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

ORDER P-260

Appeal 900107 et al

Ministry of Treasury and Economics

80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

O R D E R

On July 8, 1991, the undersigned was appointed Assistant Commissioner and received a delegation of the power and duty to conduct inquiries and make orders under the Freedom of Information and Protection of Privacy Act, 1987 (the "Act").

BACKGROUND:

On June 18, 1989 the requester wrote to the Ministry of Treasury and Economics (the "institution") requesting the following records:

> Appl. One _ Memos written by Susan Guinn in the 1985_89 period regarding Skydome (the Stadium Corporation of Ontario and on Dome Consortium Investments Inc.). Include her reports back on Stadium Board of Director meetings.
>
> Appl. Two _ Briefing notes to your Minister or the Premier in the 1985 _ 1989 period regarding the Skydome construction and costs.
>
> Appl. Three _ Your Ministry's 1988, 1989 reviews/ assessments/reports, or those done by consultants, on Skydome costs, cost increases, long term revenues projections, public debt handling and scenarios, views on potential public share offering, and other components of the economics of Skydome.
>
> Appl. Four _ Your Ministry's 1985 _ 89 approvals/ agreement for each increase in credit for Skydome as arranged through the Canadian Imperial Bank of Commerce.

> Appl. Five _ Records that indicate and document provincial funds committed beyond the $30 million, including the terms of the $5,766,250 advanced to the Stadium Corporation.
>
> Appl. Six _ Any favourable tax benefits/incentives/ breaks provided to Dome Investments or the Stadium Corporation by the Province of Ontario _ provide the records.

The requester asked for a fee waiver and stated that he wished to view the records as they became available.

The institution decided to process the six requests as a single request, because this was believed to be the most efficient method. The head advised the requester that he had considered the request for a fee waiver and "decided not to waive the payment of fees, as requested". In addition, the requester was advised that no records existed which responded to Appl. Six.

The institution granted partial access to the records, claiming exemptions pursuant to sections 12(1), 12(1)(a), 13(1), 17(1)(a) and (c), 18(1)(a), (c), (d), (e), (f) and (g) of the Act. In addition, the head issued the following fee estimates:

Fees Estimate for Request #1

Search	(54 x 1.36 hrs x $24/per hr)	= $1,762.56
Preparation	[(54 - 17) = 37 x 0.23 hrs x $24/hr)]	= $ 204.24
Reproduction	$0.20 per page	

...

Fees Estimate for Request #2

Search	(14 x 1.36 hrs x $24/per hr)	= $ 456.96
Preparation	[(14-3) = 11 x 0.23 hrs x $24/hr)]	= $ 60.72
Reproduction	$0.20 per page	

...

Fees Estimate for Request #3

Search	(23 x 1.36 hrs x $24/per hr)	= $ 750.72
Preparation	[(23-3) = 20 x 0.23 hrs x $24/hr)]	= $ 110.40
Reproduction $0.20 per page		

...

Fees Estimate for Request #4

Search	(6 x 1.36 hrs x $24/per hr)	= $ 195.84
Preparation	[(6 - 6) = 0 x 0.23 hrs x $24/hr)]	= $ -
Reproduction $0.20 per page		

...

Fees Estimate for Request #5

Search	(35 x 1.36 hrs x $24/per hr)	= $1,142.40
Preparation	[(35 - 12) = 23 x 0.23 hrs x $24/hr)]	= $ 126.96
Reproduction $0.20 per page		

The fee estimates were based on the rate of $6.00 per quarter hour which was the rate permitted by Ontario Regulation 532/87 at the time the access requests were made. The total fee estimate amounted to $4,810.00 plus photocopying charges at the rate of $.20 per page.

The requester appealed the institution's decision to deny partial access to the records (Appeal Numbers 900106, 900108, 900110, 900112 and 900114) and to charge what the requester deemed were "excessive search and preparation fees" (Appeal Numbers 900107, 900109, 900111, 900113 and 900115). He requested that the fees be "dropped". In addition, the appellant indicated that the institution's decision letter provided him with insufficient information about the records to allow him to understand the fees or narrow his requests.

Mediation to resolve the five fees appeals was attempted but was not successful. Accordingly, notice that an inquiry was being conducted to review the institution's decision regarding the fees was sent to the appellant and the institution. An Appeals Officers' Report, which is intended to assist the parties in making any representations to the Commissioner concerning the subject matter of the appeals, accompanied the Notice of Inquiry.

Written representations were received from the institution only.

In order to gain a better understanding of the procedures undertaken by the institution to locate the records responsive to

the appellant's requests, the Appeals Officer attended at the institution to review the files and the search procedures.

PRELIMINARY MATTER:

At the time of the head's decision in these appeals, the relevant portions of section 57(1) of the Act provided:

> 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; [emphasis added]

Section 57 of the Act was amended on January 1, 1991 by the Municipal Freedom of Information Statute Law Amendment Act, 1989. The amended section 57(1) provides:

> 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; [emphasis added]

The amendment made the charging of a fee mandatory, where no provision is made for a charge or fee under any other Act. Under the former section 57(1), the charging of a fee in those circumstances was within the discretion of the institution.

At the time of the head's decision, Ontario Regulation 532/87 prescribed the fees chargeable for the purposes of section 57(1). Section 5(2) of the Regulation provided, in part:

> Subject to section 57 of the Act, a head may require a person who seeks access to a record to pay the following additional amounts:

> 1. For manually searching for a record after two hours have been spent manually searching, $6 for each fifteen minutes spent by any person.
>
> 2. For preparing a record for disclosure, including severing a part of the record under subsection 10(2) of the Act, $6 for each fifteen minutes spent by any person. [Emphasis added.]

On January 1, 1991, Ontario Regulation 516/90 came into force. Section 6 of this Regulation made the charging of fees mandatory, and increased the amount of fees chargeable under section 57(1). Section 6 of the new Regulation provides, in part:

> The following are the fees that shall be charged for the purposes of subsection 57(1) of the Act:
>
> ...
>
> 3. For manually searching for a record after two hours have been spent searching, $7.50 for each fifteen minutes spent by any person.
>
> 4. For preparing a record for disclosure, including severing a part of the record, $7.50 for each fifteen minutes spent by any person.
>
> ...
>
> [Emphasis added.]

In order to ensure that the appellant is treated fairly, I will be applying the provisions of the Act and regulations operating at the time that his request was made.

ISSUES:

The issues arising in these appeals are as follows:

A. Whether the amount of the estimated fees was calculated in accordance with section 57(1) of the Act.

B. Whether the head's decision not to waive fees was in accordance with section 57(3) of the Act.

C. Whether the institution had an obligation under section 24(2) of the Act to clarify the request with the requester.

D. Whether the institution had an obligation to provide more specific information to the requester about the records and the fees in its decision letter of February 15, 1990.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the amount of the estimated fees was calculated in accordance with section 57(1) of the Act.

The appellant appealed the amount of the fee estimates provided to him by the institution. In particular, he suggested that the search and preparation fees were excessive.

Search Charge

In order to determine whether the fees were calculated properly, I must first determine whether it was appropriate to combine the six requests into one for the purpose of searching for the records responsive to each individual request and calculating the fees. I am mindful of the fact that in Order 93, former Commissioner Sidney B. Linden found that for the purposes of a time extension appeal involving this same series of requests, it was inappropriate for the institution to process the requests as a single request with six parts. He stated that a requester "should not be penalized for having listed multiple requests in one letter...".

I have reviewed the institution's submissions and the report which was prepared by the Appeals Officer following his visit to the institution. In my view, the procedures followed by the institution were to the financial benefit of the appellant. In the circumstances of these appeals, if the institution had conducted six separate searches, the fees would have been substantially higher. I am also convinced that, due to the subject matter of each of the requests and the method in which the records have been stored by the institution, it made practical sense to search for the records simultaneously.

In the circumstances of these appeals, I am satisfied that it was acceptable for the institution to conduct one comprehensive search for the records responsive to each of the appellant's requests. However, I would suggest that if the institution is faced with a similar situation in the future, the requester should be consulted before any decision is made to combine requests for the purpose of conducting a search.

Having reached this decision, I must now decide whether the actual fees were calculated properly.

The institution claimed that it took a total of 180 hours to locate and identify the 132 records responsive to the five requests. The bulk of the files searched were retained in a single filing system within the Treasury Division of the institution. However, other files within the division and within other divisions of the institution also had to be searched. A total of approximately 2,400 records were searched. As the requests, and hence the records, were inter-related, it was necessary to read most of the records to determine whether they were responsive to any one (or more) of the requests. I have been assured that the length of time to accomplish the search was not due to any confusion or disorganization regarding the way the records were stored.

The institution's search was conducted by two summer students. One had been with the institution for two summers and had worked exclusively with the files which were going to be searched. The other student had been with the institution for one summer. The first student worked on the search full time, and a total of 120 hours of search time was charged for her efforts. The other student assisted on a part time basis, and 40 hours of search time was charged for her part of the work. Both students worked under the supervision of a Senior Economist who had sole responsibility for the requested records for more than two years prior to the date of the requests. The Senior Economist explained the requests in detail to the students before they began their search. The initial search yielded 330 records which appeared to be responsive to the requests. The Senior Economist then reviewed these 330 records and reduced the number

of responsive records to 132. This second phase involved an additional 20 hours of work by the Senior Economist.

The student who worked on the search full time completed the assignment in four weeks. Although she worked a 36 1/4 hour work week, the institution charged only 30 hours per week for the purpose of determining the search fee. This resulted in a total of 26 hours of free search time. In addition, I have been advised

that there were other aspects of the search which were not included in calculating the fees (i.e. search time outside the Treasury Division). Accordingly, as a result of the way in which the search time was calculated, I am satisfied that the appellant has been provided with the equivalent of at least the initial two hours of search time for each of his six requests, as required by Ontario Regulation 532/87.

I have reviewed all information provided by the institution, and I accept that 160 hours of search time charged to the two summer students is reasonable, having regard to the nature of the appellant's requests and the extent of the search required to identify records responsive to these requests.

However, I do not accept the additional 20 hours spent by the Senior Economist to review the 330 records and narrow the responsive records to 132. The appellant should not be required to pay fees attached to a review of a search the institution claims was conducted by persons equipped with sufficient experience to do so. I find that these additional costs must be absorbed by the institution as they reflect, in essence, a second search of the records which had already been searched for

and located. I recognize that the institution feels its approach to calculating the search fees is justified because other search time was not accounted for, however, while I commend the institution for its efforts to keep the costs as low as possible, I cannot use this reasoning to uphold fees which, in my view, are inappropriate.

In my view, the search time claimed should be adjusted to 160 hours in calculating the allowable fees. Using the institution's calculations, the search time per record would be: the total amount of search time (160 hours) divided by 132 records, or 1.21 hours per record.

Accordingly, the allowable search fee for each request is as follows:

REQUEST #1: (54 x 1.21 hrs x $24/hr)	=	$1,568.16
REQUEST #2: (14 x 1.21 hrs x $24/hr)	=	$ 406.56
REQUEST #3: (23 x 1.21 hrs x $24/hr)	=	$ 667.92
REQUEST #4: (6 x 1.21 hrs x $24/hr)	=	$ 174.24
REQUEST #5: (35 x 1.21 hrs x $24/hr)	=	$1,016.40

Preparation Charge

The institution claimed that it would take 0.23 hours (or 13.8 minutes) per record to prepare the requested records for disclosure to the appellant. The Appeals Officer was advised by a representative of the institution that this time included the time required to photocopy the records, to make the severances

by placing white tape over the severed portions, and to indicate in the margin of each page of all severed records the applicable section(s) of the Act being claimed.

I have noted that the head's decision advised the appellant that in addition to the preparation and search fees there would also be a charge of $.20 per page for each photocopied page. In Order 184 then Assistant Commissioner Tom A. Wright in dealing with a similar situation stated that "I feel that $.20 per page is the maximum amount that may be charged for photocopying, which charge includes the cost of an individual 'feeding the machine'." I agree with this view, and find that the institution may not include the time to actually photocopy the records within the calculation of preparation time. I also find that the institution's method of dividing the total amount of preparation amongst the records for which preparation time was proposed to be inappropriate.

There are 132 records at issue in these appeals. Of these, the institution has claimed that preparation fees are applicable to 37 records in request number 1; 11 in request number 2; 20 in request number 3; none in request number 4; and 23 in request number 5. During the inquiry phase of these appeals, the Appeals Officer determined that 8 records in request number 1; 1 in request number 3; and 8 in request number 5 had been included in the calculation of the preparation fees, even though the head's decision indicated that access would be denied. This was brought to the attention of the institution and these records must not be included in the calculation of preparation fees. In addition, there are 41 records for which no exemptions have been claimed. That leaves 74 records for which the head has proposed severances.

Of the 176 pages which constitute the 74 records for which the head has proposed severances, only 128 pages actually include severances. The remaining 48 pages must be excluded from the calculation of preparation costs.

Of the 128 pages which contain severances, 3 contain five or more severances; 35 contain three or four; and 90 contain only one or two severances. The severances vary from one or two sentences to a paragraph. If I were to apply the institution's calculation of 13.8 minutes per record to the 74 records for which preparation may be claimed this would generate a total time figure of 1,021.2 minutes for all the records, or approximately eight minutes per page for those pages which contain severances. If I include the pages which I have found do not qualify for preparation fees (i.e. the pages of the records being denied if full (35) and the pages of the records for which severances had been claimed but contained no severances (48)) the per-page time is reduced to approximately 5 minutes (i.e. 1,021.2 minutes divided by 211 pages). Relying on the information provided in the head's decision letter, it would appear that this figure was considered acceptable by the institution in determining the preparation time fees.

In my view, this figure is excessive. Because I have found that preparation fees are chargeable for fewer pages than originally claimed by the institution (i.e. 128 rather than 211), it is necessary for me to propose a more appropriate figure. In Order 184 when faced with similar circumstances, Commissioner Wright found, at page six, that:

> It appears to me, in the circumstances, that a claim for fees for four minutes severance time per page is excessive ... Further, given that more than half of the remaining pages contain fewer than five severances per page, and many pages contain only one or two (and would therefore take only seconds to sever), in my view, two minutes per page for making the severances on the remaining ... pages would be proper.

I feel that similar reasoning should apply in the circumstances of these appeals. Well over half of the pages contain only one or two severances, and in my view, two minutes per page is an appropriate figure to use for the purpose of calculating preparation charges.

In conclusion, I find that the preparation fees chargeable to each request are as follows:

REQUEST #1: 50 pages contain severances and at 2 minutes per page = 100 minutes = 1.67 hours. At $24.00 per hour preparation charges will be: $40.08

REQUEST #2: 14 pages contain severances and at 2 minutes per page = 28 minutes = .47 hours. At $24.00 per hour preparation charges will be: $11.28

REQUEST #3: 33 pages contain severances and at 2 minutes per page = 66 minutes = 1.1 hours. At $24.00 per hour preparation charges will be: $26.40

REQUEST #4: No charge. No preparation charges were claimed or are applicable.

REQUEST #5: 31 pages contain severances and at 2 minutes per page = 62 minutes = 1.03 hours. At $24.00 per hour preparation charges will be : $24.72.

The additional cost of $.20 per page photocopying charges is also acceptable.

At the time the request was made, section 57(1) gave the head discretion as to whether or not a fee should be charged. I have reviewed the institution's representations and I find no error in the exercise of discretion in favour of charging a fee. Accordingly, I uphold the decision of the head to charge the fees in accordance with the calculations I have made, subject to consideration of the issue of fee waiver.

ISSUE B: Whether the head's decision not to waive fees was in accordance with section 57(3) of the Act.

At the time of the head's decision in these appeals, section 57(3) of the Act provided:

> 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 was silent as to who bore the burden of proof in respect of section 57(3). However, it is a general rule that the party asserting a right or duty has the onus of proving its case.

As Commissioner Linden stated in Order 111, dated November 6, 1989, the Legislature's intention to include a "user pay" principle in the Act is clear from the wording of section 57. In his original request the appellant stated that "A fee waiver is requested". Beyond this statement he has not provided any other details to support his request for a fee waiver, either to the institution or to this office in response to the Appeals Officer's Report. Therefore, in my view, the appellant has not discharged the burden of proving that he should be granted a fee waiver in the circumstances of this appeal.

Further, I have reviewed the institution's decision not to waive the fees in this request and I am satisfied that the head properly exercised discretion in accordance with the wording of section 57(3) of the Act as it existed at the time of his decision.

ISSUE C: Whether the institution had an obligation under section 24(2) of the Act to clarify the request with the requester.

This issue was raised by the appellant. In a letter dated November 1, 1989 addressed to this office the appellant stated that the "onus has to be on the [institution] not to ... do all the work without consulting the applicant early on about estimated fees or other problems ... This [institution] made no attempt to suggest I narrow the applications ...".

In considering this issue I must refer to the provisions of sections 24(1) and (2) of the Act which state:

> (1) A person seeking access to a record shall make a request therefor in writing to the institution that the person believes has custody or control of the record and shall provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record.
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

In its representations on this issue, the institution submitted that the appellant provided concise, explicit and clear details regarding each of the five requests at issue and, because of this, no further information was required to enable an experienced employee to identify the records, even though the requests themselves were broad in scope.

I agree with the institution's position, and am satisfied that the actions taken in response to the appellant's requests were appropriate in the circumstances. Although broad in scope, the requests were not broadly worded and did not require reformulation in order to comply with section 24(1). Consequently, the

institution is not technically required to seek clarification from the appellant just because the end result yields a rather high amount of search time.

However, I do not want my comments to be interpreted as discouraging institutions from contacting requesters during the course of responding to a request, if it is felt that the requester may not be aware of the scope of the request and the corresponding fee implications. On the contrary, co-operation and dialogue between the institution and the requester at this stage can only assist in ensuring that the requirements of the requester are being addressed.

ISSUE D: Whether the institution had an obligation to provide more specific information to the requester about the records and the fees in its decision letter of February 15, 1990.

The appellant suggested in his letter of appeal that the institution did not provide him with sufficient information to understand the fees estimate or to allow him to narrow his request. The appellant was specifically asked to address this

issue in the Appeals Officer's Report, but chose not to provide written representations.

On October 27, 1989, the institution provided the appellant with a detailed explanation of how the fees were calculated in this matter. While the decision letter of February 15, 1990 did not go into as much detail, the appellant was certainly aware of the method utilized by the institution in calculating the fees.

The head properly issued a decision in accordance with section 26 of the Act, subsequent to the resolution of the previously mentioned time extension appeal. The appellant made clearly worded

requests for records, which the institution understood and embarked on a search to locate the records responsive to each request. These records were found, and the appellant was provided with a decision letter indicating the number of records found under each of the five requests using the appellant's own words in describing each of the headings. They were broken down by "Record Number", "Description" (e.g. Backgrounder, Briefing Note, or Memorandum), "Access" (Yes, No, or Partial), and "Exemption" (e.g, if one was applied, 13(1)). In my view, the level of detail provided by the institution in response to the appellant's requests was sufficient to enable the appellant to make an informed decision about the fees and the records.

While I understand the appellant's concern about the extensive search fees which have been incurred, I also believe that the wording of his requests made it reasonably predictable that the fees chargeable in responding to the requests would be significant.

ORDER:

1. I uphold the decision of the head to charge fees.

2. I order that the amount of the fees be set in accordance with my calculations.

Original signed by:
Tom Mitchinson
Assistant Commissioner

December 19, 1991
Date