



**Information and Privacy
Commissioner/Ontario**

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

ORDER 105

Appeal 880293

Ministry of Health



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/Télééc: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

October 20, 1989

VIA PRIORITY POST

Appellant

Dear Appellant:

Order # 105

Re: Appeal No. 880293

This letter constitutes my Order in your appeal of the decision of the Ministry of Health (the "institution") regarding your request for information made under the Freedom of Information and Protection of Privacy Act, 1987 (the "Act").

The appeal file indicates that on August 10, 1988 you wrote to the institution as follows:

I am writing you to submit the following requests and I would appreciate it if you could review any fees under the waiver provision of the act.

...(e) Any available information relating to the :

...Social Management Unit SMU

On September 8, 1988, the institution responded to this request as follows:

...please be advised that the estimated fee for the record you have requested is \$436.00.

The institution provided you with a detailed fee estimate form that showed the cost for search and record preparation estimated at \$336.00 and the cost for the estimated 500 pages of photocopies at \$100.00.

On September 14, 1988, you wrote to me asking me to review the decision of the institution. You stated:

[IPC Order 105/October 20, 1989]

For reasons of Financial Hardship I believe that the fees totaling \$436 should be waived.

If a waiver is not secured then I am asking that the fees be severely reduced.

As you are aware, as soon as your appeal was received by my office, an Appeals Officer was assigned to investigate the circumstances of the appeal and attempt to mediate a settlement.

Upon commencement of the investigation, it became clear that the institution had not considered your request for a fee waiver in making their decision of September 8, 1988, as they had expected a more formal request from you on your receipt of the fee estimate. The institution agreed to exercise its discretion with respect to your request for a fee waiver and by letter dated November 3, 1988, they notified you that your request was being denied.

An Appeals Officer's Report was prepared and sent to both parties on January 19, 1989 together with a Notice of Inquiry. Both parties were asked to make representations to me concerning the subject matter of the appeal, and I have considered these representations in making this Order.

The sole issue arising in this appeal is as follows:

Whether the head's decision not to waive fees under subsection 57(3)(b) of the Act, is in accordance with the terms of the Act.

Subsection 57(3) provides that:

A head may 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;

(d) whether the record contains personal information related to the person who requested it; and

(e) any other matter prescribed in the regulations. The Act is silent as to who bears the burden of proof in respect of subsection 57(3), however, it is a general rule that the party asserting a right or duty has the onus of proving its case. The burden of establishing the applicability of subsection 57(3) therefore falls upon you.

In the Appeals Officer's Report, you were asked to indicate what facts you had made known to the institution on how the payment of a fee would cause you financial hardship. You were also asked to provide me with evidence in support of your request for a fee waiver.

In their representations to me, the institution advised that:

The appellant stated in his letter of application: "I would appreciate it if you could review any fees under the waiver". He did not offer any reason for the waiver.

When the head's decision to charge a fee was made known to the appellant, he did not respond to the Ministry with reasons why the fee should be waived but immediately appealed to the Commissioner. At no time did the requester plea financial hardship.

A requester can ask for a fee waiver at the time he makes his access request or after the fee estimate is received from the institution. In either situation, it is not enough for the requester to merely ask that the fee be waived without providing a basis for this request, under subsection 57(3) of the Act, and also providing any supporting information to the institution.

If a request is made for a fee waiver and the basis of that request is financial hardship, the institution must be provided with information on which to render a decision. That is, you, as requester must provide the institution with information on your financial position, including such things as your assets, income, expenses, etc.. You must show the institution why the payment of a fee would cause you financial hardship.

In this matter, you did not provide the institution with a reason for your request for a fee waiver nor did you provide any evidence in support of the request.

In your representations to me of January 23, 1989 you provided me with some information as to your financial situation. By letter dated March 10, 1989, the Appeals Officer asked you very specific questions on your financial position. You did not respond to the questions in this letter although you were asked on two further occasions to address them.

I therefore find that you have not discharged the burden of proving that the payment of a fee would cause you financial hardship and I am upholding the decision of the head not to waive the fee in this matter.

During the course of this appeal, the institution was asked to explain how they arrived at the fee estimate. The institution estimated the cost for searching for the records at \$168.00 (nine hours less two free hours for a total of seven hours at \$24.00 per hour). They also estimated that:

...seven (7) hours will be needed to determine what exemptions, if any, apply to the records in question and to prepare the requested records for disclosure, at \$24.00 per hour for a total of \$168.00. Due to the nature of the records requested and the normal practice of the Ministry when processing a freedom of information access request, it is impossible to distinguish between the time necessary to determine exemptions and the time necessary to prepare the record for disclosure in the fee estimate.

I am concerned with the approach the institution is taking in the calculation of the fee estimate. In Order No. 4, dated July 18, 1988, at page 14, I clearly enunciated my position with respect to the charging of fees for the time spent by an institution in reviewing records to determine what exemptions may apply:

While the major component of the estimated fee represents costs of locating the record for disclosure under subsection 57(1)(a), in calculating preparation costs under subsection 57(1)(b), the institution did not make a distinction between the time involved in actually making severances within the records, and time spent reviewing records to decide whether or not an exemption applied. The fee estimate for preparation included costs associated with both decision making and severing, and I feel this is an improper interpretation of subsection 57(1)(b).

In my view, the time involved in making a decision as to the application of an exemption should not be included when calculating fees related to preparation of a record for disclosure. Nor is it proper to include time spent for such activities as packaging records for shipment, transporting records to the mailroom or arranging for courier service. In my view, "preparing the record for disclosure" under subsection 57(1)(b) should be read narrowly.

My views as to how record preparation charges are to be calculated are also included on page 7-1 of the Manual prepared by the Freedom

of Information and Privacy Branch of Management Board Secretariat. It is my opinion that the institution has wrongly calculated the preparation time fee estimate. I find that this part of the total fee estimate cannot be supported by the information provided by the institution and should not be included therein.

In my view, the estimated fee for the record requested by you should be \$168.00. The additional estimated fee of \$100.00 for photocopies may not arise if, as discussed during mediation, you ultimately decide to view the record in this matter.

Yours truly,

Sidney B. Linden
Commissioner

cc. The Honourable Elinor Caplan
Minister of Health

Andrew D. Parr, FOI Coordinator