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

ORDER PO-2299

Appeal PA-030311-1

Ministry of Health and Long-Term Care

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NATURE OF THE APPEAL:

The Ministry of Health and Long Term Care (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act (the Act)* for the following information:

> I request access to all records, including but not limited to, Request For Proposals, contracts, invoices, timesheets, reports and memos, related to consultants hired for the province's E-Physician Project, including Smart Systems for Health. I request a list of all consultants hired by the project as well as their total billings to date and a breakdown of those amounts.

The Ministry responded by issuing an interim access decision and fee estimate. The decision advised the requester that, based on consultations with appropriate staff and a review of a sample package of responsive records, he would likely be given access to portions of the various records, with other portions withheld on the basis of the exemptions in sections 17(1) (third party commercial information) and 21 (invasion of privacy) of the *Act*. The Ministry also advised the requester that an estimated fee in the amount of $8,820 would be charged by the Ministry to search for, prepare and copy the records, and asked for a deposit of 50% of the estimated fee. Finally, the Minister informed the requester that he could apply for a fee waiver, pursuant to section 57(4) of the *Act*.

In response, the requester narrowed the scope of his request to include the following:

- A list of all consultants hired for the E-Physician Project
- A description of what each consultant was hired to do; and
- How much each consultant was paid or is being paid.

The Ministry then issued a new interim access decision and revised fee estimate. The same two exemptions were identified for certain records, but the fee estimate was reduced to $1,788.14. Again, the requester was asked to pay a deposit representing 50% of the fee estimate ($894.07) and was reminded that he could ask for a fee waiver. The fee was later revised to $1,785.

The requester, now the appellant, appealed the amount of the revised fee estimate.

During mediation, the appellant submitted a fee waiver request to the Ministry, which it denied.

Further mediation was not successful and the appeal was transferred to the adjudication stage.

I started my inquiry by sending a Notice of Inquiry to the Ministry setting out the facts and issues in the appeal and seeking written representations. The Ministry responded, and I sent its representations to the appellant, along with a copy of the Notice. The appellant also provided representations, which were in turn shared with the Ministry. The Ministry provided reply representations. The appellant was offered an opportunity to provide a final set of representations in reply, but declined to do so.

The issues before me in this appeal are:

1. Did the Ministry issue an adequate interim access decision letter?

2. Should the Ministry's fee estimate be upheld?

3. Is the appellant entitled to a fee waiver?

DISCUSSION:

INTERIM ACCESS DECISION

General principles

Where a fee exceeds $100, an institution may choose to do all the work necessary to respond to the request at the outset. If so, it must issue a final access decision. Alternatively, the institution may choose not to do all of the work necessary to respond to the request, initially. In this case, it must issue an interim access decision, together with a fee estimate [Order MO-1699].

Also, where the fee is $100 or more, the institution may require the requester to pay a deposit equal to 50% of the estimate before the institution takes any further steps to respond to the request (see section 7 of Regulation 460).

The purpose of the fee estimate, an interim access decision and deposit process is to provide the requester sufficient information to make an informed decision as to whether or not to pay the fee and pursue access, while protecting the institution from expending undue time and resources on processing a request that may ultimately be abandoned [Order MO-1699].

An interim access decision is based on a review of a representative sample of the requested records and/or the advice of an individual who is familiar with the type and content of the records. An interim access decision must be accompanied by a fee estimate and must contain the following elements:

- a description of the records;
- an indication of what exemptions or other provisions the institution might rely on to refuse access;
- an estimate of the extent to which access is likely to be granted;
- name and position of the institution decision-maker;
- a statement that the decision may be appealed; and
- a statement that the requester may ask the institution to waive all or part of the fee.

[Orders 81, MO-1479, MO-1614]

Representations

The Ministry outlines the steps it took in responding to the appellant's request:

> … [T]he Ministry initially provided an interim decision to the appellant which contained a detailed listing of the records which were responsive to the request. The [Ministry's Freedom of Information Coordinator] discussed this list with the appellant and was able to narrow the scope of the request. The appellant provided the Ministry with a specific, detailed list of the records requested as well as a specific timeframe in which the search was to be conducted. As a result, two program areas in the Ministry were identified as having responsive records, i.e. Smart Systems for Health and the Project Management Office's E-Physician Project.
>
> The search was conducted by experienced individuals in both branches who are knowledgeable about the program areas' record holdings. Both program areas provided [the Coordinator] with a sample package of responsive records which included Requests for Proposals, contracts, invoices, timesheets and memorandums related to the hiring of consultants. Based on the sample package, [the Coordinator] issued an interim decision to the appellant that contained: a description of the records, the time period required to conduct the search, the names and titles of the decision makers and the exemptions under the *Act* which would be applied to the responsive records. The interim decision letter also indicated that the decision may be appealed and that a request for a fee waiver could be made. In addition, the letter contained a fee statement outlining the search time, record preparation time and photocopying costs involved with this request.

The appellant disputes the Ministry's statements, pointing out that he was not provided with a detailed listing of responsive records and did not receive a description of the records from the Ministry. The appellant submits:

> It is my assertion that the fee estimate did not provide me with sufficient information to make an informed decision on whether or not to pay the fee and pursue access. So, while this is not core to my appeal, *I don't believe I was given an adequate interim decision*. [appellant's emphasis]

The Ministry responded:

> … During attempts to narrow and clarify the request, the requester/appellant was informed how the responsive records were kept in [the Ministry]. First of all, the program areas state that there is no master list of consultants hired for E-Physicians Project. In order to locate the information requested, searches had to be conducted in two program areas within [the Ministry], E-Physician Project of Ontario Family Health Network and Smart Systems for Health Agency. The search was for a fourteen month period.

Analysis and findings

The Notice of Inquiry clearly identifies the six requirements of a proper interim access decision letter. On a review of the revised decision letter provided to the appellant, I am able to conclude that four of these requirements were met:

- the Ministry has identified sections 17(1) and 21 as the exemptions it intends to rely on as the basis for denying access;
- the name and position of the decision makers is included;
- the Ministry advises the appellant of his right to appeal; and
- the Ministry advises the appellant of his right to apply for a fee waiver.

As far as the other two requirements are concerned, both of the Ministry's interim decision letters include the same statement:

> Some of the requested information will be severed from the record under the authority of Section 17(1) and 21(1) of the *Act*. Where material has been severed, the legal authority is noted in the margin. Where entire pages have been severed, a blue sheet has been inserted noting the document number, number of pages and the legal authority.

However, as the appellant points out and the Ministry has now confirmed, no descriptive information of this nature was actually attached to the decision letters. As a result, I find that the appellant has not been provided with an adequate description of the responsive records or categories of records and, more importantly, has not been given a sufficient indication of the extent to which access is likely to be granted to these records once a deposit has been made. Without this information, in my view, the appellant is unable to make an informed decision as to whether or not to pay the fee and pursue access.

Therefore, I find that the Ministry's interim access decision is not adequate, and I will include a provision in this order requiring it to issue a new decision that includes a description of the responsive records or categories of records and an estimate of the extent to which access is likely to be granted.

FEES

General principles

As noted earlier, where the fee is $100 or more, an institution's fee estimate may be based on either:

- the actual work done by the institution to respond to the request, or

- a review of a representative sample of the records and/or the advice of an individual who is familiar with the type and content of the records.

[MO-1699]

In all cases, the institution must include a detailed breakdown of the fee, and a detailed statement as to how the fee was calculated [Order P-81, MO-1614].

This office may review an institution's fee and determine whether it complies with the fee provisions in the *Act* and Regulation 460, as set out below.

Section 57(1) requires an institution to charge fees for requests under the *Act*. That section 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.

More specific provisions regarding fees are found in sections 6, 6.1, 7 and 9 of Regulation 460 under the *Act*.

Representations

In its revised decision letter, the Ministry identifies fees to be charged in three categories:

1. Search time:

2. Record preparation:

3. Photocopying:

The Ministry elaborates on these fee estimates in its representations as follows:

> Two branches in the Ministry were identified as having responsive records to the request. The interim fee from the Smart Systems for Health branch, was based on the following:
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> | | |
> |---|---|
> | Search time: | Approximately 15 minutes to locate each file
Approximately 15 files identified; Cost: $112.50 |
> | Record preparation: | Approximately 15 minutes per file; Cost $112.50 |
> | Photocopying: | Approximately 10 pages per file;
Approximately 15 files; Cost $30.00 |
>
> The interim fee from the Project Management Office, E-Physician Project, was based on the following:
>
> | | |
> |---|---|
> | Search time: | Approximately 0.25/file
Approximately 90 files; Cost: $675.00 |
> | Record preparation: | Approximately 0.25/file;
Approximately 90 files; Cost $675.00 |
> | Photocopying: | Approximately 10 pages per file;
Approximately 90 files; Cost $180.00 |
>
> As noted earlier in these representations, the search was conducted by experienced individuals in both branches who are knowledgeable about the program areas' record holdings. Both program areas identified responsive records in both electronic and hard copy format, which necessitated a search in several locations. …

The appellant disagrees with the Ministry's fee estimate, and submits:

> My narrowed request asked for very simple and direction information: name of consultants/companies hired for e-Physician project and Smart Systems for Health; description of what each consultant was hired to do; and how much consultants were being paid. We generally agreed that this information would be sufficient and that, if I wished, I could file a separate access to information request for more specific information on specific consultant or contract. I chose this route to save the Ministry time.
>
> That said, this a simple information request that -- common sense dictates -- should be equally simple to comply with. This information should be centralized,

> computerized and easily searchable and saved as electronic records. I cannot understand why it should take so much time, at so much cost, to come up with such basic information. For this reason, I fail to understand the comment in the Ministry's representations, "Both program areas identified responsive records in both electronic and hard copy format, which necessitated a search in several locations." Several locations? Why is this information not kept together for accounting purposes? …
>
> I don't feel I received a satisfactory breakdown of the fee, or a detailed statement as to how the fee was calculated. For one, the Ministry did not provide enough detail with respect to how records are kept and maintained, which I believe are crucial to this appeal. Also, the Ministry did not explain why the records are in several locations and who so much effort must go into such a basic information request.

The Ministry responded to the appellant's position as follows:

> E-Physician states that a copy of each contract is filed within an individual consultant's file. There may be multiple contracts to be pulled. It is estimated that seven to eight minutes per consultant is required to check the content of an individual file. The financial information is contained electronically by contract. Since some of the contracts overlap the specified time period, it is necessary to take out the months not specified. It is estimate that one to two minutes of manual effort per contract is necessary. A retrieval time of fifteen minutes per contract was estimated. And there are approximately ninety contracts for the period of time in question.
>
> Smart Systems for Health Agency states that consultant records are arranged by fiscal year. Within each year records are filed under three separate headings: Business cases, invoices, and Contracts. Location of responsive records requires searching each file for responsive records for each consultant. It was estimated that the time required for locating the records for one consultant was fifteen minutes and there are approximately 15 consultants.
>
> Although the Ministry's manner of record keeping may not be the most efficient, in order to facilitate fast retrieval of the sort of information requested, 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. …

Analysis and Findings

Search

The Ministry states that the searches were undertaken by branch employees who are familiar with the various record holdings, and I accept that the appropriate Ministry staff were involved in this exercise. However, I do not accept that these individuals undertook the appropriate search activities.

The appellant's original request was quite broad, and included various record types that could have required a wide range of electronic and hard copy searches. However, following consultations with the Ministry, the appellant reduced the scope of his request significantly. He no longer requires access to "all records, including but not limited to, Requests For Proposals, contracts, invoices, timesheets, reports and memos, related to consultants hired for the province's E-Physician Project", nor does he want a breakdown of the consulting fees. The scope of his revised request is quite narrow:

- a list of consultants
- a description of their responsibilities
- the total fee paid to each of them

It appears that the Ministry did not take a fresh look at the required search activities in light of the newly worded request. As far as the E-Physician Project office is concerned, the Ministry confirms that "the financial information is contained electronically by contract". Presumably, this would also be the case for financial records held by Smart Systems for Health. Accordingly, the listing of various consultants and their fees could be produced with ease.

It would appear that the need for manual searches relates primarily to separating information based on the timeframe identified in the appellant's revised request. Clearly, this is not appropriate in the circumstances. The appellant's original request was not time-specific and, as stated in his representations, the timeframe was reduced in order to "save the Ministry time". It is simply not defensible for the Ministry to rely on this reduced time period in order to justify additional search fees. I am confident that the appellant would prefer to pay the additional photocopy charges associated with records that technically fall outside the timeframe of his amended request than to pay extra fees in order ensure that he not receive records that fall within the scope of his original request.

It is also reasonable to assume that the contracts themselves, which are the only records required in order to identify the description of responsibilities the appellant seeks, would be readily accessible without the time consuming search activities identified by the Ministry.

In the circumstances, I do not uphold the $687.50 search fees identified by the Ministry. I find that the records containing the listing of consultants and their total fees can be located electronically, at no cost. I also find that manual searches for the various contract documents

themselves, copies of which would presumably be readily available from the Ministry accounting departments if not from the two program areas, could not reasonably take longer than one hour to locate. Therefore, I will allow a search fee in the amount of $30.

Preparation

Section 57(1)(b) includes time for:

- severing a record [Order P-4]
- a person running reports from a computer system [Order M-1083]

Generally, this office has accepted that it takes two minutes to sever a page that requires multiple severances [Orders MO-1169, PO-1721, PO-1834, PO-1990].

Section 57(1)(b) does not include time for:

- deciding whether or not to claim an exemption [Order P-4, M-376, P-1536]
- identifying records requiring severing [MO-1380]
- identifying and preparing records requiring third party notice [MO-1380]
- packaging records for shipment [Order P-4]
- transporting records to the mailroom or arranging for courier service [Order P-4]
- time spent by a computer compiling and printing information [Order M-1083]
- assembling information and proofing data [Order M-1083]
- photocopying [Order P-184]
- preparing an index of records [P-741, P-1536]

Based on the Ministry's submissions, there are approximately 105 consultants who provided services on the E-Physician's Project, including Smart Systems for Health. As I have already determined in my discussion of the search fee, a listing of these consultants and their fees is producible electronically and, in my view, any severances that need to be made in order to deal with portions withheld under sections 17(1) and/or 21 could also be done electronically at no cost.

As far as the contracts themselves are concerned, in my view, the portions describing the services provided by the individual consultant, which are the only portions responsive to the

appellant's revised request, can be isolated with ease. I find that the Ministry's estimate of 15 minutes per consultant is excessive and not supported by the arguments contained in its representations. In my view, it may take the Ministry 15 minutes to identify the appropriate portions of one contract, but a much shorter period to identify the comparable portion of the remaining contracts. Therefore, I will allow a fee for preparing the contracts for disclosure based on 15 minutes for two contacts (one in each program area) and two minutes for the remaining contacts, for a total of 236 minutes (rounded to 240 minutes) and a total fee of $120.

Photocopy charges

Allowable photocopy charges are based on the actual number of hard copy records copied for disclosure. The per-page charge of $0.20 identified by the Ministry is correct but, based on my findings regarding the scope of responsive records and the fact that only the description of services is contained in hard copy records, the estimated photocopy fee is excessive. A better estimate would be a maximum of four photocopied pages containing the listing of consultants and their total fees, and two photocopied pages of the responsive portions of each contract, for a total photocopy fee of $43. Should the actual number of photocopies be more or less than this estimate, the Ministry will be permitted to recover fees in the amount of $0.20 per actual page.

Summary

In summary, I find that the Ministry's fee estimate should be reduced as follows:

Search	-	$ 30
Preparation	-	$120
Photocopy	-	$ 43
Total	-	$193

FEE WAIVER

Section 57(4)(c): public health or safety

Section 57(4) of the *Act* requires an institution to waive fees, in whole or in part, in certain circumstances. Section 8 of Regulation 460 sets out additional matters for a head to consider in deciding whether to waive a fee.

During the mediation stage of this appeal, the appellant made a request to the Ministry for a fee waiver under section 57(4)(c) of the *Act*, which reads:

> 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,
>
> (c) whether dissemination of the record will benefit public health or safety;

The Ministry denied the appellant's request, stating that:

> It is the position of both program areas that the release of the requested records, which relate to contracts with consultants and their remuneration, would not benefit public health and safety.

General principles

The following factors may be relevant in determining whether dissemination of a record will benefit public health or safety under section 57(4)(c):

- whether the subject matter of the record is a matter of public rather than private interest
- whether the subject matter of the record relates directly to a public health or safety issue
- whether the dissemination of the record would yield a public benefit by
- disclosing a public health or safety concern, or
- contributing meaningfully to the development of understanding of an important public health or safety issue
- the probability that the requester will disseminate the contents of the record

[Orders P-2, P-474, PO-1953-F, PO-1962]

This office has found that dissemination of the record will benefit public health or safety under section 57(4)(c) where, for example, the records relate to:

- compliance with air and water discharge standards [Order PO-1909]
- a proposed landfill site [Order M-408]
- a certificate of approval to discharge air emissions into the natural environment at a specified location [Order PO-1688]
- environmental concerns associated with the issue of extending cottage leases in provincial parks [Order PO-1953-I]

- safety of nuclear generating stations [Orders P-1190, PO-1805]

- quality of care and service at group homes [Order PO-1962]

Representations

The appellant takes the position that disclosing the requested records would benefit public health and safety. He submits:

> … There has been very little public discussion about electronic health records in Ontario and how such a system is being built, not to mention what security and safety measures are being put in place related to the maintenance and protection of extremely sensitive personal information. This request brings significant benefits because it would shine a light on an important public policy issue that is so far moving ahead in the dark at taxpayers' expense. The material being sought is useful because it will break down how much money is being spent, and will provide information on the companies and technologies being used to build this new system. Without access to this information, an entire technological overhaul of the medical system in Ontario will continue to move forward without public scrutiny or oversight.

The appellant contends that the records contain information of public interest because they relate to the spending of taxpayers' money and involve the creation of a "massive, centralized electronic-health records system that will dramatically alter the landscape of health-care in the province". In the appellant's view, "every Ontarian has a right to know how this infrastructure is being built, by whom, and for how much".

The appellant further submits:

> Health and safety encompasses a broad spectrum of issues. Knowing who is building a critical health infrastructure, and how much they are being paid, may not have a direct relation to health and safety. I concede that my appeal is not strictly based on health and safety issues, and is as much based on public accountability with respect to the spending of public money. This latter reason is no less important and should be taken into account by [the Commissioner's Office].
>
> That said, as a taxpayer and user of our health-care system, I am concerned about how my health-care records will be kept, maintained and secured in future. Will they be subject to tampering? Will my records get lost during a blackout? Is there back-up power? Will there be an electronic-auditing system to make sure only authorized people are accessing the information? Can computer viruses harm the system? Can hacker inter it? What assurances to I have that my

> electronic health record is accurate and up-to-date? More importantly, who has been hired to put these systems in place, and at what cost to taxpayers?
>
> To date, all the Ministry and [Smart System For Health] has told the public is, "Don't worry, trust us." This isn't enough. I content that there is a public health and safety issue that needs to be addressed here. I contend the issue strikes at the very heart of public health and safety. It *is* public health and safety. This may not relate to an outbreak of SAS or nuclear safety or environmental matters, but it relates to the mechanics of a high-tech system that we are expected to entrust our highly sensitive personal information, and our lives. If the system fails us, there is a great danger to public health and safety, and to individual privacy rights. Oversight and disclosure at this early, crucial stage is in the public interest.

The appellant also points out that, as an employee of a large media outlet, there is a strong likelihood that the disclosed information would be published.

The Ministry submits that the records responsive to the appellant's request deal with financial matters and do not contain information related to health or safety matters. In the Ministry's view, the subject matter of the records is of general public interest "only to the extent that they provide information regarding the use of taxpayers' money" and that, because the Ministry intends to rely on the two mandatory exemptions, "the [financial] information which, arguably, relates to a matter of public interest will be severed from the records".

The Ministry further submits:

> … The cases where [the Commissioner's Office] has held that the records did relate to a public health and safety issue dealt with, for example, environmental matters, nuclear facility safety, or care of vulnerable persons (see Orders P-1183, P-754, P-1909). By contrast, in this case, the subject matter of the records relates to third party commercial information as well as personal information as was noted in the Ministry's interim decision letter. The Ministry respectfully submits that the identity of consultants hired by the Ministry and the amount of money they were paid, does not relate to public health or safety issues.
>
> Furthermore, the appellant has requested records that relate to the contracts signed by consultants, and the related costs of those contracts. This information will not, as the appellant states provide "knowledge of how [electronic-care records] are created, stored, managed and secured". Therefore, the responsive records do not, in any way, disclose public health or safety issues. Strictly speaking, "public health" issues relate to health matters governed by the *Health Protection and Promotion Act*.

The Ministry also disputes that disclosing the records would yield a public benefit:

> … because they do not disclose a public health/safety concern and they do not contribute meaningfully to the development of understanding of an important public health or safety issue.

In its reply representations, the Ministry sums up its position on section 57(4)(c) as follows:

> … The records in question are financial records and the appellant has not demonstrated how the dissemination of these records would benefit public health or safety. The public may have an interest in knowing what consultants were hired and what they were paid, but the public's health would not be affected by possessing this knowledge.

Analysis and findings

I am essentially in agreement with the Ministry. I am not persuaded that disclosing the names, total fee payments and a description of job responsibilities of consultants hired by the Ministry to provide services for the E-Physicians Project would result in any benefit to public health and safety, as required in order to fall within the scope of section 57(3)(c).

As the Ministry points out, the requested records are essentially financial documents reflecting contractual arrangements put in place with various third party service providers. Although they relate to a subject matter that has engaged a certain degree of attention, in my view, the appellant's position that "without access to this information, an entire technological overhaul of the medical system in Ontario will continue to move forward without public scrutiny or oversight" is exaggerated, to say the least. I have difficulty in accepting that the province's E-Physician's Project "strikes at the very heart of public health and safety", as the appellant suggests. However, even if it does, dissemination of the specific records at issue in this appeal, which, in my view, are essentially contractual documents setting out terms of reference and fees, would not provide a discernable benefit to any public health or safety concern.

The appellant would appear to concede this point, at least to some extent, in his representations. He acknowledges that the appeal "is not strictly based on health and safety issues, and is as much based on public accountability with respect to the spending of public money". In my view, the public accountability basis is much stronger that any public health or safety considerations. The appellant poses a number of questions in his representations that address his concerns, all of which, in my view, with one exception, could not be answered through the disclosure of the responsive records in this appeal. As far as the final question on the appellant's list is concerned, I accept that disclosing the records would reveal who has been hired to assist the Ministry with the E-Physician Project, but I am not persuaded that the names of these consultants would in any way meet the appellant's stated concern "about how [his] health-care records will be kept, maintained and secured in future".

For all of these reasons, I find that the fee waiver conditions in section 57(3)(c) are not present, and I uphold the Ministry's decision to deny the appellant fee waiver request.

Although the appellant requested and was denied a fee waiver on the basis of the public health or safety considerations in section 57(4)(c), the appellant and the Ministry both provided representations on the application of other grounds for fee waiver listed in section 57(4). I have reviewed these submissions and find that none of these other provisions are applicable in the circumstances of this appeal. Specifically:

- I have significantly reduced the allowable fee, thereby removing any reasonable likelihood that the actual cost to the Ministry would be less than the amount of payment the appellant must make (section 57(4)(a));

- I am not persuaded that a fee in the amount of $193 would cause financial hardship for the appellant, regardless of whether it is paid by him personally or by the media outlet he works for (section 57(4)(b)); and

- The interim decision indicates that partial access will be provided to the appellant, subject to the severance of personal and third party commercial/financial information (Section 8 of Regulation 460/section 57(4)(d)).

ORDER:

1. I order the Ministry to provide a further revised interim access decision to the appellant by **July 22, 2004** describing the responsive records or categories of records and estimating the extent to which access is likely to be granted to each record.

2. I uphold the Ministry's fee estimate in the reduced amount of $193, broken down as follows:

Search	$ 30
Preparation	$120
Photocopy	$ 43

3. I uphold the Ministry's decision to deny the appellant's request for a fee waiver.

June 30, 2004

Tom Mitchinson
Assistant Commissioner