

ORDER P-1349

Appeal P-9600294

Ministry of the Attorney General

BACKGROUND:

On February 12, 1995, the appellant made a request under the Freedom of Information and Protection of Privacy Act (the Act) to the Ministry of the Attorney General (the Ministry) for access to information relating to all requests received by the Ministry to investigate alleged hate crimes, including consents to prosecution under the Criminal Code. The Ministry sought clarification, and by letter dated April 11, 1995, confirmed that the request was for "the total number of requests made to the [Ministry], from 1970 to present, in which he/she was asked to order an investigation into an alleged hate crime or to consent to a prosecution under the hate law of the Criminal Code; and a copy of all requests received ... from 1970 to the present." On April 18, 1995, the appellant responded by indicating that her "request encompassed not only the requests made ... but also any replies or other materials in such files as could be released."

For ease of reference, I will refer to the appellant's request for the number of requests received and copies of the requests as the "initial request" and to the later expanded or clarified request as the "expanded request". In this order, I will also refer to the Ministry's response to the initial request as the "initial fee estimate" and the response to the expanded request as the "expanded fee estimate".

On October 12, 1995, the Ministry provided the appellant with a fee estimate of \$300 for the records as described in its letter of April 11, 1995. This estimate included search time only with photocopying and preparation charges to be determined. The Ministry asked for a deposit of \$150 prior to continuing to process the request. The Ministry's letter indicated that section 21 of the Act may apply to some of the records.

On October 18, 1995, the appellant sent a deposit cheque of \$150 and reiterated that her request included "any replies or other material in such files as could be released" (the expanded request). On December 22, 1995, the Ministry responded that the "broadened" request would require a new fee estimate.

On March 4, 1996, it returned the appellant's cheque, provided the appellant with a new fee estimate of \$2,900 for search time "to date" and photocopying 10,600 pages (the expanded fee estimate). The Ministry indicated that the exemptions in sections 13(1), 19, 20, 21(3)(b) and 22(a) may apply to the records.

On March 12, 1996, the appellant sent another cheque for \$150 and requested the Ministry to process the request as described in her initial request (i.e. the total number of requests received for prosecution and copies of the requests). The appellant indicated that she would make a separate request for the remaining information being "any replies or other material". At this time,

the appellant filed an appeal concerning the Ministry's handling of her request. Appeal Number P-9600172 was opened.

In response to the appellant's expanded request, the Ministry stated that "splitting" the request would not reduce the cost as it involves a search of the same records. In its response, the Ministry indicated that its fee estimate of \$2,900 was an interim estimate and that while it covered both the requests, it was only for work done "to date" as the search was not complete. The appellant then applied for a fee waiver.

During mediation, the appellant informed the Commissioner's office that she has made numerous attempts to speak with the Ministry's Freedom of Information and Privacy Co-ordinator for the purpose of identifying the records sought and therefore, narrowing the request. The Commissioner's office advised the Ministry of the foregoing and also requested its decision on the application for the waiver of fees.

The Ministry denied the waiver of fees. The Ministry stated that if the appellant wished to narrow the request, a revised fee estimate would be provided; however, the estimate of \$2,900 resulted from a preliminary review of the request and would be included in a revised fee estimate. The appellant filed an appeal of the decision to deny her request for the waiver of fees. For administrative purposes, the earlier appeal file was closed and the issues continued under a new appeal file Number P-9600294 (being the subject appeal). The appellant has not appealed the application of any of the exemptions referred to in the decision letters.

NATURE OF THE APPEAL:

The issues in this appeal are as follows:

1. What is the scope of the request?
2. Is the Ministry's decision on access a final decision or an interim decision?
3. Was the fee estimate issued by the Ministry in accordance with the Act and the regulations?
4. Was the Ministry's decision to deny waiver of the fee reasonable in the circumstances of this appeal?

This office provided a Notice of Inquiry to the appellant and the Ministry. Representations were received from both the Ministry and the appellant.

DISCUSSION:

SCOPE OF THE REQUEST

The Ministry acknowledges that it erred in that "the October 12, 1995 fee estimate and interim decision was incorrectly based on the appellant's request... i.e. [for] the request package only". The Ministry states that this was the result of miscommunication within the Ministry as it was

not until November 1, 1995 that the person responsible for locating and retrieving responsive records was notified of the clarified request.

After receiving the supplementary decision letter with the revised fee, the appellant applied for and was denied waiver of the fees. At this point, the appellant reduced the scope of her request to those records responsive to her initial request, which states:

... all instances in which the Attorney General has been asked to order an investigation into an alleged hate crime or to consent to a prosecution under the hate law of the Criminal Code... I am interested in all such requests, whether or not they were granted by the Attorney General.

In my view, while the scope of a request may not be expanded on appeal, it is entirely proper for the appellant to reduce or narrow the scope of her request and/or appeal during the clarification and mediation processes. There is also nothing in the legislation which precludes the appellant from submitting a separate request for the additional information sought, upon payment of the appropriate fees. Therefore, I accept that the scope of the request is restricted to access to the total number of requests received by the Ministry together with a copy of these requests, i.e. the initial request.

IS THE MINISTRY'S DECISION A FINAL DECISION OR AN INTERIM DECISION?

The initial request to the Ministry predates the recent amendments to the legislation and I will therefore conduct my review of the Ministry's decision within the meaning of the Act as it prevailed at the time of the initial request.

As previously mentioned, the parties to this appeal were invited to make submissions concerning the circumstances in which an institution should be permitted to issue an interim as opposed to a final access decision in connection with a fee estimate. Only the Ministry has made representations on this issue.

The concept of an "interim" access decision to accompany a fee estimate was first discussed in Order 81. In that order, former Commissioner Sydney B. Linden established that an interim access decision may be issued to accompany a fee estimate "... where the institution is experiencing a problem because a record is unduly expensive to produce for inspection by the head in making a decision." Order 81 goes on to indicate that the undue expense may be caused by "... the size of the record, the number of records or the physical location of the record within the institution". It also sets out guidelines for the contents of interim access decisions and the preparation of fee estimates.

Order 81 states that the interim notice should 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 the proposed fees. A requester must be provided with sufficient information to make an informed decision regarding payment of fees. Order 81 goes on to say that "it is the responsibility of the head to take whatever steps are necessary to ensure that the fee estimate is based on a reasonable understanding of the costs involved in providing access."

The principles and underlying reasoning of Order 81 were revisited by Inquiry Officer John Higgins in Order M-555. In that order, Inquiry Officer Higgins affirmed the approach taken in Order 81. I agree with the reasons given in Order M-555 and adopt them for the purposes of this appeal.

The Ministry submits that in light of the reduced scope of the appellant's request, it is now relying on its October 12, 1995 interim decision letter, i.e. the initial decision.

The Ministry has not indicated that the records at issue are unduly expensive to produce for inspection, such that the Order 81 procedures should apply. The Ministry states that a search for responsive records was conducted in the Correspondence Unit and 120 records were located. These records were forwarded to the Ministry's Freedom of Information and Privacy Co-ordinator for review. The Ministry states that a search for the total number of "hate files" was also conducted simultaneously and the searcher was asked to retrieve a representative sample of files for the purpose of determining how long it could take to retrieve the responsive records.

In this second search, which included reviewing various indices and file lists, 119 possible "hate files" were identified. In its representations, the Ministry states that the access decision was based on a review of the 120 records and the advice of an employee familiar with the type of record requested. The Ministry provided the appellant with the fee estimate which set out the approximate cost of the search and indicated that the exemption in section 21 may apply to some of the records. The Ministry also indicated that charges for photocopying and preparation of the records may apply. On this basis, the Ministry states that the initial decision was an interim decision, within the meaning of Order 81.

I have carefully considered the representations of the Ministry together with all relevant circumstance of this case. In my view, the initial decision does not fit within the guidelines established by Order 81 in that it was not unduly expensive to reproduce by reason of the size of the record, the number of records or the physical location of the records within the institution. Accordingly, I find that this is not a situation in which the Ministry should have issued an interim decision on access. Based on the information provided by the Ministry, I do not believe that this is a situation in which the records were unduly expensive to produce for review by the Ministry prior to making a final decision on access.

Therefore, I am ordering the Ministry to provide the appellant with a final decision on access to all of the records at issue in this appeal in accordance with section 29 of the Act. In particular, the Ministry should identify the records or the parts of records to which the personal privacy exemption will apply so that the appellant will be in a position to know the information that will be released to her upon payment of the fees upheld in this order.

In order that this appeal may proceed as expeditiously as possible, I will now consider the issues of the fee estimate and the waiver of the fee.

FEE ESTIMATE

Section 57(1) of the Act and the accompanying regulations dealing with fees, were amended in February, 1996 by the Savings and Restructuring Act (Bill 26). The request and appeal in this case were initiated prior to these amendments. Therefore, the relevant provisions of section 57(1) and the accompanying regulations for the purposes of this appeal are those which existed at the time of the request and appeal. They read as follows:

57(1) Where no provision is made for a charge or fee under any other Act, a head shall require the person who makes a request for access to 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.

Section 6 of Regulation 460, made under the Act, stated, in part:

6. The following are the fees that shall be charged for the purposes of subsection 57(1) of the Act:

1. For photocopies and computer printouts, 20 cents per page.

...

3. For manually searching for a record for disclosure, including severing a part of the record, \$7.50 for each fifteen minutes spent by any person.

...

In reviewing the Ministry's fee estimate, my responsibility under section 57(1) of the Act is to ensure that the amount estimated by the Ministry is reasonable in the circumstances. The burden of establishing the reasonableness of the estimate rests with the Ministry.

The Ministry submits that since the appellant has narrowed the scope of her request, the Ministry is now revising the expanded fee estimate provided to the appellant. In its representations, the Ministry has provided yet another fee estimate. The Ministry submits that a total search time of 31 hours (less two free hours) with a total fee estimate of \$870 is a reasonable and conservative estimate of the total search time expended on the initial request. The Ministry submits that while this estimate includes some search time expended on the looking for files responsive to the

expanded request, the search was still necessary and, therefore, the cost of the time spent must be recovered.

I have carefully considered the representations of the Ministry and in my view, while the Act stipulates and I support, a user pay principle, it is not reasonable for the Ministry to expect a requester to pay for time spent looking for records beyond the scope of the initial request. Accordingly, I find that the initial fee estimate provided by the Ministry reflects the costs of the search time expended in responding to the initial request. In its initial fee estimate, the Ministry included search time of 12 hours (less two free hours) for a fee estimate of \$300 plus applicable photocopying and preparation charges. Therefore, I allow the Ministry to charge for search time of \$300 plus applicable photocopying and preparation charges.

In making my finding above, I have been mindful of the appellant's intention to submit a separate request for the remaining records. Should she submit this new request, the Ministry can respond to this request by providing the appellant with a fee estimate for the time expended for searching for responsive records. The Ministry can therefore, recover its reasonable costs in this manner. However, I would strongly urge the Ministry to contact the appellant with a view to clarifying the records to which access is actually sought and to advise on the records to which exemptions are likely to apply, prior to engaging in further costly searches.

FEE WAIVER

The appellant seeks a fee waiver on the grounds that payment will cause her financial hardship (section 57(4)(b) of the Act). This section states, in part:

A head shall 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,

whether the payment will cause a financial hardship for the person requesting the record.

It has been established in a number of previous orders that the person requesting a fee waiver must justify such a request. In addition, I am mindful of the Legislature's intention to include a user pay principle in the Act, as evidenced by the provisions of section 57.

The appellant has provided the Ministry with evidence of her annual income, in support of the request for a fee waiver. The appellant however, has not provided the Ministry with any evidence with respect to her expenses when she requested the fee waiver.

In her representations, the appellant has submitted evidence of her annual income but has not provided evidence of expenses, assets and liabilities which would give a clearer picture of her actual financial situation.

Even if I accept that payment of the fee would result in financial hardship for the appellant, I must go on to consider whether it was fair or equitable for the Ministry **not** to have waived payment of the fee in this particular case.

Previous orders have set out a number of factors to be considered to determine whether a denial of a fee waiver is "fair and equitable". These factors are:

- (1) the manner in which the institution attempted to respond to the appellant's request;
- (2) whether the institution worked with the appellant to narrow and/or clarify the request;
- (3) whether the institution provided any documentation to the appellant free of charge;
- (4) whether the appellant worked constructively with the institution to narrow the scope of the request;
- (5) whether the request involves a large number of records;
- (6) whether or not the appellant has advanced a compromise solution which would reduce costs.

In my view, a further consideration to be taken into account when deciding whether a fee waiver is fair and equitable, is whether the waiver of the fee would shift an unreasonable burden of the cost from the appellant to the institution.

The Ministry submits that the fee estimate is much lower than and does not reflect the real cost of the time spent searching for the records. It states that it has previously waived fees for the appellant in respect of other earlier requests. In the circumstances of this case, the Ministry did attempt to clarify the request, although it is my view that this did not achieve the desired result of the parties working together to narrow the request nor to arrive at a compromise solution. The initial request does not involve a large number of records. I would also note that the appellant's request for fee waiver was in response to the expanded fee estimate. Taking into account all of the above factors and the particular facts of this case, I find that allowing a fee waiver in this case would shift an unreasonable burden of the cost from the appellant to the Ministry. In the circumstances of this appeal, I find that the Ministry's decision was fair and equitable.

ORDER:

1. I allow the Ministry to charge a fee of \$300 for search together with applicable photocopying charges at a rate of \$0.20 per page for each page disclosed to the appellant.
2. I do not uphold the fee estimate referred to in the Ministry's representations.
3. I uphold the Ministry's decision to deny a fee waiver.
4. I order the Ministry to make a final decision on access with respect to the initial request by **March 7, 1997**. This decision should be made in accordance with section 29 of the Act and without recourse to a time extension.
5. I order the Ministry to disclose the records to the appellant by sending a copy of the records responsive to the request within fifteen days of the payment of the fees set out in Provision 1.

6. I reserve the right to require the Ministry to provide me with a copy of the decision letter and records referred to in Provisions 4 and 5, in compliance with the said provisions.

Original signed by: Mumtaz Jiwan, Inquiry Officer

February 20, 1997