



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

ORDER PO-1651

Appeal PA-980192-1

Ministry of Education and Training



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NATURE OF THE APPEAL:

The Ministry of Education and Training (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act). The request was for eight categories of records relating to Great Lakes College (the College), described as follows:

1. Copies of all contracts awarded by the College (and thus by the Ministry) to contract workers or consulting firms.
2. Copies of the Requests for Proposals issued for each of these contracts.
3. Copies of all bids tendered by individuals or companies for said contracts.
4. Copies of any letters that the following (list of four individuals) have sent to the Ministry.
5. Copies of all memoranda and letters concerning the affairs of the College that have been sent by the following (list of eight individuals) people since 1995.
6. Copies of all letters of resignation sent by members of the (College's) Board of Governors to the Ministry or the Ontario Council of Regents for Colleges of Applied Arts and Technology since 1995.
7. Copies of all College employee expense accounts since June 1995.
8. Copies of all lawyer's fees paid by the College since June 1997.

The Ministry responded by advising the appellant that it only has custody or control of records responsive to Parts 4, 5 and 6 of the request. The Ministry also provided a fee estimate to the appellant in the amount of \$746 and advised the appellant that sections 17 (third party information) and 21 (invasion of privacy) of the Act may apply to some of the responsive information.

The appellant appealed the Ministry's decision to charge a fee and indicated his belief that records responsive to all eight parts of his request should exist. He also requested that the Ministry grant him a fee waiver on the basis that to do otherwise would cause him financial hardship.

The Ministry responded by amending its fee estimate to \$416. It also denied the appellant's request for a fee waiver.

A Notice of Inquiry was provided to the appellant and the Ministry. Representations were received from the Ministry only.

DISCUSSION:

CUSTODY OR CONTROL

The Ministry submits that it has custody or control over those records which are responsive to Parts 4, 5 and 6 of the appellant's request only. It states that those records relating to Parts 1, 2, 3, 7 and 8 of the request remain in the custody of and under the control of the College.

The Ministry submits that the College was established pursuant to section 5(1) of the Ministry of Colleges and Universities Act (the MCUA) and that each college which is established has its own Board of Governors which is a corporation with powers and duties under the Corporations Act. Under Regulation 771 made under the MCUA, 25 colleges of applied arts and technology, including the College, have been established. It further submits that under section 5(3) of the MCUA and the Regulations made thereunder, the Ministry has the ability to add to or vary the corporate powers allocated to each college's Board of Governors.

The Ministry indicates that while colleges are subject to some government policies and procedures, they exist as statutory corporations with the right to contract in their own names, to reimburse their employees for their expenses and to retain legal counsel. The Ministry indicates that the College is not required to provide it with records which document these types of activities and that the Ministry does not, therefore, have either custody of the responsive records or the requisite degree of control over them.

Based on my review of the submissions of the Ministry and the provisions of the MCUA, I am satisfied that the Ministry does not have custody of those records which are responsive to Parts 1, 2, 3, 7 and 8 of the request. In addition, because each college operates as an autonomous entity with respect to the matters reflected in the records sought by the appellant, I find that the Ministry does not exercise a sufficient degree of control over the types of records which are sought in these parts of the request.

However, I note, and the Ministry acknowledges, that the College is an institution under the Act. After ascertaining that it did not have records responsive to Parts 1, 2, 3, 7 and 8 of the request, the Ministry did not forward these portions of the request to the College under section 25(1) of the Act. In my view, the College may have custody or control of the records responsive to Parts 1, 2, 3, 7 and 8 of the request and the Ministry was, therefore, obliged to forward to the College for its response those portions of the appellant's request. I will accordingly, order the Ministry to do so by **January 29, 1999**, without recourse to a time extension under section 27(1) of the Act.

FEE ESTIMATE

The Ministry indicates that a fee of \$416 is payable for its processing of Parts 4, 5 and 6 of the request. This fee is broken down as follows:

Search Time	9 hours	\$270
Reproduction/Copying	380 pages	76
Preparation for Disclosure	2 hours	60
Shipping Costs		10

I will examine each element of the fee estimate in order to determine whether they are in accordance with the provisions of the Act and the Regulations governing the charging of fees. The charging of fees is authorized in section 57(1) of the Act, and more specific provisions regarding fees are found in section 6 of R.R.O. 1990, Regulation 460. Provisions regarding fee waiver are found in section 57(4) of the Act and section 8 of R.R.O. 1990, Regulation 460.

The factors to be considered in reviewing a decision to charge fees include the following:

- the costs of every hour of manual search required to locate the record(s);
- the costs of preparing the record(s) for disclosure;
- computer and other costs incurred in locating, retrieving, processing and copying the record(s);
- shipping costs;
- any other costs incurred in responding to a request for access to the record(s).

Search Time

The Ministry indicates that it conducted searches of the record-holdings of its Communications and Post Secondary (Colleges Division) Branches and the Ontario Council of Regents for Colleges of Applied Arts and Technology (the Council of Regents) for records responsive to the appellant's request. The searches undertaken by the staff of the Council of Regents and the Communications Branch required 2.5 hours each while the search at the Post Secondary Branch of the Ministry took a total of four hours.

Based on the broad nature of the request as framed and the explanation provided by the Ministry as to the nature and extent of the searches required to locate the responsive records, I find that the time incurred in conducting the necessary searches was reasonable in the circumstances.

Reproduction/Copying Charges

The Ministry located 380 pages of records which are responsive to the request and has quoted a fee of \$76 for their photocopying at \$.20 per page. I find that this amount is in accordance with section 6 of Regulation 460.

Preparation of the Records for Disclosure

The Ministry also submits that a total of two hours are required to prepare the records for disclosure. This time is required for severing of personal information which is found in many of the documents which are responsive to the request. Again, I find that this amount is reasonable in the circumstances of this appeal.

Shipping Costs

The Ministry states that the shipping costs which it will be required to incur in providing the appellant with the requested information is \$10. I find that this amount is a reasonable estimate of the cost of sending the documents to the appellant.

In summary, I find that the fee estimate provided to the appellant is in keeping with the fee provisions in the Act and the Regulations and I uphold the amount of the fee estimate in its entirety.

FEE WAIVER

An appellant, by virtue of section 57(5) of the Act, has the right to ask the Commissioner to review an institution's decision not to waive a fee. The Commissioner may then either confirm or overturn this decision based on a consideration of the criteria set out in section 57(4) of the Act.

In my view, the standard of review which should apply to the review by the Commissioner or his delegate to decisions issued under section 57(4) of the Act is one of correctness.

[Order P-474]

The factors to be considered in reviewing a decision to deny a fee waiver include the following:

- the extent to which the actual cost of processing, collecting and copying the record(s) varies from the amount charged by the institution;
- whether the payment will cause financial hardship for the requester;
- whether dissemination of the record(s) will benefit public health or safety;
- whether the requester is given access to the record(s);

- if the amount charged is under \$5, whether the amount of the payment is too small to justify requiring payment.

If one or more of the above-noted factors applies, section 57(4) of the Act also requires consideration of whether it would be "fair and equitable" to waive the fee. 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.

[Order P-408]

In his letter of appeal and correspondence with the Ministry, the appellant submits that it would cause him financial hardship if he were required to pay the entire fee estimate which was provided to him. To substantiate this assertion, the appellant has submitted his 1997 Notice of Assessment from Revenue Canada which indicates his earnings in that year. I note that the appellant reported a modest income for the year 1997, but that he is not impecunious.

In my view, the appellant has not provided me with sufficient evidence to warrant a finding that it would be "fair and equitable" in the circumstances of this appeal to waive the fee payable in this case. I have not been provided with any evidence that the appellant has attempted to narrow the scope of his request or arrive at some compromise solution to attempt to address the amount of the fee. In my view, the waiver of the fee in these circumstances would shift an unreasonable burden of the cost from the appellant to the Ministry. I am also mindful of the fact that the principle of "user pay" is recognized in the Act and by previous orders of the Commissioner's office.

ORDER:

[IPC Order PO-1651/January 19, 1999]

1. I uphold the Ministry's fee estimate and its decision not to grant a fee waiver to the appellant.
2. I order the Ministry to transfer to the College Parts 1, 2, 3, 7 and 8 of the request pursuant to section 25(1) of the Act within 10 days of the date of this order and without recourse to a time extension under section 27(1) of the Act.

Original signed by: _____
Donald Hale
Adjudicator

_____ January 19, 1999