



**Information and Privacy  
Commissioner/Ontario**

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

# **ORDER PO-1965**

**Appeal PA-010034-1**

**Ministry of Health and Long-Term Care**



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/Télééc: 416-325-9195  
TTY: 416-325-7539  
<http://www.ipc.on.ca>

## **NATURE OF THE APPEAL:**

This appeal arises from a multi-part request made to the Ministry of Health and Long-Term Care (the Ministry) under the *Freedom of Information and Protection of Privacy Act* (the Act) for access to information relating to the issue of the interchangeability of drugs. The appellant originally submitted six separate requests for information, but later agreed to consolidate the six requests and to narrow its scope. The parties agreed to limit the search for records to the Drug Programs Branch (DPB) of the Ministry to avoid duplication and to reduce fees. The appellant claimed a fee waiver on the grounds that dissemination of the records will benefit the public.

The Ministry conducted a search and located several hundred records. The Ministry then issued an interim access decision indicating that the records would likely be denied in their entirety based on the exemptions under sections 12 (cabinet records), 17 (third party information), 18 (valuable government information), 19 (solicitor-client privilege), and 21 (invasion of personal privacy).

The Ministry provided a fee estimate of \$1,140 that included 30 hours to search for records and eight hours to sever portions of the records that could not be disclosed. The Ministry also advised the requester that it would charge for shipping and photocopying costs.

The appellant appealed the fee decision of the Ministry to this office.

During mediation, the Ministry agreed to eliminate from its fee estimate the time required to sever the records.

I initially sent a Notice of Inquiry that set out the issues in this appeal to the Ministry. In its representations, the Ministry indicated that it had reduced the number of hours required to search for records from 30 hours to 28 hours. The Ministry also agreed that portions of the minutes of the meetings of the Drug Quality and Therapeutic Committee (DQTC) could be disclosed and calculated that it would take 2.25 hours to prepare these records. As a result, the fee estimate was revised to \$907.50 with photocopying costs of \$14.40.

I then sent a Notice of Inquiry to the appellant together with the Ministry's representations. The appellant submitted representations in response.

## **RECORDS:**

At issue are several hundred records that include correspondence, e-mails, submissions, reports and briefing notes.

## **DISCUSSION:**

### **FEE ESTIMATE**

### **Preparing A Fee Estimate In Accordance With Order 81**

Order 81 and other orders of this office set out the procedure for a head of an institution to follow where the record being requested is unduly expensive to produce for inspection, either because of the size of the record, the number of records, or their physical location.

In this appeal, the head provided a fee estimate and an interim decision on access. The purpose of the interim access decision is to provide the requester with an indication of whether access to the record will be given once the fees are paid and to give the requester sufficient information to make an informed decision regarding payment of fees.

The charging of a fee 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 states:

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.

### Ministry's Fee Estimate

The Ministry's current fee estimate is broken down as follows:

TASK	NUMBER OF HOURS	COST
<b>A. Manual Search</b>		<b>\$30 per hour</b>
1. Electronic files for 12 computers	8.5	\$255
2. Thirty linear feet of hard copy files	9.5	\$285
3. Drug submission folders	1.0	\$30
4. DQTC minute and review binders	5.0	\$150
5. Corporate branch files	4.0	\$120
<b>Total</b>	<b>28 hours</b>	<b>\$840.00</b>
<b>B. Preparing Record for Disclosure</b>		<b>\$30 per hour</b>
Minutes of DQTC meetings	<b>2.25 hours</b>	<b>\$67.50</b>
<b>C. Photocopying</b>		
DQTC minutes: 72 pages at \$0.20 per page		<b>\$14.40</b>
<b>TOTAL FEE ESTIMATE</b>		<b>\$921.90</b>

In its representations, the Ministry states that there is no single source for the information in this request. The search had to be conducted in three units within the DPB: the Administration, Finance, and Eligibility Unit, the Drug Programs Management Unit, and the Pharmaceutical Services Coordination Unit.

The Ministry indicates that the record search included the electronic files on approximately 12 computers, hard copy documents in filing cabinets of key staff members, DQTC review binders and binders with minutes of DQTC meetings, and hard copy documents in general corporate branch files. According to the Ministry, the hard copy search includes a search of about 39 linear feet of file documents. The Ministry estimate for the entire record search is 28 hours.

The Ministry states that portions of the DQTC meeting minutes that do not reveal proprietary information can be disclosed. This includes the first page that contains general meeting information and the list of the meeting participants, and the last page with the signatures of the DQTC chair and executive secretary. It calculates that there was an average of 12 DQTC meetings per year or a total of 36 sets of minutes over the three year period at issue. At the rate of two pages per meeting, the total number of pages to be severed is 72. The Ministry estimates that it will take 45 minutes to prepare 12 sets of minutes or less than four minutes per set. The Ministry estimate to prepare these records for disclosure is 2.25 hours.

In preparing the fee estimate, the Ministry indicates that it sought the advice of several knowledgeable staff, including the Branch Director and three Associate Directors, within each branch unit. It explained that the staff in these units is familiar with the type and contents of the requested records since they work with the information as part of their daily business operations.

During the mediation process, the appellant agreed to narrow his request. His revised request included:

.. 1998, 1999, 2000 records dealing with the background, rationales, drafts/final reports, briefing notes, communications, consultant and lawyers' reports on the issue and practices of adding or restricting, and methods of restricting interchangeability claims for [Zolof, Apo-Sertraline and Novo-Sertraline]... the legal, economic implications and options involved. ... Include summary records on the status and issues in the resulting litigation case involving the Ministry of Health and Apotex.

...year 2000 records on creating and work done to date by the Independent Fact Finding Panel On Interchangeability And Listing Issues Arising From Patents On Indications. Include the panel's terms of reference, who approved it and who the panel reports to, interim reports/presentations, costs to date and projected for the panel, timetable and method for final reporting and publications. Include records on the notification of claims for Zolof and its depression application and for Apo-Sertraline and Novo-Sertraline drug products, and with the problems in accepting or restricting interchangeability claims.

...1998, 1999, 2000 comments, concerns and exchanges with pharmacists on the issue of Zolof and its depression application interchangeability on indications for Apo-Sertraline and Novo-Sertraline drug products. This involves a new interpretation re

(sic) interchangeability on patent indications. ...Provide in the year 2000 internal summaries done of concerns of pharmacists over the new interpretations re (sic) interchangeability on patent indications.

Year 1998, 1999, 2000 correspondence, communications, E mails, faxes, consultation notes, meetings/working group notes on the interchangeability issue on patent indications with [a named individual] of Pfizer or other Pfizer officials (on Zolofit).

Year 1999, 2000 correspondence, exchanges, submissions on the interchangeability issue on patent indications with Canada's Research Based Pharmaceutical Companies (former PMAC).

Provide year 2000 latest briefing notes (no duplicates-latest updates), latest issue sheets on this issue (on the interchangeability issue on patent indications and the Zolofit case) and include year 2000 media lines/analyses prepared on this issue, including in response to an April 15, 2000 page A3 article in the Ottawa Citizen by [a named individual] on "Patent chaos grips Ontario" or in response, acknowledgement to articles in the pharmacy trade journals.

In spite of the attempt by the appellant to narrow his request, the request remains very broad in scope. I am satisfied that the wide-ranging nature of the request was a significant factor in the Ministry's requiring 28 hours to search for responsive records. According to the Ministry, the size of the request necessitated the search being conducted in three separate units within the Branch and involved five different categories of files (electronic files, hard copy files of key staff, drug submission folders, DQTC binders and corporate branch files). The organizational structure of the Branch may have contributed to the protracted search since records were stored in multiple locations. However, previous decisions of this office have found that even though the manner in which an institution keeps records may not be the most efficient, the *Act* does not require an institution to keep records in such a way as to accommodate the various ways in which a request for information might be framed (Order M-549). Accordingly, I find that the 28 hours charged by the Ministry to search for responsive records to be reasonable in the circumstances of this appeal.

Based on the Ministry's estimate that an average of less than four minutes per set of records is required to complete the severances of 36 sets of records, I also find the 2.25 hours to prepare the records for disclosure to be reasonable.

## **FEE WAIVER**

The provisions of the *Act* relating to fee waiver are found in section 57(4), which states 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 the Regulation then prescribes, in part:

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.

...

In this appeal, the Ministry agreed to disclose 72 pages of the hundreds of responsive records.

Under section 57(5), an appellant has the right to ask the Commissioner to review an institution's decision not to waive the fee. The Commissioner may then either confirm or overturn this decision based on a consideration of the criteria set out in section 57(4) of the *Act* (Order P-474).

Many previous orders have held that the onus is on the appellant to demonstrate that a fee waiver would be justified. (Orders M-429, M-598 and M-914). I am also conscious of the Legislature's intention to include a user pay principle in the *Act*, as evidenced by the provisions of section 57.

The appellant submits that he is entitled to a fee waiver on the basis that "the outcome of this issue effects (sic) the public and drug prices the public pays and the issues from records received should be disseminated and reported to the public". However, the appellant provides no evidence or further elaboration in support.

In its representations, the Ministry submits that the general public will not benefit from the dissemination of the information in the records since the majority of the people in Ontario are not users of the drugs that are the subject of the records. The appellant, in his reply, provided no evidence to refute the Ministry's statement.

I am satisfied that the subject matter of the requested records, the interchangeability of drugs, is a matter of public rather than private interest and related directly to a public health or safety issue. However, I am not convinced that dissemination of the record would yield a public benefit by either disclosing a public health or safety concern or contributing meaningfully to the development or understanding of an important health or safety issue. I accept the Ministry's position that dissemination of the record will not provide a substantial benefit to public health and safety since the pool of potential beneficiaries is small. I further find it unlikely that the appellant would disseminate the records widely. In the circumstances, the appellant has not persuaded me that he is entitled to a fee waiver on the basis of benefit to public health and safety.

**ORDER:**

1. I uphold a fee estimate in the amount of \$921.90.
2. I uphold the Ministry's decision to deny a fee waiver.

Original signed by: \_\_\_\_\_  
Dawn Maruno  
Adjudicator

\_\_\_\_\_  
November 14, 2001