



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2310

Appeal PA-030415-1

Ministry of the Environment



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NATURE OF THE APPEAL:

The Ministry of the Environment (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to chemical emissions from two named facilities.

The Ministry conducted a preliminary search and identified that there were approximately 3000 pages of responsive records. The Ministry provided the requester with an interim decision letter and fee estimate, indicating that partial access would be provided, subject to the severance of the identity of various individuals who had made complaints about the facilities, under section 21(1) of the *Act*. The Ministry's fee estimate consisted of the following items:

Search	-	2 hours @ \$30/hour	\$ 60
Photocopy	-	3000 pages @ \$0.20/page	600
Preparation	-	5 hours @ \$30/hour	150
Delivery	-		<u>10</u>
Total	-		\$820

The Ministry asked the requester for a deposit of \$410, representing 50% of the estimated total fees.

The Ministry also advised the requester that additional responsive records might exist at the Ministry's Mississauga Records Centre, and that if he wanted the Ministry to retrieve and review these records he would have to pay an additional \$60 fee.

The requester, now the appellant, appealed the Ministry's fee estimate, including the \$60 charge for obtaining records from the Ministry's Records Centre in Mississauga.

During mediation, the appellant narrowed the scope of his request to "a list of emissions given off by [two named facilities] between 1972 and 1992". The Mediator also advised the appellant that he could ask the Ministry for a fee waiver, pursuant to section 57(4) of the *Act*. The appellant indicated that he was not prepared to do so at this time.

Mediation was otherwise not successful, and the file was transferred to the adjudication stage of the appeal process.

I began my inquiry by sending a Notice of Inquiry to the Ministry, setting out the facts and issues in the appeal. The Ministry responded with representations. Because the appellant had reduced the scope of the appeal, the Ministry amended the fee estimate to \$388, as outlined in the representations. I then sent the Notice to the appellant, along with the Ministry's representations. The appellant provided representations in response.

DISCUSSION:

INTERIM ACCESS DECISION

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 [section 7 of Regulation 460].

The purpose of the fee estimate, interim access decision and deposit process is to provide the requester with 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]

The appellant's request letter provides considerable detail on the type of records he is seeking. They all concern emissions data gathered by the Ministry over the course of the time period identified in the request for two named facilities in Niagara Falls. Although the Ministry does not describe the responsive records in detail, it is clear from the content of the request letter that the appellant knows the type of records he is seeking and I am satisfied that there is no ambiguity in the Ministry's decision letter on this requirement. The decision letter indicates that partial access will likely be provided, and identifies section 21(1) as the basis for denying access to the identity of complainants contained in the various records. The decision letter is signed by the Manager of the Ministry's Freedom of Information Office as the person responsible for the decision, and includes a statement advising the requester of his right to appeal the decision to this office.

The decision letter does not inform the requester of his right to ask the Ministry to waive all or part of the fee, which is a requirement of a proper interim access decision. However, the Mediator remedied this defect in discussions with the appellant.

I would remind the Ministry to ensure that all elements of an interim decision letter be included in future, including a statement that the requester may ask the Ministry to waive all or part of the fee.

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 estimated 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 estimate and determine whether it complies with the fee provisions in the *Act*, 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*.

The Ministry's representations

General

The Ministry's fee estimate, as revised in response to the appellant's narrowed request, identifies fees to be charged in three categories:

1. Search time
2. Photocopying
3. Shipping

The Ministry bases its estimate on the advice of program area staff familiar with the type and contents of the requested records. The Ministry explains that, given the timeframe of the narrowed request, all records would be located in the Mississauga Records Centre. The Ministry points out that it does not maintain a list of emissions from the two named facilities in a single file, and that the files for each facility would need to be retrieved and reviewed. The Ministry identifies Certificates of Approval, Air Monitoring files and General Occurrence reports as the records that would contain information regarding emissions, and attaches a list of documents prepared by Ministry staff from the two program areas responsible for the two facilities, which would form the basis of the search activities. The Ministry states that a representative sample of records from one program area were retrieved and reviewed by experienced and knowledgeable program area employees, and the results of this review formed the basis of the fee estimate for that facility.

The Ministry also states that the responsive records are likely to include information about the two facilities that falls outside the scope of the request and will need to be severed. The Ministry also explains:

Prior to 1995, applications for Certificates of Approval did not include the current standard section requesting consent to share supporting documentation. As a result, where the records contain proprietary information, prior to an access decision, it may become necessary to either sever the information pursuant to Section 17(1) or to provide notice to the affected third party pursuant to Section 28(1).

The amount of time required to perform this task cannot be calculated at this time; however, given that the number of responsive records will be relatively low, the Ministry is prepared to sever up to 50 pages at its own expense.

Because the Ministry has decided not to charge preparation fees, I will not deal with this fee item further in this order.

Search time

As far as search activities are concerned, the Ministry states:

Facility #1: A total of 13 boxes of records would need to be retrieved from the Records Centre. A representative sample of 3 boxes was retrieved, and although no responsive records were identified, the person who conducted the search expressed confidence that responsive records would be located in some of the other boxes. The actual time taken to review the 3 boxes was 100 minutes, and on that basis the Ministry estimates it would take 6.5 hours to review all 13 boxes (i.e. 33.3 minutes per box).

Facility #2: Approximately 18 files would need to be retrieved from the Records Centre and it would take an estimated 2 hours to review these files and identify responsive records.

The Ministry submits:

Both reviewers will have to read through all of the documents in the boxes or files in order to ascertain whether or not they contains information that refers to emissions. The document header would have to be examined for subject matter and the body of the document would have to be reviewed for numeric characters that may or may not refer to air emissions.

In each case above, the files may or may not contain records that are responsive to the request. There is no way of identifying the exact contents of each file until they are reviewed. For example, "Lab Test Results" could be of any nature and pertain to any type of test, whether internal or external to the facility and may refer to any type of testing.

The Ministry submits that based on the experience of long term employees, the total of 8.5 hours of search time is a reasonable estimate.

Photocopying

The Ministry points out that the number of pages cannot be determined until the files have been reviewed, but estimates there will be approximately 50 pages responsive to the appellant's narrowed request that will need to be copied.

Shipping

The Ministry divides the shipping cost estimate into two categories:

- courier charges to send the records to the appellant of \$3; and
- charges of \$120 to retrieve the records from the Records Centre and to return them once the searches have been completed.

The Ministry explains that this second category "is not a revenue-generating amount, but a cost recovery as sending records from the Mississauga, Ontario location to both the regional office in Hamilton and the district office in St. Catharines are billed to the Ministry". In the Ministry's view, "[d]emanding requesters to pay the retrieval and return invoiced cost more equitably distributes the cost between the Ministry and the requester".

The Ministry obtained rough estimates from a courier firm for shipments of this nature, but points out that, because charges will be based on actual volume and weight, it is not possible to calculate the actual fee until the work is completed.

The appellant's representations

The appellant's representations are general in nature and for the most part do not deal specifically with the issues raised in the Notice of Inquiry. The representations speak primarily to the appellant's reasons for making the access request and the impact that emissions from the two facilities has had on his family, and his view that he should not have to pay a fee to access the records he is after. He submits:

Taxpayers paid for these tests while they were taken. Taxpayers pay for the wages of these people that will find the records, read the records, photocopy the records, and mail the records. I am a taxpayer! ...

...

I offered to go to [the Ministry's] office with my own people and look through the file, and take pictures of what I needed to reduce the costs. I do not believe I should have to pay for information that most likely caused many health problems in my family and many others. ...

...

The only reason I narrowed the search was to lessen the costs. I want any and all information that will show me what was in the air we breathed. I do not feel any costs should be put on this request due to the amount of death and illness involved. I feel that we deserve to know what the regulating government allowed us to be exposed to.

The appellant includes reports, email messages, and newspaper clippings relating to the two facilities in support of his position that he and others experienced health risks stemming from chemical emissions from the two identified facilities.

Analysis and findings

Search time

The Ministry's representations on search time are clear and comprehensive. In calculating the search time estimate, the Ministry relies on staff in the two program areas who have experience and expertise in dealing with the type of record holdings responsive to the request. Estimates are based either on a representative sample of records or the advice of expert staff and, in my view, are carefully considered and reasonable in the circumstances.

Accordingly, I uphold the Ministry's search time fee estimate in the revised amount of \$255.

Photocopying

Allowable photocopy charges are based on the actual number of hard copy records copied for disclosure. The per-page charge of \$0.20 is correct but, as indicated by the Ministry, is based on a best estimate of the number of pages of records ultimately determined to be responsive. I uphold the Ministry's estimated photocopy fees of \$10. 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.

Shipping

Section 57(1)(d) permits an institution to charge fees "in the amount prescribed by the regulations for, ...shipping costs". However, section 6 of Regulation 460, which outlines the various permitted fees, does not include a specific fee for shipping costs. The only component of section 6 that has potential application to shipping costs is paragraph 6, which reads:

The following are the fees that shall be charged for the purposes of subsection 57(1) of the Act for access to a records:

6. The costs, including computer costs, that the institution incurs in locating, retrieving, processing and copying the record if the record if those costs are specified in an invoice that the institution has received.

Although not clear from the wording of this provision, it is common practice for institutions to recover the actual invoiced costs of shipping records to a requester by courier. However, I am not persuaded that “shipping costs” under section 57(1)(d), even if read in the context of paragraph 6, can reasonably be expanded to include courier charges for retrieving records from the Ministry’s Records Centre. In my view, the term “shipping costs” relates exclusively to costs incurred in providing records to a requester/appellant and not to any administrative costs associated with processing a request.

That being said, I find that invoiced courier charges relating to retrieving files from the Ministry’s Records Centre are recoverable costs under section 57(1)(e), if included on an invoice submitted to and paid by the Ministry. Section 57(1)(e) is broad in scope, and allows institutions to charge fees for “any costs incurred in responding to a request for access to a record”. When read in combination with section 6, paragraph 6, of Regulation 460, costs of the nature described by the Ministry under the second “shipping” category are accurately characterized as “costs that the institution incurs in retrieving the record”, and are therefore chargeable to the appellant [Orders M-171, P-1536, PO-1536].

In summary, I find that the Ministry’s revised fee estimate of \$388 complies with the requirements of section 57(1) of the *Act*.

Because the appellant decided not to ask the Ministry for a fee waiver, that issue is not before me in this appeal, and the portions of the appellant’s representations that might have been relevant in the context of a fee waiver appeal are not relevant here.

ORDER:

I uphold the Ministry’s fee estimate in the amount of \$388.

Original Signed by: _____
Tom Mitchinson
Assistant Commissioner

August 13, 2004 _____