



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

# **ORDER P-1005**

**Appeal P-9500113**

**Archives of Ontario**



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## **NATURE OF THE APPEAL:**

The Archives of Ontario (the Archives) received a request for access to all information related to an investigation conducted by the Ministry of the Attorney General (the Ministry) into the disappearance of a specific court file. The court file relates to an action between the requester and the Ministry.

The Archives obtained clarification of the request from both the Ministry and the requester and determined that the responsive information, if it exists, would be located in 226 boxes containing the Attorney General's Correspondence Files. A preliminary search of these boxes by the Archivist eliminated 80 boxes from the search, leaving a balance of 146 boxes.

The Archives issued a letter to the requester, setting out a fee estimate for search time of \$352.50 and requesting payment of a deposit of \$176.25 prior to proceeding with the request. In its letter, the Archives also advised the requester of her right to apply for a fee waiver. The requester applied for a fee waiver on the basis of financial hardship but declined to provide any details of her financial situation to substantiate her waiver application. Consequently, the Archives was not able to make a decision on fee waiver.

The requester appealed the fee estimate on the basis that the fee is excessive. The sole issue in this order is the calculation of the estimate fee for search time.

A Notice of Inquiry was provided to the appellant and the Archives. Representations were received from the Archives only. In its representations, the Archives submits that in the circumstances of this appeal, its decision regarding the fee estimate is an interim decision. I will, therefore, first consider the nature of the Archives' decision.

## **DISCUSSION:**

### **NATURE OF THE DECISION**

The Archives issued a fee estimate in the amount of \$352.50 for 13.75 hours of search time, less two hours without charge, as provided for in the Act. The Archives requested payment of a deposit of \$176.25 before proceeding with the request. The fee estimate did not indicate whether access to the records would be granted.

The concept of an "interim" access decision to accompany a fee estimate was first discussed in Order 81. In that order, former Commissioner Sidney 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. 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 Archives states that the information, if it exists, is located in files contained in any one or more of 146 boxes. These 146 boxes would have to be retrieved from off-site storage at the Ontario Government Records Centre and the file lists, accompanying each box, checked for relevant files. A page-by-page search of all relevant files would then be undertaken in order to ensure a thorough search for responsive records. The Archives submits that because of the volume of records which must be manually searched and the location of these records at an off-site storage facility, it would be "unduly expensive to produce the records for inspection by the head prior to issuing a final decision."

The Archives acknowledges the position articulated in Order 81 that where an interim decision is silent on access, it is reasonable to conclude that access will be granted, but states that the circumstances of the current case are different. The Archives points out that where responsive records have not yet been located, an access decision can only be speculative at best and its decision is, therefore, an interim decision. In this case, the Archives has custody and control of records which were created by other institutions. In accordance with the principles articulated in Order 81, the Head relied on the advice of an experienced employee, the Senior Archivist, for information about the type, contents and organization of the requested records. It also consulted with staff from the Ministry. The fee estimate was calculated according to the search strategy and the estimate of search time provided by the Senior Archivist. It is, therefore, the Archives' position that the fee estimate is necessarily an interim decision, within the principles of Order 81.

I accept the submissions of the Archives and agree that, given the circumstances described above, this is an appropriate case for the use of an interim access decision. However, I would point out to the Archives that interim decisions generally should indicate whether access to records will be granted and should contain enough information about the records to allow a requester to decide whether to proceed with the request.

### **CALCULATION OF FEE ESTIMATE**

My responsibility under section 57(1) of the Act is to review the Archives' fee estimate to ensure that the amount estimated by the Archives is reasonable in the circumstances. In this regard, the burden of establishing the reasonableness of the estimate rests with the Archives. In my view, the Archives discharges this burden by providing me with detailed information as to how the fee estimate has been calculated, and by producing sufficient evidence to support its claim.

With respect to the method of calculation to be used in preparing a fee estimate, Order 81 provides that, where an interim access decision is issued, the fee estimate may be prepared by representative sampling, or by consulting a knowledgeable employee. In this case, the Archives consulted with its Senior Archivist and with staff of the Ministry.

Through a preliminary search conducted by the Senior Archivist, the Archives was able to eliminate 80 boxes from the 226 boxes of records, originally identified. This preliminary search time was not included in the fee estimate of \$352.50. The Senior Archivist estimated approximately 1.5 hours to identify and compile the location information needed to order the boxes from the Records Centre. Once the boxes are on-site, an average of 5 minutes per box was estimated to search for relevant files and conduct a page-by-page search of the relevant files, for a total of 12.25 hours of search time.

The Archives state that photocopying and shipping charges were not included as these were believed to be minimal.

I have reviewed the wording of section 57(1) of the Act and Regulation 460 together with the evidence before me. In my view, in the circumstances of this case, the method used for calculating this estimate is reasonable and the fee of \$352.50 for an estimated search time of 13.75 hours is reasonable.

Finally, when the Archives has retrieved and reviewed the responsive records and if it determines that the records contain the personal information of the appellant, its final decision on fees should be made in accordance with the principles set out in Order M-514. That is, it should not charge fees for any **records** which contain the appellant's personal information.

The appellant submits that the estimated fee is excessive because of the records management practices of the Ministry and the Archives and because the Archives accepts files for storage without indices. The Archives submits that file lists and indices always accompany the records sent to the Archives by other institutions.

While I understand the position of the appellant that in an environment of increasing requests for access to information, it may be prudent for institutions to organize records to facilitate retrieval of common or similar types of information, I do not agree that this submission correctly reflects the record-keeping practices of the Archives. The Archives necessarily receives thousands of records from other institutions and it is these institutions that identify and index records sent for archiving. Finally, I agree with the view articulated in numerous orders of this office "that the Act does not mandate a requirement on the part of the institution to keep records in such a way as to be able to accommodate any of the myriad of ways in which a request for information might be framed."

**ORDER:**

I uphold the decision of the Archives.

Original signed by: \_\_\_\_\_  
Mumtaz Jiwan  
Inquiry Officer

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September 21, 1995