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

ORDER PO-1943

Appeal PA-000261-1

Ministry of Training, Colleges & Universities

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NATURE OF THE APPEAL:

The appellant submitted a request to the Ministry of Training, Colleges and Universities (the Ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for information relating to College des Grands Lacs (the College), specifically:

- All records pertaining to budgetary matters and financial verifications and audits of the College from 1995 to the present;
- All letters of resignation of Board members of the College from 1995 to the present;
- All correspondence dated 1996 and 1997 between the ministers of Education of the province of Ontario and Board members of the College;
- All correspondence between the College's Board members and the Council of Colleges of Ontario from 1995 to the present;
- All ministerial briefing notes concerning the College since 1995 to the present;
- All records concerning the funding of the literacy program "Programme de Formation de Base" from 1995 to present; and
- All records concerning the cancellation in 1999 and/or 2000 of the literacy program "Programme de Formation de Base" at the College.

The Ministry issued an interim decision advising the appellant that it had located the responsive records. The Ministry estimated that the fee to generate the requested information would be $1486.20. This amount was broken down into search time ($1350) and reproduction or photocopying ($136.20). The Ministry also indicated that based on a preliminary review of the information contained in the records, most of the information may be exempt from disclosure pursuant to sections 14 (law enforcement), 17 (third party information), 18 (economic and other interests) and 21 (invasion of privacy) of the *Act*.

The appellant appealed the fee estimate and subsequently requested a fee waiver from the Ministry. The Ministry refused to waive the fees.

During mediation, the appellant confirmed that he was not appealing the Ministry's decision relating to his request for a fee waiver. Therefore, the only issue to be determined in this appeal is whether the Ministry's calculation of the fee estimate was made in accordance with the fee provisions of the *Act*.

I sent a Notice of Inquiry setting out the facts and issues in this appeal to the Ministry, initially. The Ministry responded and I attached its representations in their entirety to the Notice of Inquiry that I sent to the appellant. The appellant also made representations. After reviewing these representations, I decided that they raised issues to which the Ministry should be given an opportunity to reply, specifically, issues relating to the breadth of the Ministry's interpretation of the appellant's request and issues relating to the reorganization of the Ministry which may have an impact on the reasonableness of its fee estimate. The Ministry replied to the reply Notice of Inquiry that I sent to it.

PRELIMINARY MATTER:

FEE WAIVER

In his representations, the appellant indicates that he works for a public media outlet with a limited and decreasing budget. Moreover, he believes that publication of the requested records is in the public interest. These arguments relate to the issue of whether a fee waiver should be granted in the circumstances.

As I noted above, during mediation the appellant confirmed that the Ministry's decision refusing his request for a fee waiver was not part of this appeal. Accordingly, I will not entertain this issue in this order.

DISCUSSION:

FEE ESTIMATE

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 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.
> ...
>
> 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.

The Ministry included with its representations an affidavit sworn by the Director of the Colleges Branch of the Ministry (the Director) and a copy of the "Colleges Branch submission; breakdown of hours and fee administration form" and the "Council of Regents submission: fee administration form".

Search costs

With respect to the search conducted by the Colleges Branch, the Director states:

> Due to the broad nature of the request for information that was received by the Colleges Branch, it was necessary to canvass staff in all areas of the branch for records relating to the college system, over the period of time indicated, in an effort to determine the relevancy of materials pertaining to the request. This is because no single set our records existed in any one area of the branch that would have contained all of the information requested.
>
> I designated … as the person with responsibility to co-ordinate the search … a Senior Policy Advisor in the Governance, Accountability and Corporate Support Unit [the GACS] of the Colleges branch …
>
> When the request was received and the search was being conducted, the [Ministry] comprised two postsecondary divisions (as it does currently): the Training Division and the Postsecondary Education Division. Since records relating to the last two parts of the request were held in the Training Division, the Colleges Branch (part of the Postsecondary Education Division) had to search for records responsive to the other parts of the request. The Colleges Branch comprised three units: the [GACS]. The Program Quality Unit [the PQU], and the Finance Unit [Finance].
>
> …[I]t was necessary to review files in both the [PQU] and [Finance]. The [PQU] files may have contained records relating to specific proposals from institutions and other relevant documents, while [Finance] records would only contain those records related to approved program and capital funding.

The Director indicates that relevant information could also have been contained in various subject/program files, referring to eleven areas by way of example, including such subject areas as "women's campus safety".

The Director states that the Policy Advisor worked with Managers from each of the units and contacted employees and ex-employees who might be able to assist in the search. Although the

search for responsive records took place primarily within the Colleges Branch, the Director notes that the Ministry's Correspondence Unit was also contacted, which, in turn, contacted the Archives with respect to relevant correspondence records.

The Director states that, collectively, it took approximately 30 days for the Program Advisor to assemble the records that were requested. She indicates that staff kept records of the number of hours they worked on the task, noting that this time does not include time spent photocopying the material.

The Director acknowledges that:

> [T]he reorganization of the [Ministry] on two occasions, the relocation of the Colleges Branch and units within the branch, staff turnover, and the transferring of responsibilities and files to new staff added to the time required in finding, and preparing the records for disclosure. Records responsive to some parts of the request would originally have been housed in four of the five divisions that comprised the [Ministry] in the period from January 1995 to July 1996.
>
> In view of the reorganizations set out in the attached Appendix A and the organization of the branch and its units as it existed at the time of the request, in May 2000, it was not always possible to go directly to a unit or file that might contain the responsive records, particularly from the period 1995 – 1997.
>
> When the information request was received by the branch in May 2000, it was originally anticipated that the bulk of the information related to the request would be found in two areas – one holding records relating to French-language colleges, and the other holding records relating to college capital and operating grants. However, the search was made more difficult, and consequently more extensive, as a result of the responsibility for the management of the records being shifted to new units created by the reorganization of the Ministry, and the physical relocation of files to new locations…

The Ministry points out that 81 records were located in the Colleges Branch as a result of searches conducted by eight staff persons. Recognizing that the reorganization made it necessary to canvass all areas where records might plausibly be held, the Ministry refers to Order P-530 and states that:

> [T]he IPC accepted that aspects of reorganization included in a representation and a detailed explanation of a fee estimate satisfied the onus to show that the fee was calculated in accordance with section 57(1) of the *Act* and section 6 of Regulation 460.

The Ministry reiterates that the Training Division was also identified as an area holding records relating to the request. However, it notes that despite conducting a search and locating 625 pages

of responsive records, this division did not submit a fee estimate to the Freedom of Information and Privacy office for search time, and no fee was charged for this search.

The Ministry states that it also requested that the Ontario Council of Regents for Colleges of Applied Arts and Technology (the Council) conduct a search for responsive records. The fee administration form submitted by the Council indicates that two hours were spent searching its records holdings, which produced 31 pages (16 records) of responsive records.

The Ministry concludes that the time charged to the appellant relating to searches conducted in the Colleges Branch could have been much higher, noting that the Policy Advisor spent collectively 30 days co-ordinating the search and assembling the records, and that the time spent by the Training division was not included in the estimate.

The appellant believes that the search fees charged by the Ministry are excessive and have been inflated as a result of the Ministry's interpretation of the "breadth" of his request and the Ministry's reorganization.

With respect to the breadth of the request, the appellant appears to take the position that the Ministry conducted unnecessary searches for responsive records which had the result of inflating the estimate. In particular, the appellant questions why the Ministry searched for records in program areas such as "women's campus safety" and "lease consolidation" as these areas do not appear to have any relevance to his request.

The appellant also takes issue with the Ministry charging him for additional search time apparently necessitated by its reorganization.

In response to the appellant's first objection, the Ministry points out that the appellant's request was for "all records" relating to, for example, budgetary matters. The Ministry submits that:

> [A] request for information involving the funding provided by the province to the [College] required a review of files for each Special Purpose Grant (of which Women's Campus Safety is one). This is because the funding the College received in grants for these programming areas is part of the total operating grant to the College. The files listed in the affidavit (point 8) are all files related to these grants and therefore were identified as possible sources of responsive records.

With respect to the appellant's second point of contention, in the reply Notice of Inquiry that I sent to the Ministry, I referred to comments made in its original representations and asked it to address this issue as follows:

> In your representations, you note that (in point 8) "records would not necessarily be organized by college name. This does not mean that files are or were inefficiently managed, rather that files are organized in a way that makes them most accessible to the area holding them." You also note, however, that because

> of reorganization within the Ministry, division and branch, staff were required to first determine where likely records would be located. The Ministry is asked to explain where, in its view, the line should be drawn between "efficiently organized or managed but not in such a way as to respond to an access request" and "disorganized or inefficiently organized or managed as a result of internal administrative changes". In doing so, the Ministry is invited to comment on its situation in this regard and the impact of the reorganization on its ability to respond to an access request. The Ministry is also asked to comment on whether an appellant should be required to pay for inefficiencies (or transitional inefficiencies if that is the case) within the institution's records holdings in such circumstances.

In its reply submissions, the Ministry emphatically denies that its records are or were inefficiently organized:

> Since information stored in the Ministry is most frequently accessed by Ministry staff, it is reasonable to expect that the organization of the Information would help to expedite that access in terms of the Ministry's day to day business. Its day to day business is carrying out its mandated responsibilities for postsecondary education and training.
>
> In the Appendix of [the] affidavit, we gave a chronology of aspects of reorganization between 1995 – 2000…
>
> …
>
> The Ministry places a high priority on serving its clients. Its clients are numerous: in addition to carrying out responsibilities such as those listed above, it responds to information requests from parents, students, and public inquiries, as well as to requests made under the [*Act*]. The Ministry must try to balance the competing interests of all its clients and organize so that information needed regularly is easily accessible, while keeping in mind that specific requests for information, such as those involved in FOI requests, could be made at any time.
>
> …
>
> The fact that files going back five years are involved in this request means that more than just current files had to be accessed, as would be the case in any institution that has custody of documents. This is not an issue of efficiently or inefficiently managed files; it is the issue of the time and effort required to go back over a number of years to determine where to search for records …
>
> While reorganization at various levels occurred during the period of the request [over a five year span of time], causing many records to be relocated, the relocation cannot be said to have created "transitional inefficiencies," other than

> perhaps during the time in which the actual moves were in progress. Because records were organized in different ways to meet the restructuring, the program area, cognizant of the fact that responsive records could be overlooked if care were not taken to keep these changes in mind, identified all potential locations. The subsequent division of labour, assignment of staff, etc was carried out in a highly organized manner…

Finally, the Ministry refers to the Postcript to Order M-583 in which former Commissioner Tom Wright states:

> Previous orders made by this office have recognized that the *Act* contemplates a user pay principle for providing access to general records. Other orders have held that government organizations are not obliged to maintain records in such a manner as to accommodate the various ways in which a request for information might be framed.
>
> I believe, however, that these principles must be applied flexibly, taking into account the nature of information being sought and how frequently requests of a particular type are received.

Findings

Section 24(1) states, in part:

> (1) A person seeking access to a record shall,
>
> (a) make a request in writing to the institution that the person believes has custody or control of the record;
>
> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record.

In previous orders of this office dealing with the reasonableness of an institution's search for responsive records, it has been well established that the search which an institution undertakes must be conducted by knowledgeable staff in locations where the records in question might reasonably be located (see, for example, Order M-624). In other words, the *Act* contemplates that searches for responsive records will be conducted by reasonably informed staff. Further, the *Act* contemplates that records will be maintained in accordance with some regularized and managed system so that a reasonably informed or knowledgeable staff member will be able, upon a reasonable effort, to locate those that are responsive to the request. If an institution's reorganization results in staff not knowing where specific types of records might be located, then in my view, it would not be reasonable to expect that a requester should pay for the institution's staff to become informed.

The chronology of the Ministry's reorganization indicates that between 1995 and 2000, it underwent a number of changes, which resulted in the relocation of staff and functions (and ultimately records). The major changes appear to have occurred in July 1996, January 1997 and July 1999. It is possible that during the time at which the changes were occurring, transitional inefficiencies may have been created as a result of the disruption caused by reorganization. It is also possible that staff might have some difficulty responding to an access request in any kind of regularized or efficient manner during the transition period. While the *Act* clearly contemplates that users of the *Act* should pay for the time spent searching for responsive records, I would have some difficulty requiring a requester to pay for additional time that might be needed to locate responsive records during such times of disruption. In my view, this goes well beyond what former Commissioner Tom Wright contemplated in Order M-583 when he stated that "government organizations are not obliged to maintain records in such a manner as to accommodate the various ways in which a request for information might be framed."

However, the appellant's request was made in April 2000, well after the last major stage in the Ministry's reorganization. I am satisfied, based on the Ministry's submissions on this issue, that its offices were not in a state of transition at the time the appellant made his request. Therefore, I am satisfied that the amount charged to the appellant was not inflated as a result of transitional inefficiencies that might have existed as a result of the Ministry's reorganization.

It was not readily apparent on first reading of the Ministry's representations whether staff were required to expend time to search for responsive records in order to first determine where responsive records might exist following the reorganization. I am satisfied, however, that in raising the impact of its reorganization on the search that was conducted, the Ministry was simply attempting to explain why records were not maintained in a manner that would accommodate the appellant's request. The Ministry has clearly explained why and how records are maintained in its various branches and it would appear that "they are organized in a way that makes them most accessible to the area holding them". I agree with the Ministry that in this case it is not obliged to maintain its records in such a way as to accommodate the appellant's request.

The appellant suggests that the Ministry's search covered too broad an area thus inflating the time it took to locate responsive records. I do not agree. The first five points of the appellant's request did not specify a particular area of search. Rather, the appellant requested, for example, "all records pertaining to budgetary matters …" I accept the Ministry's position that, in order to respond to the first five points of the appellant's request, in particular, it was necessary to take a broad approach in conducting the search for responsive records. It should also be noted that all of the searches conducted in the three areas identified by the Ministry produced records responsive to the appellant's request.

The Ministry has provided a breakdown of the time spent by each of the eight staff members who conducted the searches in the Colleges Branch. Given the number of items that the appellant had requested and the various locations that needed to be searched, I find that the time spent by seven of the eight staff manually searching for responsive records was reasonable and was calculated in accordance with the *Act*.

The supporting documentation provided by the Ministry shows that the Policy Advisor spent 22 hours working on this access request. As I noted above, this individual was given the task of "co-ordinating" the search for responsive records. In doing so, she met with the managers of each of the units to explain the request and to ask them to identify appropriate staff to be contacted to retrieve the records. She then co-ordinated the search, that is, she was the person the other staff reported back to with the results of their search, or with questions relating to the request. The Director indicates that the Policy Advisor was in contact with the Freedom of Information and Privacy unit on a daily basis in order to "get clarification on a wide range of issues related to the proper processing of an access request".

The Director states further that the Policy Advisor told her that:

> [C]ontacts were made with numerous staff members regarding the search for relevant records and that it took approximately 30 days to assemble the records that were requested.
>
> …
>
> In addition, [the Policy Advisor] advised that during the assembling of the materials she spent a considerable amount of time on the project.

Earlier in her affidavit, however, the Director states that the GACS unit manager contacted both current and former employees in order to determine the location of responsive records. In my view, the evidence does not establish that the Policy Advisor, herself, participated in making these contacts.

Section 57(1)(a) only permits an institution to charge for every hour of **manual search** required to locate a record. It appears from the Ministry's submissions that the Policy Advisor, in her role as the individual responsible for co-ordinating the search, was not directly involved in conducting manual searches for responsive records. Her role was of a more administrative nature. In my view, much of the work she undertook cannot be reasonably characterized as encompassing a part of the manual search. Nor does "assembling" the records fall within this activity. Once the manual search has been completed and the records are located, the chargeable costs must be calculated under one of the other categories set out in section 57(1) and only in the amounts prescribed by the regulations.

In reviewing section 57(1) and Regulation 460 as a whole, I find that the administrative functions performed by the Policy Advisor are not allowable costs under the legislative scheme as set out in the *Act* and Regulation as they currently stand.

In making this finding, I recognize that the fees charged to the appellant do not take into consideration time spent searching for responsive records in the Training division. Despite the fact that it is possible that more time was expended in searching for responsive records than was charged, the Ministry has not provided sufficient evidence to justify the incorporation of this non-allowable charge in its calculation.

Accordingly, I find that the costs for search time were not calculated in accordance with the fee provisions of the *Act* and Regulation. As a result, the search fee must be reduced by 22 hours.

Photocopying

As I noted above, the Ministry located 81 records in the Colleges Branch, 16 records in the custody of the Council and approximately 625 pages of records in the Training division. The Ministry estimates that it will provide the appellant with 681 pages of records in total. At a cost of $0.20 per page, the amount to be charged for photocopying is $136.20. I am satisfied that this amount was calculated in accordance with the fee provisions of the *Act*.

In his postscript to Order M-583, former Commissioner Wright commented on the dual obligations of institutions and requesters under the freedom of information access regime and noted:

> To this point my comments have been directed toward government organizations. In my opinion this is appropriate since these organizations maintain the records and, therefore, can determine how they are best made available to the public. However, in my view requesters also have a responsibility when making requests.
>
> The reality is, as unfortunate as it may be, that government organizations do not have an unlimited capacity to respond to freedom of information requests. Therefore, as I have said publicly on numerous occasions, users of the freedom of information system have an obligation to be reasonable; to be conscious of the financial constraints under which all government organizations are operating.
>
> For example, users can consider viewing records, instead of asking for copies. They can narrow their requests and clarify exactly what information they are seeking.

In its interim access decision, the Ministry has indicated that "most of the information may be exempt from disclosure…" The Ministry did not include a fee for "preparation costs", one of which could include the time spent severing the records for disclosure. The appellant should realize that the costs of providing access could have been higher. On another note, it is possible that of the 681 pages of records, once severances are made, only a small number would actually contain any information that the appellant might wish to receive. In this case, if the appellant decides to pay the fee charged by the Ministry, it would not be unreasonable for the Ministry and the appellant to attempt to determine how many of the 681 pages of records would be of use to him in order to reduce, at least the photocopying charges.

In summary, the Ministry's representations support a fee for search time of $690 based on 23 hours of time spent manually searching for responsive records at a cost of $7.50 for each 15 minutes as set out in section 6.3 of Regulation 460. In addition, the Ministry's representations indicate that it has calculated the cost for photocopying the records based on $0.20 per page which is the allowable cost as set out in section 6.1 of Regulation 460.

ORDER:

1. I do not uphold the Ministry's fee estimate of $1486.20.

2. The Ministry is entitled to charge the appellant $0.20 per page for photocopying the responsive records for an estimated cost of $136.20 for 681 pages.

3. The Ministry is entitled to charge the appellant for 23 hours of search time at $7.50 for each 15 minutes of time spent for a total search fee of $690.

4. In total, the Ministry is entitled to charge the appellant $826.20.

Original signed by: September 6, 2001
Laurel Cropley
Adjudicator