



**Information and Privacy  
Commissioner/Ontario**

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

# **ORDER PO-2313**

**Appeal PA-030158-1**

**Ministry of Public Safety and Security**



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## **NATURE OF THE APPEAL:**

The requester made a request to the Ministry of Public Safety and Security (now the Ministry of Community Safety and Correctional Services) (the Ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information from the Ontario Fire Marshal's Office (the OFM) relating to a fire in Barrie. In particular, the requester sought access to "the field notes, reports, photographs, videotapes, etc." of two named OFM employees.

The Ministry issued a decision to the requester, granting partial access to the responsive records. Among other things, the Ministry also advised the requester to make arrangements with the OFM (which forms part of the Ministry) to obtain access to photographs and videos.

The requester then submitted a request for photographs directly to the OFM. The OFM responded to the requester in writing, indicating it had three rolls of film and advising the requester to contact the Photographic and Imaging Services unit of the Ontario Provincial Police (the OPP) to obtain the photographs. The OFM's letter to the requester indicated that the fee for Index Prints (also known as "Index Thermal Prints" and "contact sheets") was \$33 each, but it did not specify a fee for individual photographs.

The requester (now the appellant) appealed the Ministry's fee decision.

Mediation did not resolve this appeal, and the file was transferred to adjudication. I sent a Notice of Inquiry to the Ministry, initially, outlining the facts and issues and inviting the Ministry to make written representations. In particular, I asked the Ministry to make representations on whether its fee of \$33 per Index Print ought to be upheld.

The Ministry did not make representations in response to that Notice of Inquiry. Instead, the Ministry issued a new decision to the appellant, claiming the discretionary exemption at section 22(a), which reads:

A head may refuse to disclose a record where,  
  
the record or the information contained in the record has been  
published or is currently available to the public; ...

In its new decision, the Ministry stated:

... it is the position of the Ministry that the fee structure of the *Act* is not applicable in the circumstances of your request and appeal as the requested information is publicly available through a regularized system of access.

The requested photographic prints relating to the subject OFM fire investigation are publicly available records that may be purchased directly from the OPP Photographic and Imaging Services for the prescribed fee.

Access to the photographic prints is denied in accordance with section 22(a) ...

The Ministry advised the appellant that “[t]he cost of each 4” by 5” photographic print is \$30.00.”

Also in its new decision, the Ministry granted the appellant access to three Index Prints containing “the photographic images documenting the subject OFM fire investigation” at no charge. Each Index Print displayed, in miniature, all the colour photographs taken from one roll of film. The Ministry stated that it had exercised its discretion under section 22(a) in deciding to disclose the Index Prints.

The Ministry’s new decision marked the first time the Ministry specifically claimed section 22(a) in connection with the photographs at issue in this appeal. By that time, the deadline for claiming additional discretionary exemptions had already passed. In the circumstances, I decided to send a Supplementary Notice of Inquiry to the Ministry, adding, among other things, the Ministry’s late-raising of the discretionary exemption at section 22(a) as an issue in this appeal. The Ministry made representations in response to my Supplementary Notice of Inquiry.

I then sent a Notice of Inquiry to the appellant, together with a copy of the Ministry’s representations in response to my Supplementary Notice of Inquiry. The appellant, in turn, made representations. Finally, I gave the Ministry an opportunity to reply to the appellant’s representations, and the Ministry made additional representations.

In this appeal I must decide whether to allow the Ministry’s late claim under section 22(a).

## **BRIEF CONCLUSION:**

The Ministry’s section 22(a) claim was made too late and it must not be allowed.

## **DISCUSSION:**

### **SHOULD THE MINISTRY’S LATE CLAIM UNDER SECTION 22(A) BE ALLOWED?**

#### **General principles**

Section 11.01 of this office’s *Code of Procedure* provides:

In an appeal from an access decision, excluding an appeal arising from a deemed refusal, an institution may make a new discretionary exemption claim only within 35 days after the institution is notified of the appeal. A new discretionary exemption claim made within this period shall be contained in a new written decision sent to the parties and the IPC. If the appeal proceeds to the Adjudication stage, the Adjudicator may decide not to consider a new discretionary exemption claim made after the 35-day period.

Claiming discretionary exemptions promptly is necessary in order to maintain the integrity of the appeals process. Unless the parties know the scope of the exemptions being claimed at an early stage in the proceedings, effective mediation of the appeal will not be possible. In addition, claiming a discretionary exemption for the first time after a Notice of Inquiry has been issued could necessitate re-notifying the parties to give them an opportunity to make representations on the exemption, and delay the appeal. In many cases the value of the information requesters seek diminishes with time, and requesters may be prejudiced by delays arising from late exemption claims (Orders P-658, PO-2113).

The purpose of this office's 35-day policy is to provide institutions with a window of opportunity to raise new discretionary exemptions, but only at a stage in the appeal where the integrity of the process would not be compromised and the interests of the requester would not be prejudiced. The 35-day policy is not inflexible, and the specific circumstances of each appeal must be considered in deciding whether to allow discretionary exemption claims made after the 35-day period (Orders P-658, PO-2113).

### **The parties' representations**

In its representations, the Ministry submits:

... the Ministry issued a supplemental decision letter to the appellant granting him total access to the three index thermal prints respecting the ... fire and denied him access to the photographic prints in accordance with section 22(a) [publicly available information]. Section 22(a) is a new additional discretionary exemption from disclosure that was not explicitly claimed in the Ministry's original decision letter ...

The appellant has submitted in excess of over 30 [requests under the *Act*] to the Ministry in the past several years for access to OFM records. In response to a number of these requests, the appellant was advised to contact the OFM directly in regard to making arrangements for the purchase of publicly available photographs. The purchase of OFM photographs through this alternative system of access does not appear to have [been] an issue in respect to past requests submitted by the appellant.

... the raising of a new discretionary exemption from disclosure in the circumstances of this particular appeal does not compromise the integrity of the appeals process and does not prejudice the interests of the appellant. The appellant would be aware from the content of the [Ministry's original decision] that the Ministry believed the requested photographs could be obtained directly from the OFM.

As the appellant has not yet been invited to submit written representations, the Ministry believes that the raising of a new additional discretionary exemption at

this point in the appeals process should not result in delay arising from the necessity of re-notification of the parties.

The Ministry also reproduces a "Fee Schedule ... applicable to all requests from non-governmental agencies and member[s] of the public." This Fee Schedule lists the fee for Index Prints and 4" x 5" photographic prints, for example, at \$33 and \$30 each, respectively. The Ministry submits:

"The photographic prints do not contain any personal information and do not relate to any ongoing law enforcement matter. As such, the OFM has authorized the OPP Photographic and Imaging Services to make the photographic prints publicly available upon request in accordance with the above-noted fee schedule."

In response to the Ministry's representations, the appellant notes that the Ministry claimed section 22(a) more than two months after the deadline for claiming new discretionary exemptions had passed. He submits:

The number of requests made by the appellant should have no bearing on this or any other [request under the *Act*] made to the Ministry. In addition, photographs were never "publicly available" as suggested by the Ministry. ...

It is a completely unacceptable practice for the Ministry (OPP Photographic and Imaging Services) to be charging the [Fee Schedule fees] per photograph. This fee is grossly exorbitant and is not in keeping with the spirit of the *Act*. In this case, a total of approximately 70 separate photographic imaging images are available which would result in a cost of \$2,310.00.

Raising the discretionary exemption compromises the integrity of the Appeals process. In addition, it appears that the Ministry has used this new discretionary exemption as a stalling tactic. The Ministry should have released the photographs when requested and should not have waited an additional 2 months past the deadline to raise a new discretionary exemption ... Their failure to release the information immediately upon request, constitutes bad faith and makes everyone's job responsibilities more difficult. ...

...

The appellant has been prejudiced by the late raising of the discretionary exemptions [sic] to the records. The appellant was retained to provide an independent Engineering opinion with respect to the cause and origin of the fire. The appellant's principals advised the appellant that they had been [served] with a Statement of Claim and that they required the appellant's opinion in a timely manner. The delay has compromised the integrity of the Appeals process and affects the appellant's ability to report back to his principals. This may in turn

have a profound effect on the appellant's principal's ability to defend against the Statement of Claim.

In reply, the Ministry submits:

... the appellant has not been prejudiced by the delay in applying the discretionary exemption contained in section 22(a) of [the *Act*] to the requested photographs. The appellant was informed in [the Ministry's original decision] that he should contact [the OFM] to make arrangements to obtain the relevant photographs. The Ministry submits that the fact that these particular photographs were publicly available was implicit in its [original decision].

The Ministry has not specifically made representations on whether the fees it is charging should be upheld under the *Act*, in the event that I should decide not to allow the Ministry's late section 22(a) claim. Instead, it maintains its position that:

The charges set out earlier in the Fee Schedule of the OPP Photographic and Imaging Services are not prescribed by [the *Act*]. These charges apply to OFM and OPP photographic prints available to members of the public through a regularized system of access. ... the fee structure of [the *Act*] does not apply in this instance.

## **Findings**

I find that the Ministry's late claim under section 22(a) must not be allowed in this case.

When the appellant initiated his appeal, this office sent the parties a Confirmation of Appeal setting the date by which the Ministry could claim additional discretionary exemptions. The Ministry claimed section 22(a) well beyond this date, after mediation had concluded and once the inquiry was already underway. As a result, the parties did not have an opportunity to explore the possibility of settling or narrowing the scope of this exemption claim through mediation. Moreover, the Ministry has claimed section 22(a) for all the photographs remaining at issue, and section 22(a) is the only exemption upon which the Ministry relies. Whether section 22(a) applies to the photographs is an entirely new issue in this appeal. While the Ministry's decision to grant the appellant access to the three Index Prints at no charge was commendable, it did not resolve whether the Ministry's fees for individual photographs are proper. Depriving the appellant of the benefit of mediation in these circumstances would unfairly prejudice him.

In addition, the Ministry's late section 22(a) claim necessitated my sending the Ministry a Supplementary Notice of Inquiry, which prolonged and complicated the inquiry and impeded the appellant's timely access to the photographs. I do not accept the Ministry's submission that its position that the photographs were publicly available was "implicit" in its original decision.

In the circumstances, I find that the Ministry should not be permitted to rely on section 22(a).

I would note that my decision to disallow the Ministry's late claim in this case has no bearing upon whether a section 22(a) claim would be upheld if made in a timely manner.

**WHAT IS THE APPROPRIATE REMEDY?**

Because I am disallowing its section 22(a) claim, the Ministry must adhere to the *Act* and its regulations in charging fees associated with processing the appellant's request.

As noted above, the Ministry has not made representations on whether the fees listed in its Fee Schedule should be upheld under the *Act*, but only on why the Fee Schedule should apply. Without a detailed breakdown from the Ministry of the costs associated with processing the request, I do not have enough information to enable me to review whether the fees it is charging comply with the *Act*.

In the circumstances, I will order the Ministry to give the appellant a decision regarding fees under the *Act* for the photographs at issue. The Ministry may wish to consult this office's paper entitled "Fees, Fee Estimates and Fee Waivers for requests under the *Freedom of Information and Protection of Privacy Act* and the *Municipal Freedom of Information and Protection of Privacy Act* – Guidelines for Government Institutions" (October 2003) for assistance in this regard.

**ORDER:**

1. I order the Ministry to give the appellant a decision regarding fees under the *Act* for the photographs at issue, treating the date of this order as the date of the request, without recourse to a time extension.
2. I order the Ministry to send me a copy of the decision referred to in Provision 1 when the Ministry sends the decision to the appellant.

Original Signed By: \_\_\_\_\_  
Shirley Senoff  
Adjudicator

August 30, 2004 \_\_\_\_\_