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

ORDER P-1362

Appeal P_9600450

Ministry of Finance

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NATURE OF THE APPEAL:

The appellant made a request under the Freedom of Information and Protection of Privacy Act (the Act) to the Ministry of Finance (the Ministry). The request was for access to all documentation regarding the appellant's company's registration with the Small Business Development Corporation.

The Ministry granted the appellant access to 658 pages of records. The Ministry indicated that it would charge a fee of $161.60, calculated as follows:

658 Photocopies @ $0.20	$131.60
Preparation of the Records - 1 hour @ $30.00 per hour	$30.00
TOTAL	**$161.60**

In this same decision letter, access was denied to 40 pages of records on the basis of several exemptions in the Act.

The appellant wrote to this office to appeal the denial of access. As a result, Appeal P-9600256 was opened. The access issue was resolved by the issuance of Order P-1313.

In his letter of appeal, which was copied to the Ministry, the appellant indicated that he would like to see the records to which access was being granted, at a Ministry office in Ottawa, to decide which ones he would like photocopied. The Ministry decided not to grant this request. The appellant subsequently indicated that he wished this to be an issue in the appeal, and in his representations concerning the access issue, he advised that he would also like the appeal to include a review of the fees being charged.

From a file processing perspective, this office treated the issue of viewing the records in Ottawa, and the issue of the fees, as additional issues in an existing appeal. No new appeal fee was charged. For administrative reasons, a new appeal number was assigned to these issues (P_9600450).

This office sent the parties a Notice of Inquiry inviting representations on these two issues. Only the Ministry submitted representations in response to this notice. In its representations, the Ministry submits that these issues represent new appeals which were filed outside the statutory time frame permitted by section 50(2) of the Act.

Accordingly, the issues to be decided in this order are:

(1) whether the issue of viewing the records in Ottawa, and the issue of the fees, are new appeals, and if so, whether they were filed in time;

(2) if these are new issues and not new appeals, whether the appellant should be permitted to raise them when he did;

(3) if the appeal is to proceed, whether the appellant should be permitted to view the records in Ottawa;

(4) if the appeal is to proceed, whether the fees charged are in accordance with the Act and the applicable portions of Regulation 460 (the Regulation).

DISCUSSION:

NEW APPEALS OR NEW ISSUES IN AN EXISTING APPEAL?

Section 50(2) of the Act states:

> An appeal under subsection (1) shall be made within thirty days after the notice was given of the decision appealed from by filing with the Commissioner written notice of the appeal.

As noted above, the Ministry submits that issues (3) and (4), as summarized above, are new appeals which are out of time because of section 50(2).

Given that the decision letter containing the fee was dated May 21, 1996, and the appellant did not raise the fee issue until submitting his representations regarding the issue of access on August 23, 1996, it is clear that if this is a new appeal, it was filed outside the time frame stipulated in section 50(2).

The request to see the records in Ottawa was made on June 8, 1996, and the Ministry advised the appellant of its decision to decline this request, by telephone, on June 12, 1996. The appellant advised this office of his desire to have this decision reviewed on December 12, 1996. Although the Act does not contemplate verbal "notices of decision", if this is treated as a new appeal, an argument could be made that it falls outside the time frame in section 50(2).

In any event, because these issues arose in connection with the request under consideration in Appeal P-9600256, I find that they are properly characterized as new issues, not new appeals. The use of a separate appeal number by this office, for reasons of administrative convenience, does not mean these issues are new appeals. Accordingly, in my view, dealing with these issues does not contravene section 50(2).

This leads to issue (2), namely, whether the appellant should be permitted to raise these issues when he did.

RAISING OF NEW ISSUES BY THE APPELLANT

As part of its argument to the effect that issues (3) and (4) are new appeals which should not be permitted to proceed because of section 50(2), the Ministry states:

> Using the courtroom analogy, the pleadings are to be drawn very wide at first instance, with the understanding that some issues can be dropped but none added.

In my view, this submission is more properly directed to the question addressed here, namely whether issues (3) and (4) should be permitted to proceed as new issues in an existing appeal.

This particular submission of the Ministry's appears to be contradicted by Rule 26 of the Rules of Civil Procedure, which provides for the amendment of pleadings, including the addition of new issues and/or parties in some circumstances. Moreover, procedural rules followed by courts do not necessarily apply to administrative tribunals, whose right to establish their own procedures is well established in law.

In the context of appeals under the Act, there are circumstances in which institutional parties are permitted to raise new issues. For instance, institutions may raise new mandatory exemptions during an appeal, and in some circumstances they will also be permitted to raise new discretionary exemptions. This may occur despite the fact that, generally speaking, the Act requires institutions to make access decisions (i.e. whether to claim exemptions, and which ones to claim) within thirty days after receipt of a request, before an appeal has even commenced. Therefore, when an institution is permitted to raise a new exemption during an appeal, the time for claiming a new exemption has, in effect, been "extended" beyond the time contemplated by the Act for doing so.

In my view, fairness dictates that a similar latitude be given to appellants wishing to raise new issues. This will have to be assessed in the individual circumstances of each case, taking into account the possibility of prejudice to either party, and questions of administrative efficiency and convenience. Fairness to the parties is the overriding factor.

In the present appeal, the Ministry seeks to impose strict time limits on the appellant, based on section 50(2) of the Act. In this regard, however, I note that the Ministry received the request at one of its offices on March 4, 1996, although it did not reach the Ministry's Freedom of Information and Privacy Office until April 10. The Ministry did not issue its decision letter until May 21, 1996. Since no time extension was claimed, the Ministry's response was issued nearly two months after the expiry of the thirty day response period stipulated in section 26 of the Act.

In this context, it would not be equitable, in my view, to refuse to allow the appellant to raise issues (3) and (4) when he did. Moreover, in the circumstances of this appeal, I am not satisfied that allowing the appellant to raise these issues will result in any significant prejudice to the Ministry.

Therefore, I have decided to proceed to review the Ministry's decision to decline to allow the appellant to view the records in Ottawa, and the fees charged in connection with the request.

VIEWING THE RECORDS IN OTTAWA

As previously noted, the appellant's request to see the records at a Ministry office in Ottawa is based on his desire to avoid paying for copies of records he does not wish to receive. The records are currently at the Ministry's offices in Oshawa.

For security reasons, which I accept in the circumstances of this appeal, the Ministry states that in order to permit the appellant to view the records in Ottawa, it must make photocopies of them to send there. Therefore, to accommodate the appellant's viewing request, the Ministry would incur essentially the same costs as it would if it photocopied the records and sent them to the appellant.

In Order 8, former Commissioner Sidney B. Linden found that the Ministry of Revenue (as that part of the Ministry was then called) **was** required to send records to Ottawa for viewing by an appellant. However, in that case, the former Commissioner did not agree that the records needed to be photocopied and he also concluded that the cost of the copies at the rates specified in the Regulation would amount to the "relatively minor" sum of $13.20.

In my view, the situation in Order 8 is not analogous to the present appeal. Here, I agree with the Ministry that it would be prudent to copy the records for the purpose of this viewing, and, as determined below under "Fees", the cost recoverable under the Regulation for photocopying 658 records is $131.60, which I would not describe as "relatively minor".

Accordingly, I uphold the Ministry's decision to refuse to allow the appellant to view the records in Ottawa.

FEES

The charging of fees is authorized by section 57(1) of the Act, which states:

> 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.

The major component of the Ministry's fee is photocopying charges. Section 6 of the Regulation stipulates that the fee for photocopying is $0.20 per page. Applied to 658 pages of responsive records, this amounts to $131.60, which is what the Ministry has charged.

It is possible that, if the appellant had contacted the Ministry to discuss the responsive records, an agreement might have been arrived at to disclose selected records, resulting in a reduced

charge for photocopies. However, the request was broadly worded and in my view, the Ministry quite properly identified the responsive records and calculated a fee. In the circumstances of this appeal, I am not prepared to order the Ministry to engage in discussions with the appellant at this stage in the proceedings. I uphold the Ministry's photocopy charge of $131.60.

With regard to the fee of $30 for "preparing the record for disclosure" under section 57(1)(b), the Ministry submits that previous orders on the subject of what comprises preparation time are "obsolete" because of the addition of a "residual catch all subsection", namely section 57(1)(e), which refers to "any other costs". In this regard, the Ministry states:

> Anything not covered by "preparation of the record" can be picked up under the heading "or any other costs" in fairness to the government.

However, there is an important distinction to be made between sections 57(1)(b) and (e). Section 6 of the Regulation stipulates a fee of $7.50 for each fifteen minutes (or $30 per hour) spent by any person on preparing a record for disclosure. There is no such rate stipulated for "any other costs incurred in responding to a request for access to a record" as mentioned in section 57(1)(e). In my view, this means that the two provisions must be applied separately, and the scope of section 57(1)(b) is not affected by the addition of section 57(1)(e). For this reason, previous orders outlining the activities covered by section 57(1)(b) are not rendered "obsolete" by this amendment.

The Ministry has not explained what preparation activities were actually undertaken in connection with this request, nor how long they took, nor who carried them out. The Ministry submits that "pagination alone would take an hour", but this appears to be based on supposition. Moreover, from the perspective of the Act, I do not accept that it would be necessary to paginate records which are to be disclosed. Based on the information provided, I do not uphold the fee of $30 in connection with preparation charges under section 57(1)(b).

It is not clear from the Ministry's representations whether it is actually seeking to characterize this fee as falling under section 57(1)(e), or merely arguing (as discussed above) that section 57(1)(e) extends the scope of section 57(1)(b). In any case, even if I decided to permit the Ministry to rely on section 57(1)(e) at this stage, specific information would be required about what **was** done, by whom, and at what cost. This information has not been provided. Therefore, on the basis of the information before me, I do not uphold the fee of $30 which the Ministry initially identified as a fee for preparing the records for disclosure.

ORDER:

1. I uphold the Ministry's decision not to permit viewing of the records by the appellant in Ottawa.

2. I uphold a fee of $131.60 for photocopies.

3. I do not uphold the fee of $30 which the Ministry initially identified as a fee for preparing the records for disclosure.

Original signed by: March 7, 1997
John Higgins
Inquiry Officer