



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER P-1536

Appeal P-9700308

Ministry of Natural Resources



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>

NATURE OF THE APPEAL:

The Ministry of Natural Resources (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to all documentation and correspondence relating to a specified investigation of alleged non-payment of royalties on Crown timber.

The Ministry consulted with the requester regarding the broad scope of the request and the time required to process it. The requester declined the Ministry's suggestion to narrow the request. The Ministry advised the requester that the request could not be processed within the normal time frame, and issued a notice under section 27 of the Act extending the time period by six months. The requester did not appeal this decision.

The Ministry subsequently responded to the requester, advising her that it had retrieved and analyzed 10,694 pages of records and a number of video tapes and was denying access to approximately 80 percent of the records pursuant to sections 13, 14, 17 and 21 of the Act. The Ministry attached a 47-page index to its decision letter, generally identifying each record and indicating the appropriate exemption claims for each.

The Ministry also advised the requester that she would have to pay a fee of \$38,705.52 before access could be given. This fee consisted of search and photocopying costs totalling \$700 and invoiced costs of \$38,005.52. Copies of seven invoices were provided to the requester.

The requester agreed to pay the search and photocopying charges, so these items are not at issue in this appeal. However, the requester asked the Ministry to waive the invoiced amount. The Ministry denied this request.

The requester (now the appellant) appealed the inclusion of the invoiced costs in the fee and the Ministry's decision not to grant her a fee waiver, as well as the exemptions claimed by the Ministry.

A Notice of Inquiry was provided to the Ministry and the appellant on the fee and fee waiver issues only. The parties agreed to defer consideration of the exemption claims pending the outcome of this inquiry. Representations were received from both parties.

DISCUSSION:

CALCULATION OF THE FEE

The charging of a fee 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.

Section 6 of Regulation 460 (as amended by Regulation 21/96) provides that:

The following are the fees that shall be charged for the purposes of subsection 57(1) of the Act for access to a record:

1. For photocopies and computer printouts, 20 cents per page.
2. For floppy disks, \$10 for each disk.
3. For manually searching a record, \$7.50 for each 15 minutes spent by any person.
4. For preparing a record for disclosure, including severing a part of the record, \$7.50 for each 15 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 15 minutes spent by any person.
6. The costs, including computer costs, that the institution incurs in locating, retrieving, processing and copying the record if those costs are specified in an invoice that the institution has received.

The Ministry has set out its fee as follows:

Search Time 10 Hours @ \$30.00 per hour	..	..	..	\$ 300.00
Copying Costs 2200 pages (approx.)				
2000 pages @ \$0.20 per page	..	..	..	\$ 400.00
Invoiced Costs	.	..	..	\$38,005.52

TOTAL .. \$38,705.52
=====

The invoiced costs consist of professional services provided by a consultant retained by the Ministry exclusively for the purpose of processing the request. These costs include disbursements for food, lodging, laundry, car rental and expenses, and office supplies. Also included is the use of a temporary employment agency to create the index.

In reviewing the Ministry's fee, my responsibility under 57(5) of the Act is to ensure that the amount of fee is reasonable in the circumstances. The burden of establishing the reasonableness of the fee lies with the Ministry. In order to discharge this burden, the Ministry must provide me with a detailed explanation of how the fee has been calculated, and how each individual component of the overall fee fits within the scope of the Act and regulations.

The appellant does not dispute the costs for searching or copying the records, only the invoiced costs. She does not take issue with the payment of fees properly chargeable under the Act, and states in her representations, "[she] is prepared to pay a reasonable fee pursuant to the Act but only for those records for which access will be granted." In support of her position, the appellant points to the introductory wording of section 6 of Regulation 460, which outlines the types of fees "that shall be charged for the purposes of subsection 57(1) of the Act for **access to a record**". The appellant argues that different wording would have been used had the legislature intended to permit the Ministry to charge fees for processing a request irrespective of whether access is ultimately granted or denied.

The Ministry disagrees with the appellant, and points to the wording of section 57(1)(e), which allows an institution to charge fees prescribed by regulation for costs incurred "**in responding to a request for access** to a record."

I do not accept the appellant's position. Section 57(1)(e) provides that a fee may include any other costs incurred in responding to a request for access to a record as may be prescribed in the regulations. In my view, the concerns expressed by the appellant are appropriately addressed by the fee waiver provisions, in particular, section 8 of Regulation 460 which states:

The following are prescribed as matters for a head to consider in deciding whether to waive all or part of a payment required to be made under the Act:

1. Whether the person requesting access to the record is given access to it.

...

In my view, if a fee were to be permitted only for those records to which access is given, it would be unnecessary to consider this as a factor in respect of a fee waiver.

The appellant also submits that it is unreasonable and unfair to attempt to recover invoiced costs that are 16 ½ times higher than those which would be permitted if the same activities were handled by Ministry staff. The appellant points out that section 6 of Regulation 460 caps the amount to be charged by **any person** at \$7.50 for every 15 minute period, but the Ministry is attempting to charge \$125 for every 15 minute period for the work done by the consultant. In the

appellant's view, "[T]o allow this to occur would make a mockery of the Regulation." The appellant also objects to the fact that the Ministry made no attempt to itemize or particularize the tasks performed by the consultant on any specific day.

The Ministry explains in considerable detail the reasons for deciding to hire a consultant to process the appellant's request, and acknowledges that it did so reluctantly and in response to what it felt was an extraordinary situation. It points out that without the services of a consultant the Ministry would not have been able to meet its obligations to provide services under the Act to other requesters. The Ministry relies on the plain wording of paragraph 6 of section 6 of the Regulation, which allows for the recovery of **any costs** incurred by an institution in locating, retrieving, processing and copying a record **if those costs are specified in an invoice received by the institution.**

In this case, the Ministry received seven invoices from the consultant. Four of them relate to work completed by the temporary employment agency in preparing the index and associated reports. In Order P-741, Inquiry Officer Mumtaz Jiwan found that the time spent in preparing an index is a necessary part of an institution's obligations in administering the Act, and associated costs are not recoverable. I agree. The only difference in this case is that the index was prepared by an outside consultant and billed through an invoice. In my view, a distinction on this basis is not supportable, and I find that the Ministry is not permitted to recover costs through invoiced charges for activities which would be ineligible for cost recovery if performed internally by Ministry staff.

The remaining three invoices are for "professional services" and disbursements. These disbursements cover itemized charges for car rental, gas, parking, meals, lodging, laundry and office supplies. It is my view, these disbursements fall outside the scope of section 6 of Regulation 460. None of the charges would be recoverable if incurred by Ministry staff and, for the same reasons outlined above, I find that they are not eligible for recovery simply because they are included on an invoice.

As far as the "professional services" are concerned, the Ministry's representations do not specify what they encompass. However, the contract between the Ministry and the consultant states that the consultant's primary responsibility was to make a recommendation to the Ministry regarding the disclosure of the records and to identify program issues arising from disclosure.

Previous orders have found that the time for reviewing records for release, and making suggestions with respect to possible severances is not an allowable charge under the Act (Orders 4 and M-376). Similarly, and for the same reasons previously stated, I find that charges for the time spent by the consultant in determining what information should or should not be disclosed are not allowable when included on an invoice.

However, institutions are permitted to charge fees for preparing records for disclosure. Previous orders of this office have allowed these charges on the basis of two minutes per page @ \$7.50 for each 15 minutes of preparation time (Orders M-782, M-811 and M-858). In this case, the Ministry indicates that approximately 2,200 pages of records will be disclosed, many with severances. I will allow the Ministry to charge for severing these records, calculated on the basis of two minutes per severed page @ \$7.50 for each 15 minutes.

In summary, I find that, in addition to the \$700 search and photocopy charges the appellant has agreed to pay, the Ministry is entitled to charge preparation costs for severing records as outlined above. I find that all remaining fees for consulting services, disbursements and invoiced costs for preparing the index and related reports fall outside the scope of section 57 of the Act and section 6 of Regulation 460, and may not be charged.

The Ministry states that it had no alternative in the circumstances but to retain an outside consultant, because its staff could not deal with the high volume of records involved in the request. I disagree. It is clear from the representations that the Ministry considered other options, including a longer time extension under section 27(1)(a) of the Act. The appellant apparently had no difficulty with the Ministry's six-month time extension for a response to her request and, in my view, a longer time extension, if also agreeable, could have permitted the Ministry to process the request internally at considerably lower costs.

FEE WAIVER

As far as fee waiver is concerned, the appellant objects to the fact that the fee estimate includes the cost of processing all records when only 20% are being disclosed. She states that the actual costs of processing, collecting and copying the records to which she will be granted access varies exorbitantly from the amount of the fee, and submits that fees should be waived in proportion to the percentage of records to which access is being denied. The appellant has agreed to the \$700 search and copying charges, and has indicated that she is prepared to pay fees for preparing records for disclosure. Although I have rejected the appellant's position regarding the appropriate method of calculating fees, the effect of my findings is that she is only required to pay preparation and photocopying fees relating to records to which she is being given access. Although the issue of search fees is not within the scope of this appeal, I should state that, in my view, it would not be fair or equitable to require an institution to pro-rate search charges, since a search for responsive records should, by definition, be all encompassing.

Therefore, for these reasons, it is not necessary for me to consider the fee waiver issue further.

ORDER:

1. I uphold the Ministry's charges for preparation costs for severing records at the rate of two minutes per severed page @ \$7.50 per 15 minutes.
2. I do not uphold the Ministry's charge of \$38,005.52 for invoiced costs.

Original signed by: _____
Tom Mitchinson

March 3, 1998

Assistant Commissioner