



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

ORDER 132

Appeal 890027

Ministry of Health



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O R D E R

This appeal was received pursuant to subsection 50(1) of the Freedom of Information and Protection of Privacy Act, 1987 (the "Act") which gives a person who has made a request for access to a record under subsection 24(1) a right to appeal any decision of a head under the Act to the Information and Privacy Commissioner.

On August 21, 1989, I issued Interim Order 86 in respect of this appeal. This Order constitutes my final order, and addresses all matters left unresolved at the time of the issuance of Interim Order 86.

On December 6, 1988, the appellant wrote to the Ministry of Health (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	<u>30.00</u>
	\$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 where the records were located, 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; the appellant chose not to respond.

At this point I would refer to my Interim Order 86 for the specifics of the institution's representations. Suffice it to say that the representations, in my view, were not sufficiently detailed nor responsive to the questions posed in the Appeals Officer's Report, and I found that the onus of proving the reasonableness of the fee estimate had not been discharged by the institution. Accordingly, at page 5 of my Interim Order 86, I ordered 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).

In compliance with the Interim Order, the institution clarified the request with the appellant and determined that both parties

had correctly understood the nature of the requested records. On September 11, 1989, the institution also issued an "interim" section 26 notice based on a representative sampling of the requested records and consultations with individuals familiar with the requested records. According to this "interim" section 26 notice, the institution determined that severances pursuant to sections 17 and 21 of the Act would be required before the appellant could be provided with access to the requested records.

The institution's September 11, 1989 letter also stated that the original fee estimate contained in its January 11, 1989 letter to the appellant was correct, and that the severances contemplated by the institution would not significantly affect the amount of the estimated fee. The institution also advised the appellant of his right to request a waiver of the fee, pursuant to subsection 57(3), and invited him to make representations to the head on the question of fee waiver.

Because the appellant was not satisfied with the institution's fee estimate, the institution provided my office with further written representations in support of its position, as required by Interim Order 86. These representations were received by my

office on October 6, 1989. On that same date, the appellant wrote to the institution outlining his reasons in support of the claim for a fee waiver under subsection 57(3) of the Act.

In its representations, the institution conceded that the original fee estimate provided to the appellant was incorrect. The head had included an amount which reflected "the time required to review the record to determine the severances that

would apply to the record", in contravention of my Order 4, dated July 18, 1988. In that Order I found that it was not proper to charge this type of expense to a requester. Apart from this error, however, the institution submitted that:

...the estimate provided by the Ministry was reasonable and complied with section 57 of the Act.

It is further submitted that the Ministry provided detailed information as to how the estimate was arrived at in its original Appeal Submission and that this information supports the Ministry's position that the estimate is reasonable.

...

Therefore, it is submitted that, with the exceptions of the correction required to subtract charges for the preparation of the record for severances as required by Order 4, the fee estimate is the same as that originally provided.

It should be noted that the error identified by the institution in recognition of Order 4 came to the attention of the institution after the September 11, 1989 "interim" section 26 notice and accompanying letter was sent to the appellant. The fee estimated by the institution in this letter was identical to the original fee estimate contained in the institution's January 11, 1989 letter.

At page 4 of my Interim Order 86, I stated:

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.

...

[B]ecause 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.

Having reached this conclusion in my Interim Order, I do not see how the institution can reasonably expect me to change my views, in the absence of any additional supporting documentation or representations.

As stated in my Interim Order:

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.

The Appeals Officer's Report asked the institution to respond to the following questions, among others:

1. What factors influenced the head's decision, under subsection 57(1) to charge a fee?
2. What facts, if any, did the appellant make known to the institution regarding the application of subsection 57(3) to his circumstances?
3. With respect to the location of the requested records:
 - (a) What actions are needed to locate the records at issue?

- (b) What is the estimated total time required to locate the requested records?
 - (c) What is the estimated total cost to locate the requested records?
4. With respect to the production or retrieval of the requested records:
- (a) What actions are needed to produce or retrieve the records at issue?
 - (b) Which of the records, if any, are machine readable?
 - (c) Are computer programs required to produce the machine readable records?
 - (d) If so, what actions are required to develop such programs?
 - (e) How much time is it estimated that this process will take?
 - (f) What costs are attendant to the production of machine readable records?
 - (g) What is the estimated total time required to produce or retrieve the requested records?
 - (h) What is the estimated total charge for production or retrieval time?
5. With respect to the preparation for disclosure of the requested records:
- (a) What actions are needed to prepare the records for disclosure?
 - (b) How many severances, if any, are estimated to be necessary? How much time is it estimated that this process will take?
 - (c) How many pages of records are estimated to be copied in order to answer the request? How much time is it estimated that this process will take?

- (d) What is the estimated total time required to prepare the records for disclosure?
- (e) What is the estimated total charge for preparation time?

None of the questions contained in the Appeals Officer's Report requires an exact response based on actual expenses already incurred. They simply ask the institution to provide estimates of the time and costs involved in proceeding through the various steps necessary to answer the appellant's request. It is clear from the way the questions are worded that I realize the institution's fee estimate is just that, an estimate.

Paragraphs 11 and 13 of the institution's original representations read as follows:

<u>11. TYPE OF SERVICE</u>	<u>UNIT COST</u>	<u>NUMBER</u>	<u>FEE</u>
Photocopies	.20/page	8,639 pgs	\$1,727.80
Manual search (after 2 hours)	6.00/15 min	665/15 min	\$3,990.00
Record Preparation (including severances)	6.00/15 min	566/15 min	\$3,396.00
Developing computer program to produce records	10.00/15 min	14/15 min	\$ 140.00
Other costs (JLC expenses)**			\$ 220.00
Shipping costs			<u>\$ 30.00</u>
	TOTAL ESTIMATED COST		\$9,503.80

**JLC expenses: computer costs to design, write, produce and run the Job Control Language needed to control implementation of computer search.

...

13. It is submitted that the fee estimate given to the Requestor by the Ministry was in accordance with Ontario Regulation 532/87 under the Freedom of Information and Protection of Privacy Act, 1987.

In its second set of representations, the institution submitted the following:

It is submitted that paragraph 11 of our original appeal submission provided information about the detailed costs included in the fee estimate necessary so that the Commissioner could evaluate the reasonableness of the estimate.

...

In particular, it is submitted that in paragraph 13 the Ministry stated that the fee estimate was prepared in accordance with regulation 532/87 of the Act and provided detailed information to support this submission.

Having reviewed both sets of representations submitted by the institution, my view is that they do not provide sufficient information to permit me to determine whether or not the fee estimate is reasonable. By stating the same bottom line calculations which were provided to the appellant, and supporting these calculations by asserting that they were prepared in accordance with Regulation 532/87, the institution has not provided me with the kind of "detailed information" necessary to support a fee estimate. Indeed, had the information provided by the institution been as detailed as the head submits, the error in the original estimate subsequently identified by the institution would have been obvious to the Co_ordinator at a much earlier stage in this appeal.

In my view, I am in no better position now than I was at the time of issuing my Interim Order 86 to understand which factors influenced the head's decision to charge a fee under subsection 57(1), as required by question #1 of the Appeals Officer's Report. I am also still uncertain what has been included in the institution's calculation of the categories of costs listed in paragraph 11 of the institution's original representations. In each instance I have simply been provided with the same bottom line figure given to the appellant at the time of his original request. The institution has chosen not to respond to

questions 3(b) and (c), 4(b), (d), (e), (f) and (g), and 5(a), (b), (c), (d) and (e) of the Appeals Officer's Report, which were intended to elicit precisely the information I require in order to determine the issue of reasonableness.

Normally when I am required to consider an appeal dealing with the reasonableness of a fee estimate under section 57 of the Act, I am provided with sufficient information by the institution to determine which components of the estimate are reasonable and which are not. I am then able to eliminate any unreasonable components and issue an order establishing the fee estimate that is reasonable in the circumstances of the particular appeal. (See, for example, Order 105, dated October 20, 1989, involving the same institution.) In this appeal, however, I am unable to confirm the reasonableness of the institution's estimate, nor can I determine an alternative reasonable figure based on the representations, despite providing the institution with two opportunities to provide me with sufficient information on which to base such a decision.

Because the institution has failed to demonstrate the reasonableness of the fee estimate, I have two options in disposing of this appeal: (1) I could order the institution to produce the records which respond to the request, with appropriate severances, and permit the institution to recover the actual costs allowable under subsection 57(1); or (2) I could order the institution to provide the appellant with access to all requested records, with appropriate severances, without fee.

In the circumstances of this appeal, I believe the first option is inappropriate, because it would send a signal to institutions that they need not take their responsibilities seriously when providing a fee estimate to requesters. Despite being given two opportunities to do so, the institution in this case has not

established that the fee estimate provided to the appellant is reasonable and, in my view, it is appropriate for me to choose the second option and require the institution to provide the appellant with access to all requested records, without fee. The Legislature, in considering the question of fees in the Freedom of Information and Protection of Privacy Act, 1987, imposed a specific responsibility on institutions to provide requesters with a "reasonable estimate of any amount that will be required to be paid" in order to receive access to requested records. Discharging this responsibility can at times be onerous, but it cannot be ignored.

As noted earlier in this Order, the appellant provided the institution with representations in support of his request for a fee waiver under subsection 57(3) of the Act. The head refused the appellant's request in a letter dated October 27, 1989.

Because I have determined, in the circumstances of this appeal, that the institution has failed to demonstrate the reasonableness of the fee estimate, it is not necessary for me to consider the question of fee waiver.

In summary, in the circumstances of this appeal, I order the head to disclose the requested records, with appropriate severances, to the appellant within fifty_six (56) days (8 weeks) of the date of this Order. This is the time period which the institution itself submitted was required to perform this task. The records should be accompanied by a final notice under section 26 of the Act. As the institution has indicated that there will be severances from the records, the section 26 notice must comply with the requirements of subsection 29(1)(b) of the Act.

The institution is further ordered to advise me in writing within five (5) days of the date of disclosure of the records, of the date on which disclosure was made.

Original signed by: _____
 Sidney B. Linden
 Commissioner

_____ December 21, 1989
 Date