



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER PO-1942

Appeal PA-000082-2

Ministry of Finance



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BACKGROUND:

The Ministry of Finance (the Ministry) re-classified a number of Financial Officers as Tax Auditors and raised their salaries. This created an imbalance between the salaries of these Tax Auditors and their managers. To correct the situation, the Ministry created new management positions with a higher classification and salary range. However, not every manager who supervised Tax Auditors was re-classified. Those tax managers who were not re-classified filed a corporate tax grievance. In preparing for the grievance hearing, the Tax Revenue Division (the TRD) within the Ministry conducted a record search and provided relevant documents to the Human Resources Branch (the HRB). In turn, the HRB gathered records from its branch and provided records from both the TRD and the HRB for the grievance hearing.

NATURE OF THE APPEAL:

This appeal arises from a request made to the Ministry under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information about the classification of the position of Group Audit Manager and other positions within the Tax Revenue Division at the AM20 and AM21 levels. The request specified information about:

1. Position Number, bargaining agent, position to which it reports, classification of the report to position, the number of authorized Group Audit Manager positions and the present number of incumbents in that position within your Ministry.
2. Position specifications, together with the physical needs analysis, and the number and classification of any “reports to” subordinates.
3. The position classification documents which support it’s (sic) classification and the salary range resulting there from (sic). More specifically copies of any classification standards or position specifications to which these positions were compared during the preparation of the classification or to which reference is made are included in this request.
4. Provisional or proposed classifications presented for consideration by branch or divisional committees or individual officers.
5. Copies of educational requirements, standards adopted by the division and memos relating thereto used by or made available to the classification officer in determining the classification of the positions.
6. Copies of any position audits, interview notes, memos or other documents supplied by the tax branches, divisional committees or executive, or external agencies and commissions which were available to or relied upon by the classification officer to interpret the position specification as proposed or the standards to which reference was made.

The documents are required for the four milestone events:

1. Creation of the Group Audit Manager position at the AM20 level and assignment, reclassification or grand fathering (sic) of the incumbents to the new AM20 level positions.
2. Creation of the Regional Tax Offices with subsequent re-assignment/transfer of positions.
3. Conversion/elimination of the authorized positions known as the FO5 from the audit departments of the Retail Sales Tax Branch.
4. Creation of the AM21 Group audit manager position within the Corporation Tax Branch and the Regional Tax Offices.

The Ministry granted access to the records and charged a fee of \$420.60. The fee was based on 12 hours of search time at \$30.00 per hour and photocopying of 303 pages at \$0.20 per page. The appellant paid the fee and received 297 pages of records.

The appellant appealed the amount of the fee.

At mediation, the appellant requested that the Ministry search for additional records responsive to his request, as well as providing the additional six pages that he had paid for but had not received. The Ministry conducted a further search, but found no additional records. Since the Ministry was unable to account for the six-page discrepancy, it invited the appellant to review the 'master copy' of the records to attempt to identify any pages that may have been inadvertently omitted.

I initially sent a Notice of Inquiry that set out the issues in the appeal to the Ministry. The Ministry submitted detailed representations in response that were shared with the appellant in full. In its representations, the Ministry agreed that it had provided only 297 pages of the record to the appellant and not the 303 pages for which the appellant had been charged. The Ministry, accordingly, agreed to refund the appellant the amount of \$1.20 (6 pages at \$0.20 per page).

The appellant also made extensive submissions that raised new issues that the Ministry was asked to respond to. The Ministry made reply representations.

The two issues in this appeal are whether the Ministry's revised appeal fee of \$419.40 should be upheld and whether the Ministry has conducted a reasonable search for records responsive to the appellant's request.

DISCUSSION:

FEES

Introduction

The charging of fees is authorized in section 45 of the *Act*, and more specific provisions regarding fees are found in section 6 of Regulation 823 made under the *Act*. Section 45 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 Regulation 823 provides that:

The following are the fees that shall be charged for the purposes of subsection 45(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.

Allocation of Fee

The Ministry's initial invoice was for 12 hours of search time with the HRB contributing 11 hours and the TRD one hour. Subsequently, the Ministry agreed that one hour claimed by the HRB for photocopying was not an allowable charge. However, it proposed an offset to this deduction by claiming an extra hour for work completed by the TRD. This meant that the total fee charged and the total number of hours of search time remained unchanged. Only one hour of search time had been re-allocated from one branch to another.

According to an affidavit filed by the TRD co-ordinator, the total time to prepare the chart responding to the request for the number of authorized and incumbent Group Audit Manager positions was two hours and 45 minutes, although the TRD only charged for one hour of search time. The TRD co-ordinator later conducted a record search and e-mailed seven individuals. The Ministry's reply representations state:

Each of her e-mail recipients had to spend a certain amount of time searching for soliciting (sic) information in order to conclude that there was nothing responsive to the request. The only record which resulted from the e-mails was a duplicate of something previously disclosed. When documents are gathered together for one purpose the second gathering may be easier, but it still has to be done again. The fee charged of one hour was reasonable for the information gathering required to create the chart responsive to item #1 of the request. An additional hour at least could be charged for the post complaint e-mails.

The Ministry's claim for fees is broken-down as follows:

<u>Search Time</u>			
(i) Human Resources Branch	10 hours*	\$30/hour	\$300.00
(ii) Tax Revenue Division	2 hours	\$30/hour	\$ 60.00
Totals - Search Time	12 hours	\$30/hour	\$360.00
<u>Photocopying:</u> 297 pages at \$0.20 per page			\$ 59.40
TOTAL FEES CLAIMED			\$419.40

[*Individual A – 1 hour; Individual B – 8 hours; Individual C – 1 hour]

In response to the Ministry's re-allocation of an hour of search time from the HRB to the TRD, the appellant claims that "Hours not previously billed by [a named individual] should not now be added to the claim as such would appear to be an abuse of the appeal process."

In reply, the Ministry submits that

The concept of adding an item at the appeal stage not charged for initially is as valid as subtracting an item incorrectly charged at the same time. The Ministry subtracted the one hour of photocopying by [a named individual from HRB], but added a modest one hour for the second search by e-mails by [a named individual from TRD]. It is the Ministry's position that as with any invoice review, errors can go both ways. A one sided approach is an unworthy and unfair approach.

In any case, the accounting is not done at first instance but was provided only in the affidavit upon appeal. Therefore the Ministry did not represent any particular accounting to the appellant which it now reverses. The Appellant objects erroneously that something new has been charged which was "not previously charged".

I agree with the Ministry that it is only fair that any errors in accounting for fee items should be considered whether they result in additions or deletions. The Ministry correctly deducted one hour of search time for photocopying since this is not an allowable charge under the *Act*. It then added an hour of search time for work completed by the TRD that had not been previously charged. The TRD, in a sworn affidavit, stated that it provided substantially more search time than the two hours now being assigned to the Division. Based on the evidence before me, I am satisfied that the allocation of fees by the Ministry is a reasonable reflection of the work actually undertaken.

Legitimacy of Fees

The Ministry submits that "the search charges are exclusively for manual search, namely 1) finding and looking through files and boxes... and 2) looking for information in order to create a document to answer the requester's question about numbers of individuals holding certain positions for which there was no existing document."

The appellant in his representations states that:

Based upon the sworn statements provided, 10 of the 11 hours billed were not the direct result of my request.

...The ministry has charged me for assembly of documents which were known to have been previously identified and assembled.

In his Affidavit [the HRB co-ordinator] stated at para (sic) 5 "I had previously organized the gathering of them together and read them in assisting the grievance lawyers."

Affidavit of [the TRD co-ordinator] para (sic) 3 “I had already collected them” and again at Para (sic) 4 “I was certain that HR had all the existing documents which [the director of the TIP2 Project] and I had provided to HR earlier.”

In its reply representations, the Ministry states:

[The HRB co-ordinator and a named individual] had previously organized the gathering of documents for the corp (sic) tax grievance hearing but these amounted to only 20 pages or so of the request, the ones collected by [a named individual]. This was at the time the s. 65(6) [of the Act] appeal had been lost by the Ministry, and the hearing lawyers, having finished the hearing, endorsed their disclosure. Most of the documents [compiled by the individual claiming 8 hours of search time] had absolutely nothing to do with the corp tax hearing, because they were job specifications dating back to 1986 or so and of no relevance to the corp tax hearing. The 20 pages, copies of which were previously gathered for the hearing had been filed again and still had to be gathered again for the request. There was no pre-established pile. The additional part of deciding whether or not documents were responsive to the request adds to the search.

...The bulk of the pages requested, obsolete job specs (sic), were still in the archive, because these were not needed for the hearing which did not go back in time nor consider audit positions under tax statutes other than corp tax.

... The request was much broader than what was needed for the hearing.

In a letter, the co-ordinator of the HRB search explains the areas that were searched for records, and the particular records that were located in each area. He states:

Most of the searching of the obsolete and current job description files held in HRB storage area was done by [a named individual who claimed 8 hours of search time]. These are maintained by position number but, as position numbers change over the years, and the requester wanted data at “four milestone events” for AFA20 and 21 Group Managers of Audit covering C.T.B. [Corporate Tax Branch], R.S.T. [Retail Sales Tax], E.H.T. [Employer Health Tax], and M.F.T.T. [Motor Fuel and Tobacco Tax], an extensive search of all archived files was required.

[the named individual who claimed one hour of search time] had to search grievance files and classification files for documents/memos requested regarding the establishment of AM21 Group Manager Audit positions – related to para (sic). 6 and milestone 4 of request.

[HRB co-ordinator] had to review all the material assembled and catalogue it as an index to the FIPP Co-ordinator on April 3, 2000.

The appellant claims that the Ministry charged him for time searching for records that had already been assembled by the Ministry in preparing for the tax grievance hearing. The Ministry contends that the bulk of the search time, eight hours spent by the HRB, was to locate records that were unrelated to the grievance hearing and therefore had not been previously collected.

The appellant's request was for information pertaining to "four milestone events" of which only one milestone referred to a current timeframe that would have been relevant to the grievance hearing. The timeframe of the other three milestone events extended from the 1980s to the mid-1990s. In addition, the appellant's request was complex. It involved six separate categories at four different time periods, for a possible total of twenty-four combinations of documents. As well, four different tax branches were involved and there was no standard job description number against which to search for records. After considering all of the material before me, I am satisfied that the eight hours of search time by the HRB was reasonable and related to the appellant's request for records and not to the tax grievance hearing.

One hour of search time was for records involving the creation of new management positions and therefore related to the grievance hearing. The Ministry explained that although these records had been compiled for the grievance hearing, they had been re-filed prior to the request and had to be collected again. This hour of search time could be challenged on the ground that these records had already been assembled and that no extra time was required in order to provide them. This might be the case where such records remained collated and segregated. In this situation, however, the records were returned to their original location after the hearing. In response to this request, the HRB had to initiate a new search. This second search undoubtedly took less time than the original search. Nevertheless, I find it reasonable that the second search would have taken an hour to complete.

The other hour invoiced by the HRB was to review the assembled documents and to prepare an index.

In the circumstances of this appeal, I find that the search time billed by the HRB to be a reasonable charge. I further find that the two hours charged by the TRD to create a chart responding to one part of the request and to initiate a record search to be reasonable.

REASONABLE SEARCH

Tax Revenue Division

According to the affidavit by the TRD co-ordinator, she did not initially conduct a search for records since she "was certain that HR had all the existing documents which [a named director] and I had provided to HR earlier." The Ministry in its reply representations states that what the "[FOI Co-ordinator] Human Resources and the Tax Division saw as exclusively within the jurisdiction of the Tax Division was the last two lines of the request, portion #1, [ie.] the number of authorized Group Manager positions and the present number of incumbents in that positions".

The TRD co-ordinator, instead of starting a record search, prepared a document that responded to that part of the FOI request.

After the appellant's subsequent request for additional documents, the TRD co-ordinator contacted seven employees to search for records. According to the affidavit of the TRD co-ordinator,

Only the Retail Sales Tax Branch responded with documents. I checked these with those disclosed and found that there was nothing new to be disclosed...

I also consulted the ADM's current and former secretaries who managed his files; they were unable to locate any new records responsive to this request...

No further records were found by those I contacted...

To the best of my knowledge and belief, this is a complete record of my search both for the purposes of showing the time value and the completeness of the search.

Human Resources Branch

Except for one document that was prepared by the TRD, all 297 pages of records that were sent to the appellant were provided by the HRB. The HRB billed 10 hours for this record search.

In response to the appellant's claim that the search for records was incomplete, the HRB co-ordinator made a further search and concluded that:

the records the Appellant expected were not in existence. As I said in the note, the classification officer's task would have been to validate the classification level against the class standards for any new job description produced and signed off by line management. The position evaluation documents had already been provided to the requester.

The completeness of the search is based on direction provided by my knowledge of the documents given to those who searched. I have reviewed this upon revisiting the search, and I am satisfied that no further documents exist.

To the best of my knowledge and belief this statement exhausts my knowledge on the fee question as well as the completeness of the original search.

Appellant's Representations

The appellant submits that:

The Ministry search was inappropriately limited by the direction given and decisions taken by [the TRD co-ordinator]. Some individuals most likely to have pertinent documents in their possession were not asked to search their files.

...The ministry has yet to produce a single document that speaks to the changes to position specifications and reporting relationships which occurred at milestones 1 through 3.

The appellant then lists records that should have been included in the search. These are:

- i) Records from all the Directors of the Regional Tax Offices
- ii) Records of the Director of the Tax Integrity Program (TIP2 Project)
- iii) A consultant's report that analysed staffing needs
- iv) A specific computer directory in the ADM's office
- v) Records from the Regional Tax Office – North York
- vi) Records relating to milestone 4
- vii) Records from named individuals
- viii) An index of documents provided to the HRB by the Director of TIP2 Project
- ix) An index of files in off-site storage

Ministry Reply Representations

The Ministry responds that:

While the Appellant may think that the indented number 6 of the request for "Copies of any position audits, interview notes, memos or other documents supplied by the tax branches, divisional committees or executive, or external agencies and commissions" would contain documents exclusively residing within the Tax Division, it does not, because the request limits that part of the request by adding at the end "which were available to or relied upon by the classification officer (a Human Resources Branch employee) to interpret the position specifications as proposed or the standards to which reference was made."

Whatever was available to or relied on by the classification officer was in the Human Resources Branch and was provided to the requester. This is true as it applied to all four milestones.

It is undoubtedly for this reason that when [the TRD co-ordinator] asked the tax branches for their response in December of 1999 in the e-mails attached to her affidavit, there were no new documents forthcoming not already unearthed by the Human Resources Branch.

In reply to the appellant's request for records from specific departments and individuals, the Ministry states:

Regarding named potential ministry contacts, I submit that it would be inappropriate to contact the satellite office or RTO's (sic) [Regional Tax Office] (named individuals) when under request 6 only what was relied on [by] the classification officer was requested. On [requests] 1-5 the information did not reside there. [The director of the TIP2 Project] was involved at every stage as she works hand in hand with [TRD co-ordinator]. [A named individual] was contacted as Director of Corp (sic) Tax by [the TRD co-ordinator] in an e-mail, as was [a named individual] in his later position as Director of Retail Sales Tax Branch, and all the directors of tax branches (even if one e-mail was not attached to the affidavit) and as were the ADM's support staff [two named individuals]. As previously discussed, none of those e-mails were necessary because of the wording of [paragraph] 6 and the fact that the rest of the information resided in H. R. [Human Resources]. [A named individual] the director of the Human Resources Branch was not as close to the grievance as [the HRB co-ordinator], who is second to [the director] in the branch; hence it was not necessary to contact [the director]. It was not necessary to contact [a named individual] a senior manager of Corp (sic) Tax Branch, as the director was contacted. It was not necessary to contact [a named individual] a human resources consultant who reports to [the HRB co-ordinator], as [the HRB co-ordinator] was contacted.

I respectfully submit that the search was not only reasonable but it went above and beyond the call of duty both in the creation of a new document and in providing an extensive second search in the fact of the appellant's complaint.

The Ministry also claims that the additional requests outlined in the appellant's representations are new requests and should not be treated as part of this appeal.

Conclusion

To meet its obligation under the *Act* to conduct a reasonable search for records, the Ministry must provide sufficient evidence to show it has made a reasonable effort to identify and locate records responsive to the request. The appellant's obligation is to provide a reasonable basis for concluding that such records may, in fact, exist.

The TRD co-ordinator contacted a total of seventeen different individuals in its search for records. However, the appellant questions whether the TRD inappropriately restricted its search by not asking the right people for records. According to the Ministry's analysis of that part of the request at issue, the relevant records would be located in the HRB and not the TRD. It adds that the TRD's search was "an effort to show good will, good faith and intent to respond appropriately". Even assuming that the Ministry's analysis of the request is incorrect and there may be relevant records in the TRD, I find that the TRD made a reasonable effort to identify and locate records responsive to the request.

The HRB, after a nine hour search provided the majority of the documents disclosed to the appellant. The HRB then carried out a second search, but found no further records. In fact, the

HRB co-ordinator stated that he believed that additional records responding to the request did not exist. I am satisfied that the HRB made a reasonable effort to identify and locate records responsive to the request.

With respect to the search by both the TRD and the HRB, I find that the appellant has not provided a reasonable basis for believing that further records exist in either department.

ORDER:

1. I uphold the Ministry's fee decision.
2. I find that the search conducted by the Ministry for responsive information was reasonable.

Original signed by: _____
Dawn Maruno
Adjudicator

_____ August 30, 2001