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

ORDER P-1183

Appeal P-9500758

Ministry of Environment and Energy

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BACKGROUND:

On February 15, 1994 the Environmental Bill of Rights Act (the EBRA) came into effect. The focus of this legislation is to guarantee basic environmental rights to the people of Ontario and to open the decision-making process to public scrutiny. Section 5 of the EBRA establishes an Environmental Registry (the Registry), which is a vehicle for publicizing information about the environment. The Registry, a computerized bulletin board system, is part of the Government of Ontario Information Service.

The Registry includes: information regarding the EBRA and its regulations; notice of proposals and decisions on environmentally significant legislation; policies; regulations and prescribed instruments; appeals and decisions on instruments and relevant court actions and decisions. Each item on the Registry is given a Registry number and can be located by reference to that number.

NATURE OF THE APPEAL:

The appellant submitted a request to the Ministry of Environment and Energy (the Ministry) under the Freedom of Information and Protection of Privacy Act (the Act) for access to all submissions received by the Ministry regarding two Registry numbers, excluding his own submissions and enclosures. The two Registry numbers relate to a proposed amendment of a regulation to remove the ban on new municipal waste incinerators, and a proposed guideline for combustion and pollution control requirements for new municipal waste incinerators.

The Ministry had received 75 submissions relating to these two Registry items. Although they are summarized on the Registry, the actual contents of the submissions are not accessible through this vehicle. Registry items involve all offices of the Ministry and the Registry indicates the office responsible for a particular item. In this case, comments were to be sent to the Ministry's Science and Technology Branch.

The Ministry issued a decision letter in which it granted full access to the requested records and estimated a fee to process the request at $350. The appellant wrote back to the Ministry and requested a fee waiver. This request was denied and the appellant appealed the denial of the fee waiver. Three days after the appeal file was opened, the Ministry issued a second decision letter in which it denied access to the records on the basis of section 22(a) of the Act (information published or available). The Ministry provided the name and telephone number of the individual at its Science and Technology Branch who received the submissions.

A Notice of Inquiry was sent to the Ministry and the appellant on February 22, 1996 which addressed the issue of fee waiver. This Notice inadvertently omitted reference to the Ministry's decision to deny access on the basis of section 22(a). Therefore, a supplemental Notice was sent to the parties on April 3, 1996. Representations were received from both parties. Both parties addressed all of the issues raised in the two notices.

DISCUSSION:

INFORMATION PUBLISHED OR AVAILABLE

Section 22(a) of the Act provides:

> A head may refuse to disclose a record where,
>
> > the record or the information contained in the record has been published or is currently available to the public;

The Ministry states that the Environmental Registry is used to notify the general public about significant changes to legislation, policies, regulations and instruments. The Registry contains a statement that "all comments and submissions received will become part of the public record". The Ministry indicates that all comments relating to the two Registry numbers referred to above relating to waste incineration were made to the Science and Technology Branch of the Ministry and that the employee referred to in its decision letter is the key contact for these matters.

The Ministry indicates that the public is allowed access to records relating to the Registry upon request. In this regard, the Ministry indicates that the records are made available for viewing in the Science and Technology Branch's boardroom. The person viewing the records is informed that should a copy be required of any of the records, the Ministry would arrange for the photocopying.

The Ministry states further that the EBRA does not provide a fee schedule to access this public record. However, in order to recoup the costs of providing copies it has implemented the fee schedule as set out in section 57 of the Act and section 6 of Ontario Regulation 460 to calculate the fee. The fee calculation provision in section 57(1) of the Act provides:

> A head shall require the person who makes a request for access to a record to pay fees in the amounts prescribed by the regulations for,
>
> > (a) the costs of every hour of manual search required 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;
> >
> > (d) shipping costs; and
> >
> > (e) any other costs incurred in responding to a request for access to a record.

Section 6 of Regulation 460 provides:

> The following are the fees that shall be charged for the purposes of section 57(1) of the Act:
>
> > 1. For photocopies and computer printouts, 20 cents per page.

2. For floppy disks, $10 for each disk.

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.

5. For developing a computer program or other method of producing a record from machine readable record, $15 for each fifteen minutes spent by any person.

6. For any costs, including computer costs, incurred by the institution in locating, retrieving, processing and copying the record if those costs are specified in an invoice received by the institution.

The Ministry states that to obtain a copy of the records outside of the access process would cost the appellant an estimated $350. This amount includes photocopying, preparing the record for disclosure and courier delivery.

In his representations the appellant contends that the Ministry's method of providing access to the records does not constitute a regularized system of access. Moreover, he argues that to be required to come and view the material at a government office is unnecessarily restrictive.

In Order P-327, Assistant Commissioner Tom Mitchinson considered the meaning of "currently available to the public" for the purposes of section 22(a) as follows:

> In my view, in order for records to qualify for exemption under section 22(a), they must either be published or available to members of the public generally, through a regularized system of access, such as, for example, a public library or a government publications centre.

A public library or government publications centre are good examples of vehicles for providing regular access to the public, but they are not the only way government information can be made routinely available to the public. In my view, the fact that the records are only available to the public at a specific location is not, in and of itself, an indicator that they are not available to the public through a "regularized system of access". Nor do I find a requirement, that records be obtained from one location only, unnecessarily restrictive. Rather, in determining whether a regularized system of access has been established, the method by which availability of the information is determined must be considered.

Without question, the information contained in the Environmental Registry is generally and routinely available to the public through the Government of Ontario Information Service.

Further, the Ministry's practice of treating all background material, such as submissions and comments as part of the public record to be made available upon request demonstrates a clear intention to make these records publicly available.

In my view, an approach which attempts to recover the actual cost of providing copies of the records to a requester is not inconsistent with the application of the exemption. Nor is recovery of the direct expense of sending the copies to the requester by courier if that is the method by which the requester wishes to receive them.

However, the Ministry has indicated that, where necessary, it is prepared to apply the entire range of fee options which are set out in section 57 and Regulation 460. In this case, apart from the estimated cost of photocopying approximately 1250 pages and courier fees of $10, the Ministry has also indicated that the appellant would be required to pay approximately $90 for preparing the record for disclosure. The Ministry also indicates that should it be necessary to conduct a search for the requested records, a fee would be charged for this as well.

In Order P-327, Assistant Commissioner Mitchinson made the following statement regarding the purpose of the exemption in section 22(a):

> In my view, the section 22(a) exemption is intended to provide an institution with the option of referring a requester to a publicly available source of information where the balance of convenience favours this method of alternative access; it is not intended to be used in order to avoid an institution's obligations under the Act.

In considering the Ministry's obligations under the Act, I am mindful of the purposes of the Act which are set out in section 1. Section 1 states in part that:

> The purposes of this Act are,
>
> (a) to provide a right of access to information under the control of institutions in accordance with the principles that,
>
> (iii) decisions on the disclosure of government information should be reviewed independently of government;

In my view, the Ministry has availed itself of the fee provisions established in the Act, without the attendant obligations under the Act of having the fees charged subject to independent review. As a result, the Ministry has indirectly prevented the appellant from seeking a review of the fees charged. In doing so, the Ministry is using the exemption to avoid its obligations under the Act, in a manner which is contrary to the purposes of the Act. In the circumstances of this appeal, therefore, I find that the system of access established by the Ministry with respect to these records does not make the information available to the public as contemplated by section 22(a) of the Act. Accordingly, I find that the exemption in section 22(a) does not apply. I will now turn to whether a fee waiver should have been granted.

FEE WAIVER

The provisions of the Act relating to fee waiver appear in section 57(4). When the Ministry issued its fee waiver decision, this section (since amended by Bill 26) stated as follows:

> 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,
>
> (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; and
>
> (d) any other matter prescribed in the regulations.

In Order P-474, former Assistant Commissioner Irwin Glasberg found that the appropriate standard of review for decisions under this section is one of correctness.

In order to substantiate a fee waiver request, the appellant must first demonstrate that he has met the criteria in one of the subsections of section 57(4). The appellant's waiver request states that disclosure of the requested information will benefit public health or safety (section 57(4)(c)).

In Order P-474, referred to above, former Assistant Commissioner Glasberg found that the following factors are relevant in determining whether dissemination of a record will benefit public health or safety under section 57(4)(c) of the Act:

1. Whether the subject matter of the records is a matter of public rather than private interest;

2. Whether the subject matter of the records relates directly to a public health or safety issue;

3. Whether the dissemination of the records would yield a public benefit by a) disclosing a public health or safety concern or b) contributing meaningfully to the development of understanding of an important public health or safety issue; and

4. The probability that the requester will disseminate the contents of the records.

I agree with former Assistant Commissioner Glasberg's interpretation and I adopt these factors for the purposes of this appeal.

The Ministry argues that disclosure of the requested information would not benefit public health or safety, largely because of the amount and nature of the information which is already available through the Registry. The Ministry indicates that the Registry contains summaries of the submissions. Further, the Ministry notes that a decision has already been made to lift the ban on incineration; a decision which took into consideration these submissions, and submits that the debate over the advantages or disadvantages of incineration has been determined.

In his waiver request, the appellant indicated that he will be disseminating the information to a coalition of 45 public interest groups. He attached a letter from the coalition which indicates that the information is to be disseminated widely to constituent groups of the coalition to assist them in participating in communities where the regulatory changes would have an impact. In this regard the coalition indicates that it is concerned with the health and safety issues around incineration.

The appellant submits that it would save these groups considerable time and money if he was able to access the information and distribute it to them.

I am satisfied that the issues surrounding waste incineration are of public interest, relating directly to a public health issue. I am also satisfied that dissemination of this information would contribute meaningfully to the development of an understanding of the issues relating to incineration, and the ability of the public to have input into an important public health issue. Finally, I believe it to be likely that the appellant would disseminate the contents of the records.

However, I must go on to consider whether it would be fair or equitable for the fee to be waived 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; and
7. Whether the waiver of the fee would shift an unreasonable burden of the cost from the appellant to the institution.

The Ministry indicates that it offered the appellant an opportunity to come into its offices to view the records at no cost to determine whether he required copies of all the pages. In this regard, the Ministry advises that the submissions consist of those which address business interests as well as public health or safety issues, and without viewing the records first, the appellant would not know which ones are relevant to his concerns.

In this case, there are a large number of records and the costs which have been estimated relate primarily to the photocopying and delivery of the records. The Ministry indicates that preparation time involves the time required by an employee to remove staples and/or bindings from the submissions.

The appellant indicates that he had asked to borrow the records so that he could copy them himself at his own expense (which he indicates is 3 cents per page as opposed to 20 cents under the Regulation). He goes on to say that if the records were available at a public library he would be able to photocopy them there with his own photocopier or to have this performed for him. With respect to copying them himself, however, the appellant indicates that he has, on another occasion, taken a photocopier to the Ministry's offices to photocopy the material himself, but found that this process was too time consuming. Therefore, he did not consider this as a viable option in the circumstances.

In considering the representations of the parties and the nature of the information at issue in this appeal, I find that the waiver of the fees in this case would shift an unreasonable burden of the cost from the appellant to the institution. In coming to this conclusion, I am sensitive to the concerns raised by the appellant.

However, I find that the amount of information which is currently available through the Registry, free of charge, is relevant to this issue. Moreover, I am concerned by the fact that the appellant has not made any effort to attempt to reduce the fees by going in and viewing the records. In this regard, I have taken into consideration the fact that the Ministry has made these records available to anyone who wishes to see them. The appellant appears to recognize that he will have to pay at some point for copies of the records, although he objects to the amount prescribed by the Act. However, his offer to remove the records from the Ministry's offices in order to obtain a better price for photocopying is not, in my view, a reasonable one.

Accordingly, I uphold the Ministry's decision to deny the appellant's fee waiver request in the circumstances of this appeal.

ORDER:

1. I do not uphold the Ministry's decision with respect to its claim that the records are currently available to the public under section 22(a) of the Act.

2. I uphold the Ministry's decision to deny the appellant's fee waiver request.

Original signed by: May 23, 1996
Laurel Cropley
Inquiry Officer