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

ORDER 86

Appeal 890027

Ministry of Health

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August 21, 1989

VIA PRIORITY POST

The Honourable Elinor Caplan
Minister of Health
10th Floor, Hepburn Block
80 Grosvenor Street
Toronto, Ontario
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Dear Ms Caplan:

Re: Interim Order 86
Ministry of Health
Appeal No. 890027

This letter constitutes my Interim Order in the appeal by Appellant (the "appellant") from a decision of the Ministry of Health (the "institution") to charge a fee in the amount of $9,503.80 in response to his request for information under the Freedom of Information and Protection of Privacy Act, 1987.

On December 6, 1988, the appellant wrote to the institution requesting access to the following records:

> Copies of forms, documents, Terms and Conditions, Tenders, Waivers of Tender, Prospectuses of Tender, Requests for Tenders and/or Quotations, letterhead quotes, telephone quotes, and correspondence, pertaining to 'fee for service' contracts not performed by Ministry of Health - Finance and Administration Division & Health Insurance Division staff, whether let by Sealed Tender, Request for Project Proposal, Letterhead Quote or by Telephone Quote, for all services purchased from January 1, 1983 to the present, by all offices of the Health Insurance and Finance and Administration Divisions of the

Ministry of Health, with no exclusions to all the above. On January 11, 1989, the then Freedom of Information and Privacy Co-ordinator for the institution (the "Co-ordinator") responded by providing the appellant with a fee estimate for the requested records in the amount of $9,503.80. The estimate was broken down as follows:

photocopies	$1,727.80
manual search	3,990.00
preparation including severances	3,396.00
programming	140.00
other costs	220.00
shipping costs	30.00
	$9,503.80

On February 9, 1989, the appellant wrote to my office appealing the amount of the fee, and I gave notice of the appeal to both parties on February 20, 1989.

Upon receipt of the appeal, the Appeals Officer assigned to the case asked the institution to provide him with a copy of the records at issue in the appeal. He also requested an explanation of the factors considered by the head when deciding to charge a fee. In response, a representative of the institution advised the Appeals Officer that the requested records had not been retrieved and reviewed prior to the issuance of the fee estimate; rather, the Co-ordinator had contacted the various branches and departments of the institution having custody or control of these records, and asked them to provide him with an estimate of the costs involved in preparing the records for possible disclosure. The Co-ordinator simply consolidated these estimates and relayed the total estimated fee to the appellant in the January 11, 1989 letter.

Although the fee estimate included charges for severing the records, this estimate was made without having reviewed the contents of the records. Consequently, the institution was unable to advise the appellant regarding the possible application of any of the exemptions contained in the Act, or whether any confidentiality provisions contained in other statutes would bar the institution from disclosing any of these records. The institution's position, as communicated to the Appeals Officer, was that the institution did not have to address the issue of the appellant's right of access to the records until the appellant paid a deposit equal to 50% of the estimated fee ($4,251.90).

During the mediation process, it became clear that the appellant had a different impression. He advised the Appeals Officer that he thought all of the requested records would be released to him, unsevered, upon payment of the estimated fee. However, after he was informed that severances might in fact be made, the appellant indicated that he was not prepared to pay the fee unless and until he received an indication as to the nature and extent of exemptions which the institution might later apply. As a result, a mediated settlement was not effected.

At this point, the Appeals Officer prepared a report which was sent to the parties with a letter dated April 28, 1989. This letter advised the parties that the appeal had reached the inquiry stage and invited each of them to make representations in response to issues raised in the Appeals Officer's Report. The Appeals Officer's Report asked the institution to respond to specific questions regarding the time and costs involved in locating and retrieving the requested records, and preparing them for disclosure. The institution responded to my request for representations, and I have considered this response in making this Interim Order. The appellant did not submit representations.

The institution's representations included the following comments:

> It is submitted that the majority of the information requested is not held on a computer data bank nor on microrecords, thereby requiring manual search to identify those personnel files which meet the requirements of the request.
>
> It is submitted that the majority of the information requested is maintained in paper files which are located in a variety of offices throughout the province:
>
> - Toronto
> - Don Mills
> - Kingston
> - District Offices
> - Regional Personnel Offices
> - Cooksville
>
> It is submitted that two years after an unclassified employee terminates employment all personnel files are transferred to the Inactive Records Centre managed by the Ministry of Government Services. Therefore, all files dated 1983 to 1987 must be retrieved from the Centre in Mississauga.

> It is submitted that while some employees are clearly identified as nonclassified staff, in many instances this is not the case. Summer student files reside with the nonclassified staff files, as well as, some current and terminated employees who initially began their public service career following an unclassified contract position. Therefore, in order to meet the requirements of the request, in the majority of offices, all personnel files must be reviewed.
>
> It is submitted that the files which need to be examined would take 3 to 4 weeks to retrieve and another 5 to 6 weeks would be needed to review the files and produce the material.
>
> It is submitted that a computer program must be developed to produce a number of the records requested. The steps required in developing this program are: establish user requirements; analyse problem; design program; write program in COBOL computer language; test program; user sign-off and acceptance; and implementation and production of records.

The institution's representations did not address many of the questions posed in the Appeals Officer's Report. In particular, the institution provided no information regarding the costs which would be incurred in responding to the request.

Whenever I receive an appeal from a head's decision to charge a fee, it is my responsibility under subsection 57(4) of the Act to ensure that the amount estimated by the institution is reasonable in the circumstances. The burden of establishing reasonableness rests with the institution, and unless I have been provided with information as to how a fee estimate has been calculated, it is not possible for me to determine whether the institution's fee estimate is reasonable.

In this appeal, because the institution did not respond to some of the key questions posed in the Appeals Officer's Report, I find that the burden of proving reasonableness has not been discharged, and I infer that the fee estimate provided to the appellant was not reasonable in the circumstances.

Although not stated by the institution, it would appear that one of the difficulties experienced in determining a reasonable fee estimate stemmed from the fact that the requested records are maintained at various Ministry locations throughout the province and are, therefore, unduly expensive to retrieve.

I recently dealt with a similar issue in my Order 81 (Appeal Number 880117 et al.). In that Order I set out the procedure to be followed by an institution when responding to requests involving records which are unduly expensive to retrieve for inspection by the head in making a decision under section 26 of the Act. This procedure requires an institution to issue an "interim" section 26 notice together with a fee estimate under section 57(2) of the Act. This "interim" notice must give the requester an indication of whether he or she is likely to be given access to the requested records, together with a reasonable estimate of any proposed fees. As I stated at page 9 of my Order 81:

> ...requester must be provided with sufficient information to make an informed decision regarding payment of fees, and it is the responsibility of the head to take whatever steps are necessary to ensure that the fees estimate is based on a reasonable understanding of the costs involved in providing access.

In accordance with the procedure set out in my Order 81, I Order the institution to take the following action:

1. clarify the request with the appellant to ensure that both parties have the same understanding as to the scope of the appellant's request;

2. issue an "interim" section 26 notice to the appellant based on either a representative (as opposed to a random) sampling of the requested records, or consultations with individuals within the institution who are familiar with the requested records. This "interim" section 26 notice must advise the appellant whether access is likely to be given;

3. issue a revised fees estimate to the appellant under subsection 57(2) of the Act. This estimate must include a clear statement of how the estimate was calculated, and must solicit representations from the appellant regarding the head's discretion to waive fees under subsection 57(3).

Although it is up to the head to decide which of the two methods she will use to determine a reasonable fee estimate, in the circumstances of this appeal I would recommend that the institution base its "interim" section 26 decision and its revised fees estimate on a representative sampling of each type of record requested by the appellant. Efforts to determine a reasonable

estimate based on consultations with Ministry staff were not successful in the first instance, and it may be that a representative sampling would be the preferred method in the circumstances.

In summary, I order the institution to issue an "interim" section 26 notice and revised fees estimate to the appellant within 20 days of the date of this Order. The revised fees estimate must solicit representations from the appellant as to waiver of fees.

Unless the appellant provides the institution with an indication that he is satisfied with the revised fees estimate within 10 days of notification by the institution, I order the institution to submit written representations in support of the revised fees estimate, including complete answers to the questions posed in the Appeals Officer's Report, to me within 45 days from the date of this Order. These representations must address the issue of waiver if the appellant provides the institution with any information in support of a claim to waiver of the revised fees estimate. Following receipt of representations, I will review this matter and issue a Final Order regarding the question of fees.

In order to assist the institution in complying with this Interim Order, I have enclosed a copy of the full text of my Order 81.

Yours truly,

Sidney B. Linden
Commissioner

Enclosure

cc: Mr. Andrew Parr, FOI Co-ordinator
Appellant