



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

ORDER PO-2927

Appeal PA10-33

Ministry of Education



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NATURE OF THE APPEAL:

This order deals with the issues arising out of a request made to the Ministry of Education (the Ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for copies of all reports, memoranda, briefing notes and invoices related to all focus group discussions commissioned by the Ministry from October 3, 2003 to August 28, 2009.

The Ministry issued a fee estimate letter to the requester, advising that the estimated fee for access to the responsive records would be \$672.50, calculated as follows:

- 21.75 hours of search time at \$30 per hour; and
- 100 pages of records at 20 cents per page for photocopying.

The requester subsequently appealed the Ministry's fee estimate as being excessive. In the appeal letter, the requester, now the appellant, advised that the information at issue should be disclosed at no cost, as the disclosure of the information would be in the public interest, and the Government had set a precedent of releasing records in response to other freedom of information requests for free.

The appeal moved to the mediation stage of the process, during which the appellant wrote to the Ministry requesting a fee waiver under section 57(4)(c) of the *Act*, again on the basis that the requested information is of interest to the general public and that the government had set a precedent for releasing information responding to freedom of information requests for free. In particular, the appellant noted responses received from the Ministry of Health and Long-Term Care (MOHLTC) and the Ontario Lottery and Gaming Corporation (OLGC).

The Ministry denied the fee waiver on the basis that the appellant did not establish that there is a connection between the public interest in the disclosure of the records and any public health and safety issues arising out of the information contained in the records, which is the criterion specifically referred to in section 57(4)(c). The Ministry also provided further information in regard to the estimated search time and areas to be searched for responsive records and suggested that the appellant narrow the scope of the request in an effort to reduce the fee estimate.

The matter was not resolved at the mediation stage and subsequently moved to adjudication for an inquiry under the *Act*. I sought, and received, representations from the Ministry and the appellant. I also sought, and received, reply representations from the Ministry. Representations were shared in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction* 7.

For the reasons that follow, I will uphold the Ministry's denial of a fee waiver and its estimate for photocopying. However, I will reduce the Ministry's claim for search time.

DISCUSSION:

FEE ESTIMATE

General principles

Where a fee exceeds \$25, an institution must provide the requester with a fee estimate. Where the institution charges a fee of \$100 or more, the 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 (Order 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 and 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 (Orders P-81 and 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) of the *Act* requires an institution to charge fees for requests under the *Act*. That section reads, in part:

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;
- ...
- (e) any other costs incurred in responding to a request for access to a record.

A more specific provision, relevant to this appeal, regarding fees is found in section 6 of Regulation 460, which states, in part:

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.
- ...

3. For manually searching a record, \$7.50 for each 15 minutes spent by any person.

Calculation of the fee

Search

Representations

The Ministry provided a fee estimate of \$652.50 for search time, based on 21.75 hours of search time, at a rate of \$30.00 per hour.

The Ministry submits that, based on the request, it determined that the five following divisions/branches of the Ministry might have responsive records:

- Elementary/Secondary Business and Finance Division;
- Instruction and Leadership Development Division;
- French Language, Aboriginal Learning and Research Division;
- Student Achievement Division, Learning and Curriculum Division; and
- Communications Branch.

A search was conducted by the above divisions/branches. In order to determine the possible number of responsive records upon which to base a fee estimate, the financial officer in the Communications Branch checked the Integrated Financial Information System (IFIS), which is the system used to track project spending. The purpose of checking this system was to determine how many focus group discussions were commissioned by the Ministry. Three to five projects, dating from 2005 to 2009, were identified that may respond to the request. The Student Achievement Division located 15 pages of responsive records. The Ministry then used the information from the Student Achievement Division in conjunction with the information provided by the Communications Branch as a representative sample in determining the fee estimate.

In addition, the Ministry advises that IFIS was implemented in 2005 and, therefore, manual searches would be required to locate records in the period from 2003 to 2005.

Further, the Ministry submits that another five projects may exist, housed in various program areas and in off-site storage, bringing the estimated number of focus groups commissioned by the Ministry from 2003 to 2009 to ten.

Ministry staff then estimated that, based on the search time required to find one group of records, it would take approximately 2.75 hours to properly and efficiently search for the requested records for each focus group project.

The Ministry states:

In order to ensure that the fee estimate was reasonable and fair to the requester, the Ministry calculated the estimated fee based on 8 responsive projects – a lower estimate than the ten projects which are thought to exist – so that the total average search time is calculated based on 22 hours (8 x 2.75 hr). The Ministry then further revised this total estimated search time downwards to 21.75 to reflect an experienced employee searching for a total of three days at 7.25 hours per day.

The Ministry also states that the fee estimate includes 21.75 hours of search time because the request covers a period of six years and a range of types of records, which are stored in different program areas in different formats, such as hard copy, or electronic. Therefore, the Ministry submits that significant manual search time would be required to find the records in addition to computer-based search time.

The appellant submits that the Ministry's fee estimate is excessive, as 2.75 hours of search time per focus group is extremely high. The appellant states:

Given that all of the requested information and documentation is from the period dated October 3, 2003 to August 28, 2009, we find it rather difficult to accept the fact that searching for such documents is as burdensome and onerous as stated by the Ministry. A significant number of these documents are undoubtedly archived in an electronic format. Furthermore, because we have requested "reports, memoranda, briefing notes, and invoices" for each of the Ministry's focus group discussions in the specified time period, this information ought to be stored collectively in the files pertaining to the focus group itself.

In addition, the appellant is of the view that the majority of the focus group projects took place after 2005 and, therefore, a large proportion of the documentation, particularly financial documents, should be easily accessible in an electronic format. Simply because a focus group took place between 2003 and 2005, the appellant adds, does not mean those files are any more difficult to locate than a focus group that took place later.

Lastly, the appellant submits that, assuming focus group and related documents are archived in a professional and responsible manner, they should be contained in their own files and would not each require nearly three hours of manual searching.

In reply, the Ministry submits that the appellant's argument that responsive documents should be "archived in a professional and responsible manner," and would, therefore, not require nearly three hours of manual searching, is not plausible. The Ministry states that this office has confirmed in previous orders that the *Act* does not require an institution to keep records in such a way as to accommodate various freedom of information requests. The Ministry cited Orders P-31, M-166 and M-583 to support its position.

The Ministry further submits that the *Education Act* does not specify how the Ministry is required to organize its records and documents. In addition, while the *Archives and*

Recordkeeping Act, 2006, requires the Ministry to have records schedules, it does not mandate how the Ministry organizes its records.

The Ministry also reiterated its position that the fee estimate was based on both a representative sample of records and the advice of knowledgeable staff familiar with the records. In addition, the Ministry noted that the records pre-dating 2005 would necessitate a time consuming off-site, manual search.

Analysis and Findings

As stated above, the purpose of a fee estimate is to provide the requester with sufficient information to make an informed decision on whether or not to pay the fee and pursue access to the requested records. In the current appeal, the Ministry's estimate was based on the estimated search time and photocopying to be done to respond to the appellant's request.

Where a fee estimate for search time is based on a representative sample and/or the advice of an employee familiar with the records, rather than on actual documented time spent finding all of the records, there is of necessity an element of guesswork and speculation in the estimate. In that situation, I must decide whether I am satisfied that the conclusions reached by the Ministry on the basis of the sample and the advice of its employee represent a reasonable estimate of the required search time. If I am not satisfied, the proper outcome is disallowing all or part of that component of the fee estimate.

On my review of the evidence and the arguments of the parties regarding search time, I am prepared to uphold the Ministry's fee estimate only in part.

The Ministry's search fee is based on a representative sample of responsive records, which constitutes one of the "projects" identified by the Ministry. I do not accept the Ministry's argument that the search time will total 21.75 hours and I find that figure to be excessive. I have reached this conclusion because, in my view, there will be a substantial amount of duplication in searching for records relating to the remaining projects and I would expect that Ministry staff would become more efficient in conducting the searches for each of the remaining projects.

I also accept the appellant's submission that the responsive records for each project should be located in discrete files relating to each project. Once a project file is located, it is reasonable to expect that any "reports, memoranda, briefing notes, and invoices" related to that project would be contained in that file.

The Ministry submits that neither the *Education Act* nor the *Archives and Recordkeeping Act, 2006* mandates how the Ministry is to organize its files. However, I note that the responsive records are of relatively recent origin; in fact, based on the appellant's request, no record was created prior to 2003. It is reasonable to expect that Ministry records from this time period are kept in a consistent and easily searchable manner. If they are not, I am of the view that the appellant should not bear the financial burden of the Ministry's failure to implement proper record management practices. Given this, I find that 2.75 hours of search time for each project file is excessive.

In my view, a better estimate of the time that would be required is 30 minutes per project, and I am therefore prepared to uphold a fee estimate for search time based on that figure. Based on the Ministry's use of 8 projects to calculate the fee for search time, I will allow 4 hours of search time at \$30.00 per hour, for a total of \$120.00.

Photocopying

The Ministry estimated photocopying charges of \$20.00. The Ministry calculated these charges based on 15 pages of records in the representative sample. Eight projects, at 15 pages each and at a cost of 20 cents per page totals \$24.00. In its estimate, the Ministry revised this portion of the fee downwards to \$20.00. The appellant has not disputed the Ministry's estimate regarding the costs for photocopying responsive records. I find the Ministry's estimate with respect to photocopying to be reasonable and in accordance with the fee provisions in the *Act* and Regulation 460. As a result, I uphold the Ministry's estimate in this regard.

In summary, I will uphold a fee estimate of \$140.00. The appellant requested and was denied a fee waiver. I have upheld the Ministry's decision with respect to the fee waiver for the reasons that follow.

FEE WAIVER

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

The appellant relies on section 57(4)(c) in support of his request for a fee waiver.

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

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,

...

- (c) whether dissemination of the record will benefit public health or safety . . .

Section 8 of Regulation 460 sets out additional matters for a head to consider in deciding whether to waive a fee; however those provisions are not relevant in the circumstances of this appeal.

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 fee provisions in the *Act* establish a user-pay principle which is founded on the premise that requesters should be expected to carry at least a portion of the cost of processing a request unless it is fair and equitable that they not do so. The fees referred to in section 57(1) and outlined in section 6 of Regulation 460 are mandatory unless the requester can present a persuasive argument that a fee waiver is justified on the basis that it is fair and equitable to grant it or the *Act* requires the institution to waive the fees (Order PO-2726).

In other words, while the burden of proof for establishing that its fee estimate is reasonable and calculated in accordance with the *Act* and Regulations rests with the Ministry, in the case of a review of a fee waiver request, the burden of proof rests with the appellant (Orders M-429, M-598, and MO-2495).

There are two parts to my review of the Ministry's decision under section 57(4)(c) of the *Act*. I must first determine whether the appellant has established the basis for a fee waiver under the criteria listed in subsection (4). If I find that basis has been established, I must then determine whether it would be fair and equitable for the fee, or part of it, to be waived (Order MO-1243).

Past orders of this office have established that 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 focus of section 57(4)(c) is "public health or safety." It is not sufficient that there be only a "public interest" in the records or that the public has a "right to know." There must be some connection between the public interest and a public health and safety issue (Orders MO-1336, MO-2071, PO-2592 and PO-2726).

Representations

As previously indicated, the appellant is relying on section 57(4)(c) of the *Act* and states that fees are to be waived when public health or safety is in question. In support of his position, the appellant states:

. . . We contend that Ontario's public education system is a fundamental component of the greater public health. Decisions and policies which impact the education system inexorably affect many aspects of the public interest, including the economy, social cohesion, public safety, crime, global competitiveness and higher education.

When considering an issue as critical to a society's present and future prosperity as education, the public deserves to know who is making and influencing decisions as well as why and how these decisions came to be.

The appellant also submits that the public deserves to know the identity of the individuals responsible for public education policy decisions, particularly in light of the current government's "troubling willingness to reward political supporters with considerable influence on public policy."

The Ministry submits that the appellant has failed to outline how disclosure of the records he requested is in the public interest. In addition, the Ministry argues that in order to obtain a fee waiver under section 57(4)(c) of the *Act*, it is not sufficient for a requester to assert a public interest without demonstrating the connection to a public health and safety issue. The Ministry states that the appellant has failed to demonstrate the requisite connection.

With respect to the appellant's statement that other government ministries/agencies have responded to freedom of information requests by providing the records for free, the Ministry submits that it does not have enough information about the MOHLTC request to comment. The Ministry also distinguished the OLGc request from this request. Although it did not have the particulars of that request, a newspaper ran an article on which the Ministry commented as follows:

. . . [I]t does appear that the circumstances of the OLGc request were rather different. According to the article, a number of different requesters had made requests for the same information. Additionally, one of the requesters actually paid the fee and, only after collecting the fee . . . did OLGc later release the records for free to subsequent requesters. One can infer that because the information was widely in demand – having been sought by a number of different requesters around the same period of time – that the information was considered to be in the public interest. According to the article, only after the release of the information to all parties was the fee refunded to one of the requesters.

Lastly, the Ministry submits that providing the appellant with a fee waiver would shift an unreasonable burden of the cost from him to the Ministry and, ultimately the tax payers of the province, especially given that the appellant did not accept the opportunity to narrow his request.

Analysis and Findings

I agree with the appellant that the subject matter of the records relates to a public rather than a private matter. I also accept that the disclosure of the responsive records may be in the public interest. However, I do not agree with the appellant's position that the subject matter of the records relates directly to a public health and safety issue.

The mere existence of a public interest does not by itself fit within the public health or safety section of the fee waiver provisions in section 57(4). In order to meet the requirements of this ground, set out in section 57(4)(c), the subject matter of the records themselves must relate directly to a public health or safety issue, and the records must illuminate the connection between the public interest and an established public health or safety issue.

The appellant's general arguments and concerns about the decision-making process surrounding education in this province fail to provide the level of detail required to establish a connection between the records and an established public health or safety issue. The appellant's position is that the public deserves to know how decisions regarding education are being made. While this may be true, the appellant's representations fail to identify a particular public health or safety issue that will be addressed through the disclosure of the records. At best, the appellant sets out a connection between the educational system and its impact on broader societal issues that is too remote to meet the standard set by section 57(4)(c). Accordingly, the appellant has failed to establish a connection between the records and an identified public health or safety issue.

Consequently, I find that the fees should not be waived pursuant to section 57(4)(c). In view of my findings on the first part of the test for fee waiver, it is not necessary for me to address the second part of the test, namely the assertion that granting the fee waiver would be fair and equitable in the circumstances.

ORDER:

1. I will allow the Ministry to charge the appellant a fee of \$120.00 to conduct a search for responsive records.
2. I uphold the Ministry's photocopying fee estimate of \$20.00.
3. I uphold the Ministry's decision to deny a fee waiver.

Original signed by: _____
Brian Beamish
Assistant Commissioner (Access)

November 9, 2010