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

ORDER PO-2458

Appeal PA-040320-1

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 access to:

> …Facility Specific Reports at long term care facilities employing [a named organization's] members. This application seeks identical information to that provided in relation to [an identified facility] by the decision in File A-2004-00125/mm dated April 8, 2004.

The requester represents a large organization of registered health professionals. The request was for long-term care facility-specific reports that were prepared in 2004. The reports contain the results of province-wide classification of residents in the long-term care facilities. The classification is based on the residents' care requirements.

The Ministry issued an interim access decision and fee estimate based on a review of a random sample of records. Based on its review, the Ministry estimated that the fee for searching, severing and photocopying the records would be $4,656.60. The Ministry also advised the requester's representative that, based on its review of the random sample of records, section 21(1) of the *Act* would apply to exempt part of the records.

The requester's representative then wrote to the Ministry requesting a waiver of the fee "based on similar grounds as awarded by Adjudicator Frank DeVries in … Order PO-2333 dated October 20, 2004 (Appeal PA-030265-1)."

The Ministry denied the request for a fee waiver advising that the request did not meet the requirements of section 57(4) of the *Act*.

The requester's representative (now the appellant) appealed the decisions. The decision of the Ministry is an interim decision, based on a representative sample of records. In the circumstances of this case, the issues under appeal relate to the fee estimate and the denial of a fee waiver.

During the course of mediation the appellant submitted another letter to the Ministry requesting a fee waiver. The Ministry advised the mediator that the appellant's request was reviewed, and that a fee waiver would not be granted.

As mediation did not resolve the appeal, it moved to the adjudication stage of the appeal process.

I sent a Notice of Inquiry to the Ministry, initially, outlining the facts and issues and inviting representations. The Ministry filed representations in response. I then sent a Notice of Inquiry, with a complete copy of the Ministry's representations, to the appellant. The appellant provided representations, which raised issues that I invited the Ministry to respond to. Complete copies of appellant's representations were provided to the Ministry. The Ministry provided reply representations. I provided the appellant with an opportunity to respond to the Ministry's reply representations. Complete copies of the Ministry's reply representations were provided to the appellant. I received sur-reply representations from the appellant.

DISCUSSION:

FEE ESTIMATE

Section 57(1) of the *Act* 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;
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> (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 section 6 of Regulation 460 under the *Act*, which reads:

> 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. O. Reg. 21/96, s. 2.

The Ministry submits that its fee estimate is accurate because it was based on a random sample. The Ministry submits further that it is "supported by established IPC jurisprudence". As

previously noted, the *Act* permits the Ministry to charge $7.50 for each 15 minutes ($30 per hour) of search and/or preparation time. In its representations, the Ministry provides the following fee calculation:

Search time 15 minutes per home	15/60x234x$30.00/hr.	$1755.00
Severance Time 2 min/page	2/60x9x234x$30.00/hr.	$2106.00
Pages	17x234x.20	$ 794.00
Total		**$4656.60**

Because the Ministry did not provide an explanation for its calculation, an Adjudication Review Officer from this office called the Ministry by telephone, and obtained clarification. The Ministry advised that "15" "60" and "2" refer to minutes, "234" is the number of responsive facilities, "17" is the average total number of pages per record and "9" is the average total number of pages requiring severances per record. On this basis, I am satisfied that the Ministry's calculations reflect the fee amounts set out in the regulation. I will now assess whether the Ministry's time and page volume estimates are reasonable.

The appellant submits that the amount of time for search and severance quoted in the Ministry's estimate are excessive. The appellant submits generally that "it is reasonable to assume" that the Ministry has electronic records and that electronic records would require less time to search and sever, than would paper records.

With respect to the search portion of the fee estimate, the appellant submits that the manual search time per page is excessive and that a "… more appropriate time period for each manual search would be one minute". Because the Ministry stated that the documents are chronologically filed per facility, the appellant submits that the records that he seeks access to should be near the top of each file and, therefore, easily located. The appellant submits that, in the alternative, he is prepared to amend his request to the "January 2005 Facility Specific Reports" and submitted that there "should be no prejudice from such an amendment, as the nature of the material is exactly the same, although the data is more current." The appellant submits that the 2005 reports would be correspondingly easier to locate.

The appellant submits that the Ministry has inflated the manual severance time of two minutes per page, stating that "…5 minutes per document is sufficient for the severance functioning".

I have carefully reviewed and considered the representations of the Ministry and the appellant. In my view, both the search and severance fee estimate provided by the Ministry is reasonable.

Because the Ministry based their search fee estimate on a random sampling of the records, I accept its submission that "… the manual search time estimate included an estimate of the time required to simply locate the file for each facility … (and) that the reports are not prominent or easily identifiable within each file." I note, in particular, the Ministry's explanation that "… each facility's file is organized chronologically; the reports are not given any special place of prominence within the file (and) are not printed on coloured paper or in a specially

distinguishable format, so they cannot be easily recognizable within each facility's file." In light of the Ministry's explanation of how the records are manually, not electronically, filed, I accept its submission and that, even if the request were amended, "…there would be no significant saving of time involved."

Regarding the severance time estimate, the Ministry submits that it does not have electronic copies of the reports and has to manually sever the records. The Ministry states that:

> … its estimate of 2 minutes per page in fact represents an estimate of a reduced fee … the severances and de-identification of the personal information in the reports require a contextual consideration of the information contained therein, with cross referencing to other personal information to ensure that potentially identifying information is not disclosed. In fact, the Ministry's review of a representative sample of the reports indicated that, per report, the severances took longer than an average of two minutes per page. The Ministry provided the reduced estimate of two minutes per page in accordance with principles established in IPC orders to the effect that where a few severances per page are required, it is reasonable to estimate that severances will require two minutes per page [Orders #184, P-260, P-565, M-782, M-811].

Additionally, in light of the Ministry's explanations as to how the records are filed, I do not find that the appellant's suggestion to request facility specific reports for 2005 instead of 2004 would result in a lower fee estimate because I accept that the manual search time would likely be the same.

There are a number of orders from this office in which it is accepted that it takes two minutes to sever a page requiring multiple severances. [see Orders MO-1169, PO-1721, PO-1843, PO-1990] Because the Ministry based its fee estimate for severing on actual work done on a random sample, I also accept its statement that the estimate of a 2 minute average time to sever each page represents a reduced fee. In my opinion, the submission of the appellant that 5 minutes per document is sufficient is unreasonable. If I accept the appellant's initial statement that 9 pages per document are involved, that allows little more than 30 seconds per page; if I accept his later submission that 12 pages are involved, the time is correspondingly less. In my view, it is plainly not reasonable to expect the Ministry to accurately sever personal information from the records in this amount of time, and I adopt the reasoning in the orders previously referred to regarding severance estimates.

In conclusion, I uphold the Ministry's fee estimate and I now turn to the fee waiver issue.

FEE WAIVER

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

> 57(4) 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 by the regulations.
>
> 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].

Based on the appellant's representations, the fee waiver issue in the circumstances of this appeal turns on section 57(4)(c) (whether dissemination will benefit public health and safety) and, to a lesser extent, 57(4)(b) (financial hardship).

Section 57(4)(a) relates to the extent of any variance between the estimate and the actual cost of locating, severing and copying the records. In the circumstances of this appeal, where only a sample has been processed, this may be a consideration after the deposit is paid and the work is completed. The appellant may wish to ask the Ministry to consider that basis for a waiver at that stage. Similarly, the factor in section 8, paragraph 1 of the regulation cannot be assessed at present because, although the Ministry indicates some information will be withheld under section 21(1), the extent to which information will be withheld is not yet known.

I turn now to sections 57(4)(b) and (c).

Section 57(4)(b): Will the payment for the record cause a financial hardship for the appellant?

Section 57(4)(b) lists financial hardship as a factor to consider. The appellant represents a large non-profit organization and does not specifically claim financial hardship. However, the appellant submits that, "… as a non-profit organization every dollar spent on fees is a dollar not available for other non-profit activities".

The appellant has not provided me with specific evidence that the amount of fees proposed by the Ministry would hamper any other non-profit activities. Keeping in mind the Legislature's intention to include a user pay principle in the *Act*, as evidenced by the provisions of section 57, and in weighing the appellant's submissions with the user pay principle of the *Act*, I am not persuaded that section 57(4)(b) supports a fee waiver.

Section 57(4)(c): Will dissemination benefit public health or safety?

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

    (a) disclosing a public health or safety concern, or

    (b) 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]

The appellant, throughout his request and appeal, refers to Order PO-2333 and submits that the circumstances of the appeal before Adjudicator DeVries can be applied to the present appeal. I disagree. In my opinion, the records and the facts in the present appeal are distinguishable from the records and the facts in Order PO-2333. In Order PO-2333, the records at issue were

occurrence abuse reports for incidents of alleged and actual abuse/assaults in nursing homes. Additionally, Adjudicator DeVries was provided with evidence that dissemination of similar records had already benefited public health and safety. The appellant, in that appeal, stated:

> [The requester] … obtained the records (and others through the *Act*), and disseminated them to the public through a series of newspaper articles that probed the unfortunate state of care in nursing homes. Following publication, the Minister of Health announced that he plans a "revolution" in the nursing home sector. He made this announcement as a direct result of [the requester's] stories.

Adjudicator DeVries refers to copies of articles the appellant provided to him, which further supported the appellant's position, in that appeal, that the dissemination of the record was a benefit to public health or safety. Adjudicator DeVries stated:

> The public interest in the dissemination of the records is the issue that I am addressing, and the ability of the appellant to do so is clearly a factor in any analysis of this issue. Furthermore, in this appeal I find that the fact that the requester did publish a series of newspaper articles based partly on the contents of the records is a significant consideration. The subsequent public responses and reactions to these published articles are further evidence of the weight to be given to this factor.
>
> Accordingly, I am satisfied that dissemination of the record will benefit (and indeed, has benefited) public health or safety.

By contrast to the records in Order PO-2333, the records before me do not address the actual *care or delivery of care*, and whether or not it is being provided in a proper or adequate manner; rather, the records simply relate to the *care requirements* of the residents with no assessment of whether those requirements are being met or not. In my view, this is a significant distinction, and I am not persuaded that dissemination of the latter type of record would benefit public health or safety. I accept that the appellant would disseminate the records, but unlike the records in Order PO-2333, I find that this would not disclose a public health or safety concern, or contribute meaningfully to the development of understanding of an important public health or safety issue. I also find that, while the records may relate to public health or safety, they do not relate to any identified "issue" in that regard.

Accordingly, I find that section 57(4)(c) does not support a fee waiver in this appeal.

In summary, I find that a fee waiver is not justified under section 57(4)(b) or (c). Based on the evidence and arguments before me, I also find that it would not be fair and equitable to waive the fee.

ORDER:

I uphold the decision of the Ministry.

Original signed by: March 17, 2006
Beverley Caddigan
Adjudicator