



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2464

Appeal PA-050058-3

Ministry of Community and Social Services



Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Télé: 416-325-9188
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

A request was submitted under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for information concerning the requester held by the Family Responsibility Office (FRO) of the Ministry of Community and Social Services (the Ministry). The requester also sought other detailed information about the operations of the FRO.

The Ministry did not respond to the request within 30 days, and the requester, now the appellant, filed a “deemed refusal” appeal. Appeal Number PA-050058-1 was opened. Subsequently, the Ministry issued a decision in response to the request, and this appeal was closed.

In the Ministry’s decision, it refused to process the request under section 27.1 of the *Act* and section 5.1 of Regulation 460 as, in its opinion, the request was frivolous and vexatious.

The appellant appealed this decision and the Commissioner’s office opened Appeal Number PA-050058-2. During mediation, the Ministry agreed to process the request, and the appellant agreed to significantly reduce the scope of his request to include only the following points that are outlined in bold:

- (a) A detailed account of yearly expenditures. **The unedited statement of expenditures for the fiscal year ending March 31, 2003. The total budget that was submitted to the Ministry of Community and Social Services by FRO for approval for the fiscal year 2003.**
- (b) Any and all management reports. **Quarterly reports for Management Board Secretariat and internal management for the year of 2003.**
- (c) Time elapsed between court rulings and first contact with payor. **The average time it took for a case number to be assigned after the court ruling and first contact with payor for the year of 2003.**
- (d) How much interest is gained everyday by withholding payments to the recipients? **The amount of interest that was paid to the account where money was deposited for recipients in total for the years 2003.**
- (e) Where does the interest go? **If any interest is earned in any bank account used by FRO where does this money go?**
- (f) Who are the computer consultants to FRO? **What are the names of the computer consultants used by FRO?**

The Ministry then issued an interim decision and fee estimate based on the narrowed request. The fee estimate stated that depending on the level of detail the appellant is requesting, the estimated fee is either \$4,292.40 or \$613.20.

As a result of this decision, this office closed Appeal Number PA-050058-2. However, the appellant appealed the fee estimate provided by the Ministry, and the current appeal, PA-050058-3, was opened.

During mediation, the Ministry clarified its two fee estimates and provided further information about what level of detail would be provided with each estimate. The appellant indicated that he wanted the level of detail represented by the larger estimate, and submitted a request for a waiver of the fee of \$ 4,292.40, pursuant to section 57(4) of the *Act*. After reviewing information that

the appellant provided, the Ministry denied the request for a fee waiver. The appellant added the denial of the fee waiver as an issue in this appeal.

I began my inquiry into this appeal by sending a Notice of Inquiry setting out the facts and issues to the Ministry. I received representations in return. I then sent a copy of the Notice of Inquiry and the representations of the Ministry to the appellant and he also responded with representations.

DISCUSSION:

FEE ESTIMATE

General principles

Section 57(1) authorizes 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 information regarding fees are found in section 6 of Regulation 460 made under the *Act*. That section reads:

6. 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.

Where the fee exceeds \$25, an institution must provide the requester with a fee estimate. Section 7 of Regulation 460 states that, where the fee is \$100 or more, the institution may require the requester to pay a deposit equal to 50% of the fee estimate before the institution takes any further steps to process the appeal.

A fee estimate of \$100 or more must 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.

[Orders P-81, MO-1699]

The purpose of a fee estimate is to give the requester sufficient information to make an informed decision on whether or not to pay the fee and pursue access [Orders P-81, MO-1367, MO-1479, MO-1614, MO-1699]. The fee estimate also assists requesters to decide whether to narrow the scope of a request in order to reduce the fees [Order MO-1520-I]. 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 above.

Representations submitted by the parties

Ministry's representations

As noted above, the appellant has advised that he is requesting the level of detail of records represented by the larger of the two fee estimates provided by the Ministry. In its decision letter,

the Ministry provides the following breakdown of this fee estimate:

The breakdown of the estimated fee (\$4,292.40) for the records you have requested is as follows:

Searching: \$480.00 (16 hours at \$7.50 per 15 minutes spent searching for the records)

Severing \$3,177.00 (3,177 pages to sever at \$7.50 per 15 minutes spend severing the records)

Photocopying: \$635.40 (3,177 pages at \$0.20 per page)

In its representations, the Ministry provides the following additional information to substantiate the three components of its fee estimate outlined above.

Search time

Addressing the search time required to locate the requested records the Ministry submits that:

[I]t based its fee estimate on actual work done as well as an estimate of work that would need to be done to fully satisfy the request. The Ministry sought the advice of several individuals familiar with the type and contents of the requested records. The individuals involved with the search were Privacy Counsel for the Family Responsibility Office, Articling Students in the Freedom of Information Unit of the Family Responsibility Office, a Senior Financial Policy Analyst, a Senior Program Analyst, the Controller of the Family Responsibility Office and the Acting Manager of Client Services as well as the Manager of the Planning and Support Unit.

The Ministry explains that the records at issue are administrative reports, paper copies of which are kept in various Managers' offices, and any electronic version of the reports that might exist are stored on the shared hard drive of the Family Responsibility Office. The Ministry also describes the nature and extent of the search that is necessary to locate the requested records:

The Family Responsibility Office has already begun searching for the requested records. To date, four employees have spent approximately 12 hours searching for responsive documents. The Ministry has estimated that an additional four hours are required to locate the remaining requested documents.

Specifically, it is estimated that it would take a single employee one hour to visually inspect the records that relate to yearly expenditures and locate responsive documents. There are approximately 3,072 pages related to these records.

It is estimated that it would take a single employee one hour to visually inspect the management reports and locate responsive documents. There are approximately 100 pages that relate to these records.

It is estimated that it would take a single employee two hours to visually inspect records that identify the names of the computer consultants used by the Family Responsibility Office and to locate the responsive documents. It is estimated that there are approximately five pages that will relate to this request.

Accordingly, the Ministry has concluded that it will take a total of 16 hours to search for the 3,177 pages of records requested.

Preparation time

The Ministry also describes the work required to prepare the records for disclosure. It submits that once the records have been located, they must be reviewed, and any information that falls within the ambit of the exemptions outlined in the *Act* must be severed. Relying on Orders M-1169, PO-1721, PO-1834, PO-1990, the Ministry estimates that it will take approximately 2 minutes per page to sever the records, as this would involve taping over the protected information and listing the applicable statutory exemption on the face of the record.

Photocopying

The Ministry explains that all records must either be photocopied or printed off from the computer and therefore, photocopy fees pursuant to section 6 of Regulation 460 would apply.

Finally, the Ministry states that it has not included the shipping costs that will be associated with sending the records to the appellant.

Appellant's representations

As indicated above, the appellant was provided with both a copy of the Notice of Inquiry setting out the facts and issues on appeal and the representations submitted by the Ministry which are set out, in part, above. The appellant did not make any specific representations on whether the fee estimate was or was not appropriately calculated under the *Act*, but focused his submissions on why, in his view, he is entitled to a fee waiver.

Analysis and finding

Based on the information before me, I make the following findings regarding the different components of the fee estimate:

Search time

The Ministry's representations on the estimated search time required to locate the responsive records are clear and comprehensive. It is clear from the representations that the search requires locating a number of different types of records that are found in a variety of different locations, requiring a number of people to conduct various searches. In calculating the search time estimate, the Ministry relied on the advice and opinions of a number of experienced staff who have expertise in dealing with the type of record holdings responsive to the request. The estimate is also based, in large part, on the twelve hours that have already been spent conducting the actual search for the responsive records. The remaining time represents an estimate of four additional hours required to search for and identify the remaining records.

In my view, the search time has been carefully estimated and was calculated in accordance with the *Act*. Accordingly, I find that this aspect of the Ministry's fee estimate is reasonable in the circumstances. I uphold the Ministry's fee estimate of \$480.00 for the search time associated with responding to this request.

Preparation time

In outlining the actions required to prepare the records for disclosure, the Ministry submits that all of the records must be reviewed and information that is subject to one of the exemptions outlined in the *Act* must be severed. It should be noted that I cannot permit the Ministry to charge preparation time for it to review the records to determine which exemptions might apply. In Order MO-1380, Senior Adjudicator David Goodis examined section 45(1)(b), the municipal equivalent of section 57(1)(b), and summarized the approach this office has taken to this issue as follows:

“Preparing the record for disclosure” under subsection 45(1)(b) has been construed by this office as including (although not necessarily limited to) severing exempt information from records (see, for example, Order M-203). On the other hand, previous orders have found that certain other activities, such as the time spent reviewing records for release, cannot be charged for under the *Act* (Orders 4, M-376 and P-1536). In my view, charges for identifying and preparing records requiring third party notice, as well as identifying records requiring severing, are also not allowable under the *Act*. These activities are part of an institution's general responsibilities under the *Act*, and are not specifically contemplated by the words “preparing a record for disclosure” under section 45(1)(b) (see Order P-1536).

I agree with the approach taken by this office on this issue, as articulated by Senior Adjudicator Goodis, and I apply it here. Accordingly, I will not allow the Ministry to charge for the time required to review the records and to determine what information, if any, qualifies for exemption, and which exemption applies. These activities do not, in my view, fall within the ambit of actions contemplated by the words “prepare a record for disclosure.

With respect to the time spent by the Ministry severing the records, previous orders issued by this office [Orders M-1169, PO-1721, PO-1834 and PO-1990] have established that, on average, it takes two minutes per page to sever a record and I accept that approach. The Ministry has calculated that it will require two minutes to review each and every page of the responsive records for a fee of \$3,177.00.

In my view, this fee has not been calculated in accordance with the *Act* and previous orders issued by this office. Specifically, the Ministry neither issued an interim decision with the fee estimate that gave any indication to the appellant as to what information might be disclosed to him if he paid the fee; nor did it identify what exemptions it relies upon in support of the anticipated severances. Considering the nature of the records requested by the appellant, I am not persuaded that it will be necessary for the Ministry to make multiple severances to every single page of the responsive records. I find that because the Ministry's submissions are speculative on this issue, I have not been provided with sufficient evidence to uphold a decision to charge for preparation time on this basis. Therefore, I do not uphold that portion of the Ministry's fee estimate dealing with the preparation of the records for disclosure. Because I have no basis to substitute a different fee estimate for the time required to make severances to the responsive record, I must disallow this portion of the fee.

Photocopying

The Ministry's estimate of \$635.40 for photocopying 3,177 pages is calculated in accordance with item 1 of section 6 of the Regulation. Allowable photocopy charges are based on the actual number of records copied for disclosure. The per-page charge of \$0.20 is correct, based on the estimate of the number of pages of records ultimately determined to be responsive. I, therefore, uphold the Ministry' estimated photocopy fees of \$635.40. Should the actual number of the photocopies be more than this estimate, the Ministry is permitted to recover fees in the amount of \$0.20 per actual page.

Summary

In conclusion, I am satisfied that the Ministry's fee estimate for searching and photocopying the responsive records is appropriate. Accordingly, I uphold the Ministry's fee estimates of \$480.00 for search time and \$635.30 for photocopying charges.

I do not however uphold the Ministry's fee estimate for preparing the records for disclosure.

FEE WAIVER

General principles

Section 57(4) of the *Act* requires an institution to waive fees, in whole or in part, in certain circumstances. That section states:

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 Regulation 460 sets out additional matters for a head to consider in deciding whether to waive a fee:

8. 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.
2. If the amount of a payment would be \$5 or less, whether the amount of the payment is too small to justify requiring payment.

A requester must first ask the institution for a fee waiver, and provide detailed information to support the request, before this office will consider whether a fee waiver should be granted. This office may review the institution's decision to deny a request for a fee waiver, in whole or in part, and may uphold or modify the institution's decision [Orders M-914, P-474, P-1393, PO-1953-F]. The standard of review applicable to an institution's decision under this section is "correctness" [Order P-474].

Section 57(4) requires that I must first determine whether the appellant has established the basis for a fee waiver under the criteria listed in section 57(4) and then, if that basis has been established, determine whether it would be fair and equitable for the fee to be waived.

Part 1: basis for fee waiver – financial hardship

The appellant submits that he is entitled to a fee waiver on the basis of financial hardship under section 57(4)(b).

To meet the “financial hardship” test a requester bears the onus of establishing financial hardship under section 57(4)(b). Generally, to meet the “financial hardship” test to justify a fee waiver, the requester should provide details regarding his or her financial situation, including information about income, expenses, assets and liabilities [see for example, Order P-1393].

The Ministry states that it received insufficient evidence from the requester for it to determine that the payment of the fee for the requested records would cause him financial hardship. It argues that:

The Ministry requested that the requester provide financial disclosure to substantiate his request for a fee waiver. On July 26, 2005, the Director’s office received a letter from the requester, with a copy of his current court Order for spousal support, and a bank account printout from the Requester showing 17 recent transactions. The documents submitted did not indicate the requester’s current income, expenses, assets or liabilities. Nor was there any indication as to how many bank accounts the requester had. Accordingly, the information provided by the requester was insufficient to establish that the payment of the fee would cause the requester financial hardship.

The appellant submits that the first step in the analysis of whether payment would cause financial hardship would be for all parties to agree on a definition of “financial hardship”. The appellant “contend[s] that that any money spent outside of the life sustaining requirements would be cause for financial hardship”. The appellant also submits that when first asked by the Ministry’s Freedom of Information Unit for financial information to support his fee waiver application, he was provided with no information as to the detail of information required and was not advised that the information that he provided was insufficient. He submits that he was never made aware that the Ministry required disclosure of his “current income, expenses, assets or liabilities” as outlined by the Ministry in their representations.

Additionally, to support his contention that payment of the fee would cause him financial hardship, the appellant enclosed with his representations information outlining his current financial situation including summaries of his tax returns for 2001 through 2004, as well as a detailed financial statement which sets out his current total monthly income and expenses, including spousal support payments ordered by the Courts.

Analysis and finding

Having reviewed the representations and documents submitted by the appellant, they reveal that his monthly expenses do exceed his monthly income to a considerable degree and he has very

little in the way of assets. Without repeating all the figures here, in my view, the appellant has provided me with sufficiently detailed financial information to demonstrate that if he was required to pay the estimated fee for the requested records, he would suffer financial hardship within the meaning of that term in section 57(4)(b).

Despite the fact that I accept payment of the fee would constitute a financial hardship for the appellant, section 57(4) of the *Act* also requires that I consider whether, in the circumstances, it would be fair and equitable for the fee to be waived.

Part 2: whether it would be fair and equitable to waive the fee

Previous orders have set out a number of relevant factors to consider when deciding whether a denial of a fee waiver is “fair and equitable” [see Orders P-474, P-890, P-1183, P-1259 and P-1557]. These facts may include:

- the manner in which the institution responded to the request;
- whether the institution worked constructively with the requester to narrow and/or clarify the request;
- whether institution provided any records to the requester free of charge;
- whether the requester worked constructively with the institution to narrow the scope of the request;
- whether the request involves a large number of records;
- whether the requester has advanced a compromise solution which would reduce costs;
- whether the waiver of the fee would shift an unreasonable burden of the cost from the appellant to the institution.

[Orders M-166, M-408, PO-1953-F]

With respect to the last factor listed above, it has been established in previous orders that, when reviewing an institution’s decision to refuse a fee waiver, this office must be mindful of the Legislature’s intention to include a user pay principle in the *Act*, as evidenced by the mandatory language in section 57(1).

The Ministry takes the position that a fee waiver is not fair and equitable in the circumstances for three reasons:

(a) Manner in which the Ministry responded to the request:

- the Ministry advised the requester of the fees and asked him to consider narrowing his request;
- the Ministry provided the requester with two different estimates of the fees for the requested records based on the level of detail of responsive records;
- although the requester did not initially provide the Ministry with any financial disclosure to substantiate his fee waiver request, the Ministry provided the him with an opportunity to submit details about his financial situation;
- the Ministry responded to the request in a timely manner and went beyond its obligations to narrow the request, reduce the applicable fees and substantiate the financial hardship claim.

(b) Manner in which the requester worked with the Ministry:

- the requester initially refused to consider narrowing his request, although he subsequently did so;
- the requester did not work with the Ministry to narrow the request in any way;
- the requester did not initially provide any financial disclosure to substantiate his fee waiver request.

(c) Fee waiver would shift an unreasonable burden on the Ministry:

- the volume of records responsive to the request is significant.

The appellant did not provide representations on whether, in his view, it is fair and equitable to waive the fee in the circumstances of this appeal, and did not respond to the Ministry's representations on this issue.

Analysis and finding

In the circumstances of this appeal, I find that a number of the factors listed above from previous orders are relevant to a determination of whether a fee waiver is "fair and equitable".

I find that the Ministry responded to the request promptly and worked with the requester with a view to narrowing and/or clarifying the request to reduce the fee and to ensure that the records identified were those actually sought by the requester.

I note that the appellant has also made attempts to narrow the request, as is evidenced by a comparison between the initial and the narrowed request. In my view, a factor supporting the granting of a fee waiver which weighs strongly in the appellant's favour is that he aided the Ministry in its efforts to narrow or clarify his request. Although, as pointed out by the Ministry, the appellant initially refused to narrow his request, during the mediation of Appeal Number MA-050058-2, the appellant did indeed narrow his request, as described earlier in this Order.

Although the Ministry might feel that the appellant did not narrow the request sufficiently, it is not for the Ministry to determine what information the appellant might require of them. I find that the appellant's efforts to narrow the scope of the request to be a significant factor favouring the granting of a fee waiver.

The request involves a significant number of records. As noted above, the responsive records that have been located to date amount to 3,177 pages. Preparing this number of records for disclosure will take considerable time and will engage a number of Ministry staff. I find that this is a significant factor weighing against the granting of a fee waiver.

The Ministry has also indicated that it will not be charging for the shipping costs that will be associated with sending the records to the appellant. Particularly given the volume of records that are likely to be disclosed, this is a less important factor weighing against the granting of a fee waiver as it demonstrates an attempt on the part of the Ministry to reduce the costs borne by the appellant.

The Ministry submits that waiver would shift an unreasonable burden of the cost from the appellant to the Ministry. In light of the hours required to search, locate and prepare the responsive records for disclosure, and keeping in mind the "user-pay" principles inherent in the *Act*, I accept that granting a fee waiver would shift an unreasonable burden of the cost from the appellant to the Ministry. This factor weighs heavily against the granting of a fee waiver.

From my review of the factors above, I find that on the balance, the factors weighing against the granting of a fee waiver outweigh those in favour of doing so.

I must again re-iterate the significance of the "user-pay" principles inherent in the *Act*. The fees set out in section 57(1) and the Regulations are mandatory unless the appellant makes sufficient argument that a fee waiver is warranted on the basis that it is "fair and equitable" to do so. In the present case, although I accept that the payment of the portions of the fee that I have upheld will cause the appellant financial hardship within the meaning of section 57(4), I find that the appellant has not provided me with sufficient evidence to substantiate a finding that it is "fair and equitable" to waive the fee. Moreover, in light of my finding with respect to the fee estimate for severing the responsive records, I have substantially reduced the fee that can be charged by the Ministry in the circumstances of this appeal. Taking that into consideration, I am satisfied that no further diminution of the fee is appropriate.

In conclusion, I find that it would not be "fair and equitable" in the circumstances of this appeal to order the Ministry to grant the appellant a fee waiver under section 57(1) of the *Act*. Accordingly, I uphold the Ministry's decision not to grant the appellant a fee waiver.

ORDER:

1. I uphold the Ministry's fee estimates of \$480.00 for search time and \$635.30 for the photocopying of the records responsive to the request.

2. I do not uphold the Ministry's fee estimate of \$3,177.00 for the preparation of the records responsive to the request.
3. I uphold the Ministry's decision to deny the appellant's request for a fee waiver under section 57(4) of the *Act*.

Original signed by: _____
Catherine Corban
Adjudicator

_____ April 10, 2006