



**Information and Privacy
Commissioner/Ontario**

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

ORDER 111

Appeal 890029

Human Resources Secretariat



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November 6, 1989

VIA PRIORITY POST

Appellant

Dear Appellant:

Re: Order 111
Appeal Number 890029
Human Resources Secretariat

This letter constitutes my Order in your appeal from the decision of the Human Resources Secretariat (the "institution") regarding your request for information made under the Freedom of Information and Protection of Privacy Act, 1987 (the "Act").

The appeal file indicates that on October 27, 1988 you submitted a request to the institution asking for the following:

- (1) All records created in 1988 including reports, studies, statistical surveys, projections, plans proposals, contentious issue reports and briefing notes relating to the following:
 - (a) compensation and benefits for professionals within the Ontario public service;
 - (b) the current and proposed Government of Ontario's compensation plan and classification scheme for lawyers it employs;
 - (c) salaries paid and benefits provided to Ontario Government lawyers in comparison to non_Ontario Government lawyers.

[IPC Order 111/November 6, 1989]

- (2) This request is to exclude the Weiler report itself, and the submissions made by any groups to Mr. Weiler but to include any submissions or representations made by or on behalf of the Government.

On November 4, 1988, you wrote to the institution, and stated, in part, the following:

This letter is a request pursuant to subsection 57(3) of the Act to waive the payment of all amounts required to be paid under the Act. Our Association has been given a mandate by Management Board to bargain on behalf of all lawyers employed by the Ontario government. In order to properly perform that function we must assemble and consider a large amount of information. Any substantial payments required under the Act will cause financial hardship for our organization.

...Our negotiations are being conducted in a cooperative and collegial atmosphere. I request that the head of the Ministry or institution grant our request for a waiver on the grounds of fairness and equity in light of the spirit of our ongoing negotiations.

On January 27, 1989, the institution responded to your request by indicating, in part, as follows:

...partial access to your requests has been granted.

The partial access to records relates to part 1(a,b and c) of your requests. In accordance with subsection 29(1)(a) of the Act, access cannot be provided to records requested in part 2 of your requests because the records do not exist.

The fee for providing this service is \$480.00 and is calculated as follows:

Request for 1987 records

a) Search charge to locate records		
2 hours @ \$24.00 per hour	=	\$48.00
(less first 2 hours free)	=	48.00
		<u>TOTAL: nil</u>

Request for 1988 records

a)	Search Charge		
	20 hours @ \$24.00 per hour	=	\$480.00
	(less first 2 hours free)	=	<u>48.00</u>
			\$432.00
b)	Cost of preparing record		
	2 hours @ \$24.00 per hour	=	<u>\$48.00</u>
			\$480.00

...Upon receipt of your cheque or money order, you may view the original record as requested at...

On February 15, 1989, you wrote to me appealing the decision of the institution. You appealed both the Head's failure to waive the fee charged for access to those records to which access was granted and the denial of access to certain records. In regard to the fee, you stated the following:

The Head erred in failing to waive the fee charged for access despite a written request to do so and accordingly the Head has acted in an arbitrary and inconsistent manner since similar requests have been granted in the past.

As you are aware, as soon as your appeal was received by my office, an Appeals Officer was assigned to investigate the circumstances of the appeal and attempt to mediate a settlement. It was agreed that the issue of fee waiver would be dealt with as a preliminary issue, in this appeal, leaving a resolution of the substantive issues related to the denial of access to records to be resolved afterwards, if necessary. Although you did not take issue with the quantum of the fees assessed, in addition to soliciting submissions on the issue of waiver, the institution was asked to provide a description of how the fee estimate was calculated.

When it appeared that no settlement could be achieved, the Appeals Officer prepared a report which was sent to you and the institution with my letter of August 16, 1989, requesting representations on these matters. I have received and reviewed these representations.

Subsection 57(1) of the Act reads as follows:

(1) Where no provision is made for a charge or fee under any other Act, a head may require the person who

makes a request for access to a record or for correction of a record to pay,

- (a) a search charge for every hour of manual search required in excess of two hours 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; and
- (d) shipping costs.

The explanation of the fee, provided to me by the head, has satisfied me that the amount of the estimated fee was calculated in accordance with the Act and the regulation and that the head has properly exercised her discretion under subsection 57(1) to charge a fee.

Subsection 57(3) of the Act reads as follows:

A head may waive the payment of all or any part of an amount required to be paid under this Act where, 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;
- (d) whether the record contains personal information relating to the person who requested it; and
- (e) any other matter prescribed in the regulations.

The Act is silent as to who bears the burden of proof in respect of subsection 57(3) however, it is a general rule that the party asserting a right or duty has the onus of proving its case.

The head indicated to me, in her submissions, that the terms of subsection 57(3) of the Act were considered and it was determined that:

- a) the actual cost of processing the request far exceeded the amount being charged the requestor;
- b) in the opinion of the institution, the minimum charge of \$480.00 would not cause financial hardship to the Association of Law Officers of the Crown as this Association collects dues from its members and compensation and general research is an expected and necessary activity and cost of any party to collective bargaining;
- c) the records requested were not relevant to the issue of public health or safety;
- d) the records do not contain personal information relating to the person who made the request.

In addition to the foregoing, the head submitted the following:

The institution fully considered all the circumstances relating to this request and did in fact reduce the fee the equivalent of 11.25 hours of search time. Section 57(3) of the Freedom of Information and Protection of Privacy Act states that all or part of a fee may be waived where 'in the head's opinion, it is fair and equitable to do so after considering' certain circumstances. It is respectfully submitted that discretion with respect to the application of fee waivers is given to the head of an institution and therefore the Human Resources Secretariat should not be bound by the practice or response of any other institution faced with a similar request for information. It is further submitted that the decision of the head is not arbitrary and is a proper exercise of the discretion conferred by the Act.

As I have stated in my Order 5 (Appeal Number 880091) dated July 18, 1988, "I find that the wording of subsection 57(3) creates an exhaustive list of the matters to be considered by the head in determining if a waiver of all or any part of a fee is appropriate."

In a letter to the institution and again in your submissions, you specifically referred to the ground of "financial hardship", thereby implicitly invoking subsection 57(3)(b) of the Act. You indicated that the Association for whom you act is:

...a non_profit entity funded entirely by the fees paid by our membership... In order to form our Association it was necessary to retain legal counsel to represent us in negotiations with the government. We have not been able to allocate funds to our other needs including the preparation of information and research concerning our position in the bargaining process.

It is now government policy to bargain with the Association over salary matters concerning our membership...

We have the responsibility to represent over 300 lawyers in these negotiations. In order to properly discharge our responsibilities to our members as well as carry out the function which government has given us, we must have access to the information to which we are otherwise entitled. We will be unable to adequately carry out our function without this information and we do not have the funds to pay the fee in question...

As I have stated in previous Orders, the Legislature's intention to include a "user pay" principle in the Act is clear from the wording of section 57. The head has considered and rejected as being inapplicable to this case, all of the factors set out in subsection 57(3). I can find no error in the head's decision in regard to subparagraphs 57(3)(a), (c), (d) and (e). In particular, in my view, financial hardship has not been established. In arriving at this conclusion, I have considered the size of the Association on whose behalf you are acting, which is in excess of three hundred people. If the Association were to pay the fee quoted, the financial burden on each member would amount to little over one dollar, if that. I am also in agreement with the head's conclusion in regard to subparagraph 57(3)(b) in that I find that you have not presented evidence that paying the fee would cause financial hardship to the Association or to yourself that is sufficient to shift the financial burden from you and the Association to the government and ultimately, of course, to the public.

Although I may have some sympathy with regard to your perceived need for the records, this is not a consideration for waiver listed in subsection 57(3). I would hope that a need for the records would be present whenever a request was made. Likewise, it is within the discretion of the head to waive a fee and the decisions of head's of other institutions or even of the same head in regard to different cases are irrelevant, provided the decision is in accordance with subsection 57(3) of the Act.

Accordingly, I find that you have not demonstrated financial hardship, in this case, and I support the institution's position that the grounds for waiver under subsection 57(3) do not apply. Therefore, the appeal is dismissed.

Yours truly,

Sidney B. Linden
Commissioner

cc. Dr. Elaine M. Todres, Deputy Minister
Human Resources Secretariat
Mr. John Goodman, Senior Analyst