE REQUEST

Section 57(1) of the Act reads:

> 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 Ontario Regulation 460 reads:

> 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 a 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.

In her letter of appeal, the appellant submitted an article from The Lawyers Weekly dated June 19, 1998 which she says indicates that the Commission has already compiled statistical information respecting section 34 cases. In addition, the appellant submits that the statistics provided to her show that the Commission has already compiled the information she is seeking. The appellant further submits that the statistics provided indicate that the source of the information is the "mainframe database" and she cannot understand why she would have to pay to obtain statistics for section 34(1)(c) cases which statistics would be readily available on the computer, if this breakdown does not also already exist.

The Commission submits the following on this issue:

Complaints that are sent for a Commission decision pursuant to Section 34 of the Code, will contain a staff recommendation under one or more of the sub sections listed in Section (1) of the above. The analysis that is placed before the Commissioners will contain the following elements:

(i) identification of the sub section(s) of Section 34(1) that is being requested by the respondent or commission
(ii) the rationale for the specific sub section(s) being requested
(iii) the appropriateness of the specific sub section(s) to the complaint at hand
(iv) a recommendation to deal with or not deal with the complaint pursuant to each sub section of Section 34; and
(v) a general recommendation to deal with or not deal with the complaint.

If the staff recommendation is to not deal with the complaint, the Commissioners may accept that recommendation in whole or in part. For instance, staff may recommend that the Commission not deal with the complaint under Section 34(1)(a) and (b) but the Commissioners may decide to not deal with the complaint under Section 34(1)(a) only. Furthermore, the Commissioners may not accept staff's recommendation and instead decide to deal with the complaint. Please note that the decision could be partitioned. For instance, the decision could be to deal or not deal with certain allegations in the complaint or a particular respondent.

During the period that is the subject of this appeal, the information recorded on the Commission's mainframe database system was that a not deal with or deal with decision was made. The sub section(s) under which the Section 34 decision was made was not recorded on the database. In order to generate the requested statistics, the Commission would have to have recorded the sub-sections under which the decision was made and the Commission has not done this.

The requester is erroneous in her conclusion that the Commission has compiled the record and can access the specific statistics that she is seeking.

. . . . .

The minutes of the Commission and Panel meetings record the Commission's decision and the reasons for that decision. It is the Commission's reasons that cite the particular subsection of Section 34 under which a decision was made. The only record available, from which the Commission staff can compile the information requested, is the minutes (sample attached) of past meetings. The Commission's staff will have to manually review the minutes over a 5-year period and record the subsection under which the decision was taken.

> The Commission's new Case Management Information System is still under development. When the statistical module is completely developed, the Commission will have the ability to access statistical information relating to the subsections of Section 34. However, this information will be current commencing from the date the module is operational. Please note that our present developers are not under contract to design programmes that will record and gather information on old cases. The expenditure for such an [undertaking] is high and we have no plans to do so within the near future. The raw material is not in the format requested.
>
> The Commission must review the minutes of Commission and Panel meetings to prepare the record that contains the raw information for disclosure.
>
> Please note that should the requester wish the Commission to compile the information, a revised higher fee estimate would apply [emphasis in original].

Based on the explanation provided to me by the Commission, I am satisfied that the detailed information requested by the appellant is not easily accessible electronically. Further, I accept that the most reasonable method for disclosing the information is to have Commission staff prepare the minutes for disclosure by severing information from them as necessary and providing the minutes to the appellant so that she can review them and compile the statistical information she seeks.

However, I do not accept the Commission's time estimate of two minutes per page, for two reasons. First, I note that in the sample minutes provided to me by the Commission the names of the Commissioners and their staff attending the meetings were also severed - in my view, this information in most, if not all, cases need not be severed, since it normally would not constitute "personal information" under section 2(1) of the Act. I direct the Commission's attention to Reconsideration Order R-980015 of former Adjudicator Donald Hale for guidance on this issue. Thus, the time spent severing the record should be significantly reduced. Second, the Commission has included photocopying time in its 2 minute calculation. In my view, time spent photocopying is not validly included as part of time "preparing a record for disclosure" under section 6, paragraph 4 of Ontario Regulation 460. That time is already accounted for in paragraph 1 of section 6 (Orders M-549, M-562). As a result, I find that the Commission's time estimate of two minutes per page is too high, and should be reduced to one minute per page.

I note that the Commission has not included a charge for photocopying the records, although this appears to be required in order to provide the appellant with access in the manner proposed by the Commission. Since charging for photocopies is mandatory under section 57(1)(c) of the Act, the Commission's fee estimate should be revised accordingly. It is important to note, however, that where records are being severed, this charge may only be levied for photocopies which are actually given to the appellant, and not for copies required as part of the severing process which are not ultimately given to the appellant. In other words, if a page has to be copied twice to facilitate severing, the Commission may only charge for the copy of that page which is given to the appellant (Order M-556).

If the appellant chooses to pay the requested deposit and the actual preparation time and number of pages to be copied varies from the estimate, the Commission will be obliged to adjust its fee accordingly. The parties should also note that the Commission's final fee decision may be the subject of an appeal to this office.

REASONABLE SEARCH

Introduction

The appellant takes issue with the Commission's decision that no records exist in response to parts 4, 5, 6 and 7 of her request.

Section 10(1) of the Act provides a right of access to a record or a part of a record "in the custody or under the control of an institution."

The issue to be decided is whether the Commission has conducted a reasonable search for responsive records within its custody or control as required by section 24 of the Act. If I am satisfied that the Commission's search for such records was reasonable in the circumstances, I will uphold its decision. If I am not satisfied, I may order further searches.

Part 4: Policies or procedures regarding increasing section 34 dismissal numbers/rates

The appellant submits the information in the guidelines disclosed to her prove that the policy records responsive to this part of her request must exist. She cites page 2 of the guidelines which state:

> From an enforcement standpoint, there are compelling reasons in favour of the appropriate rigorous use of Section 34.
>
> In May 1993, the Commission, in a review of its case management practices, decided to apply Section 34 more rigorously. This decision was part of several measures that were introduced to improve the Commission's efficiency, effectiveness and fairness.
>
> In February 1994, the Standing Committee on Government Agencies reviewed the Commission's operations and called on the Commission to use Section 34 more rigorously.

The appellant further submits:

> [] The Commission claims that s. 34 was never invoked in order to expedite the backlog of unresolved claims; however, it seems to me that the language in this section, with its reference to "efficiency, effectiveness and fairness", goes directly to this issue, and I would

> wish the Commission to provide any documentation which might serve to explain what this language means if not expedition and economy.
>
> The paragraph at the top of [page 3 of the guidelines] ends with the statement that s. 34 "allows the Commission to control its caseload and provides it with direct involvement in its own processes"; I seek in this regard any documentation the Commission has in its possession which indicates that prior to the decision to invoke s. 34 "rigorously" its backlog was comprised disproportionately of cases in which s. 34 ought to have been invoked to decline jurisdiction on one of the four grounds. I would also seek documentation directing Commission staff as to how the s. 34 provisions are to be applied "accurately and precisely" so that Commission staff apply s. 34 "in accordance with the principles of natural justice and fairness and in keeping with the spirit and mandate of the Code". Specifically, I would like information relating to those circumstances under which subsections of s. 34 are deemed to require staff to canvass issues that "touch on the merits of the case". Which staff members are involved at this stage? Is there documentation which defines whether or not Commission staff engaged in these activities are purely investigative staff without formal training in law or do investigative Commission staff at this stage consult with the Commission's own lawyers?

The Commission submits:

> [The] "Section 34 Guidelines", (copy attached) that were disclosed to the requester is the record that contains its policy on the use of Section 34.
>
> As a way of background, it should be noted that the Commission's use of the Section 34 provisions, prior to 1993, was infrequent. The provisions were used after the decision of McKinney v. University of Guelph, [1990] 3 S.C.R. 229, dealing with the mandatory retirement age. The decision of the Supreme Court in the above cited case, clearly stated that the mandatory retirement age was 65. Therefore, the Commission has no jurisdiction of complaints, in the area of employment, when the ground of the complaint is age 65 years and above.
>
> In the Lawyers Weekly article, Mr. Beauregard stated that the Commission decided to consider requests under Section 34 following the recommendation of the Standing Committee on Government Agencies to apply this section more rigorously. (Attached is an excerpt from the Report that contains the recommendation).
>
> The Committee's recommendation led to the development of guidelines on the use of the Section 34 provisions of the Code. Whereas the Committee suggested that the Commission use Section 34 as a means of reducing its caseload, it is the Commission's position that this section of the Code be used appropriately. This policy is reflected in the "Section 34 Guidelines" that were disclosed to the requester.

> The Commission has undergone changes in personnel, such as Chief Commissioner, Executive Director, and structure since the Committee's 1994 recommendation. The present management staff are not aware of any such policy, as outlined in the request, being in existence. The Freedom of Information co-ordinator searched the files in the keeping of the Chief Commissioner and the Executive Director for information that might have existed relating to any such policy. No such information exists.

In the circumstances, I am satisfied with the Commission's explanation that the policy information the appellant seeks is incorporated in the "Section 34 Guidelines" disclosed to the appellant, and that the Commission has conducted a reasonable search for other records which might fit within the scope of Part 4 of the request. I do not accept the appellant's submission that the fact that a policy decision was reached to apply section 34 more rigorously means that policy documents other than the guidelines must exist.

I note that portions of the appellant's submission are directed towards seeking from the Commission an explanation or justification for its approach to section 34 of the Code, without specifically connecting this information to records in the custody or under the control of the Commission. In this regard, the appellant has raised an issue which is beyond the scope of this appeal (see, for example, Order P-562). In addition, the appellant in her submission appears to be seeking additional records outside the scope of her original request. Again, in so doing the appellant has raised issues beyond the scope of this appeal.

Part 5: Policies or procedures regarding directions to and from Commission staff to recommend section 34 dismissal

The appellant submits that she does not believe that the Commission does not have a policy setting out when Commission staff, including legal counsel, should direct investigative officers to decline jurisdiction.

The Commission submits:

> The Commission employs lawyers whose duties include providing legal advice to staff. The regional managers provide guidance to officers to enable them to perform the functions of their job. It is an accepted function of management in the Ontario Public Service to provide guidance to staff. It is within the context of review work and guiding officers that a manager may direct the officer to prepare a report recommending that a specific subsection of section 34 be applied to a particular complaint. It should be noted that all Commission staff, including lawyers are guided by the evidence relating to the case, established case law and the Commission's procedures when providing advice or preparing a case analysis (report). The procedures on Section 34 and the investigation of complaints have already been disclosed to the requester. The requester can access case law from any law library. The evidence relating to specific cases are not accessible to the public and is protected under the privacy provisions of the Act.

> The Freedom of Information Co-ordinator asked the Commission management staff if they were aware of any such formal or informal policies with respect to the request in "Part 5". Beyond what is described above, the Commission does not have any policy that states that an officer can be directed to prepare a report declining jurisdiction [emphasis in original].

In the circumstances, I am satisfied with the explanation provided by the Commission and I find that the Commission has conducted a reasonable search for records responsive to Part 5 of the appellant's request.

Part 6: Policies or procedures regarding separation of investigative and adjudicative functions in section 34 dismissal process

The appellant submits that in December, 1998 she was advised by the Commission of a policy change in the role of Commission investigators in the section 34 dismissal process. The appellant submits that "[i]t is possible that this change was under consideration prior to my June 3 request and that the Commission has documentation dating prior to June 3, 1998 relating to a proposed policy change which has now been put into effect . . ."

The Commission submits:

> Section 32 of the Code states:
>
> > An investigation by the Commission may be made by a member or employee of the Commission who is authorised by the Commission for the purpose.
>
> This section of the Code deals with the authorisation of Commission staff to conduct the investigation of a complaint.
>
> Sections 34, 36, 37 and 43 of the Code (copies attached) all address the decision-making function of the Commission. These sections of the Code do not delegate any of the decision-making functions to employees of the Commission.
>
> Since employees cannot make a decision on a case pursuant to Sections 34, 36, 37 and 43 of the Code, the functions of the decision-making and investigation are thus separated.
>
> Staff of the Commission are not aware of any policy with respect to "part 6" that speaks to the separation of the investigative and decision making functions [emphasis in original].

In the circumstances, I am satisfied with the explanation provided by the Commission and I find that the Commission has conducted a reasonable search for records responsive to Part 6 of the appellant's request.

Part 7: Policies regarding Commission's decision not to report section 34 dismissal statistics

The appellant submits that she does not believe that the Commission does not have responsive policy records. The appellant points out that the "pie-shaped graphs" are marked "confidential", and she contends that this indicates that the Commission made a conscious policy decision not to include section 34 statistics in its annual report, and that policy records relating to this decision must exist.

The Commission submits:

> As stated in the Commission's decision letter, the Commission does not have a policy whereby it has made a decision to not provide statistics on the number of complaints in which it has declined jurisdiction. Furthermore, the Commission does not even have a record of the statistics other than what was already provided to the requester.
>
> The copies of statistical information provided to the requester are marked confidential because they were taken from the Commission's staff reports that are deemed confidential until they have been presented to the Commissioners.
>
> The Freedom of Information Co-ordinator contacted the Commission's Public Policy and Public Education Branch which produces the Annual Report with respect to "part 7" of the request.
>
> There are no records in that Branch or anywhere in the Commission relating to such a policy [emphasis in original].

In the circumstances, I am satisfied with the explanation provided by the Commission and I find that the Commission has conducted a reasonable search for records responsive to Part 6 of the appellant's request.

ORDER:

1. The Commission's fee estimate of $2,196.50 is set aside.

2. I order the Commission to issue a revised fee estimate to the appellant, in accordance with the findings set out above under the heading "Fee Estimate: Part 1 of the Request", by **April 9, 1999**.

3. In order to verify compliance with the terms of this order, I reserve the right to require the Commission to provide me with a copy of the revised fee estimate issued pursuant to Provision 2.

Original signed by: March 26, 1999
David Goodis
Senior Adjudicator