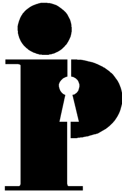

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER P-1402

Appeal P-9700020

Ministry of Education and Training

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NATURE OF THE APPEAL:

The appellant submitted a request to the Ministry of Education and Training (the Ministry) under the Freedom of Information and Protection of Privacy Act (the Act). The request was for information about a named educational institution, which I will refer to throughout this order as "the educational institution". In particular, the appellant sought access to:

- records of all complaints (and their dispositions) against the educational institution for the period 1989 - 1996 inclusive;
- inspection and audit reports regarding the educational institution for the period 1989 _ 1996 inclusive; and
- records regarding an alleged scandal involving the educational institution, and all correspondence between the Ministry and the educational institution, for the period 1989 _ 1996 inclusive.

The Ministry responded by indicating that fees would be charged in connection with the request. The Ministry's initial fee estimate was as follows:

Search time, 2 hours @ $30 per hour =	$60.00
Photocopying 8065 pages @ $0.20 per page =	$1,613.00
Preparing record for disclosure, 37.76 hours @ $30 per hour =	$1,133.33
Shipping	$25.00
TOTAL	**$2,831.33**

The Ministry also advised the appellant in connection with this estimate that responsive records would likely also exist within individual student files, and that if the appellant wished a search in this regard to be carried out, she would have to pay estimated search fees of $36,005 in addition to the above estimate, based on 1200.17 hours.

The total charges in the estimate amount to $38,836.33.

In addition, the Ministry's decision letter included an "interim access decision" as contemplated in Order 81, advising the appellant that several exemptions would likely apply to certain parts of the records. As noted in Order 81, the fee estimate may be appealed at this stage, but not the interim access decision. Once fees are paid and a final access decision is made, it would be open to the appellant to appeal the final access decision.

The appellant appealed the amount of the fee estimate.

This office sent a Notice of Inquiry to the appellant and the Ministry.

The Ministry's representations include an argument to the effect that the appeal was filed outside the statutory time frame, and that for this reason I am not in a position to proceed with the appeal. I will consider this as a preliminary issue, below.

The appellant's representations include a request for a fee waiver, which I will also consider as a separate issue in this order.

PRELIMINARY ISSUE:

LATE FILING OF 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.

In Order M-775, Inquiry Officer Laurel Cropley discussed the meaning of the terms "the notice was given" and "filing" in section 39(2) of the Municipal Freedom of Information and Protection of Privacy Act (the equivalent of section 50(2) of the Act) as follows:

> Section 39(2) provides that the appeal must be made "within thirty days after the notice was given ...". Therefore, the time period begins to run after the institution's decision is received by the requester. In this appeal, there is no independent evidence other than the assertion of the institution, of the date on which notice was given.
>
> The question of when the period ends is somewhat more ambiguous. The language of the provision does not require that the appeal be "filed" or "registered" with this office. Rather, an appeal is "made", and there is no further explicit guidance in the Act. It is thus arguable that an appeal is "made" by mailing the appeal within thirty days of receipt of the decision by the requester.
>
> In view of the evidence which shows that an appeal mailed to this office can take a considerable time to arrive, and there is no deemed mailing date provision in the statute, the purpose of the statute to provide an independent review of government decisions could be frustrated by a requirement that the effective date for an appeal is the date of receipt by the Commissioner's office. Therefore, it is my view that the effective date for making an appeal is the date of mailing by the requester.

I agree with this reasoning and adopt it for the purposes of this appeal. The evidence before me does not disclose the date on which the appellant received the Ministry's decision of November 18, 1996. However, the appeal was hand delivered to this office on January 23, 1997 and in these circumstances, I am satisfied that it was "filed" on that date. If the appellant received the

decision one day after the date of the letter, i.e. November 19, 1996 (which is highly unlikely given that it appears to have been sent by ordinary mail), then the appeal was filed on the 66th day after notice was "given", or 36 days after the expiry of the statutory time limit.

On this basis, the Ministry submits that the Act prohibits me from proceeding with this appeal. In my view, however, there are several other noteworthy facts to consider.

The request which is the subject of this appeal was received by the Ministry on September 13, 1996. The Ministry decided to effect a third party notification under section 28 of the Act. In this regard, I note that section 28(3) requires such a notification to be given "within thirty days after the request for access is received". This period expired on October 13, 1996. According to the Ministry's representations, the section 28 notification was given on October 15, 1996, which is two days after the expiry of the statutory time limit.

The Ministry also wrote to the appellant advising that a section 28 notice had been sent, and indicating that a decision on access would be made by November 14, 1996, "in accordance with section 28(4) of the Act". Section 28(4) requires a decision within thirty days after sending a section 28 notice, which would have expired on November 14, 1996, the same date indicated by the Ministry in its letter. In fact, however, the Ministry issued its fee estimate and interim access decision on November 18, 1996, which is four days after the expiry of the statutory time limit.

In my view, it would not be equitable to allow the Ministry to impose a strict reading of the time limits in the Act after breaching several of them in its own handling of the matter.

I also note that, in Order M-775, Inquiry Officer Cropley quoted with approval several comments made in Order 155 by former Commissioner Sidney B. Linden, as follows:

> > The nature of the appeals system envisaged by the Act is informal. The policy of the Act as outlined in section 1 thereof is to promote access to information in the custody or under the control of government institutions, and to provide for the protection of personal privacy.
>
> In view of these circumstances, Commissioner Linden states that the Act should be interpreted:
>
> > ... liberally in favour of access to the process, rather than strictly to deny access. This is especially true where the alleged lapse of time after the date when an appeal should have been filed is not significant, and where no prejudice has been shown by the institution or any other person affected by the alleged delay.

I also agree with the views expressed by former Commissioner Linden. The delay in filing the appeal does not appear to be particularly significant, and the Ministry has not indicated that it

would be prejudiced by proceeding with the appeal. Moreover, given that the subject of this appeal is a fee estimate, with the issue of access yet to be decided in a final way by the Ministry, in my view it would be unreasonable to dismiss the appeal and require the appellant to go through the whole request procedure again in order to obtain a ruling on the fee.

For all these reasons, I have decided to proceed with this appeal.

DISCUSSION:

FEE ESTIMATE

I will begin this discussion by setting out the relevant provisions of the Act and Regulation 460 made under the Act (the Regulation).

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.

Section 6 of the Regulation also deals with fees. It states, in part, as follows:

> 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.
>
> 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.

In its representations, the Ministry revised its fee calculations with respect to "readily available" files (i.e. the estimate of $2,831.33 referred to above) by reducing the search time from 2 hours to .5 hours. The revised estimate is as follows:

Search time, .5 hours @ $30 per hour =	$15.00
Photocopying 8065 pages @ $0.20 per page =	$1,613.00
Preparing record for disclosure, 37.76 hours @ $30 per hour =	$1,133.33
Shipping	$20.00
TOTAL	**$2,781.33**

The other aspect of the estimate, relating to searches of student files, remains unchanged at $36,005.

I will consider these two parts of the estimate separately.

Estimate Relating to the "Readily Available" Records

The Ministry submits that these records are located in three areas.

The Legal Services Branch is estimated to have 1225 pages of responsive records for photocopying. The Ministry submits that the search and preparation times associated with these records are nil.

The Private Vocational Schools Branch is estimated to have 40 pages of responsive records for photocopying. The Ministry submits that the search time associated with these records is .5 hours, and that this search time is required because this branch does not maintain separate complaint or investigation files.

The Ontario Student Assistance Program (OSAP) is estimated to have 6800 pages of records to be photocopied. Because these records (which include investigation reports and supporting documentation) contain a significant amount of personal, third party and solicitor-client information they will require extensive severances. Based on twenty seconds per page for severances, the Ministry submits that 37.76 hours of preparation time will be required.

The Ministry further submits that the page counts for the Legal Services Branch and OSAP are likely to be accurate as the records were accessed when the estimate was prepared.

The appellant refers to Order 4, in which former Commissioner Sidney B. Linden commented that:

> 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.

I agree with these comments of former Commissioner Linden and I will apply them in my decision.

Having reviewed the fee estimate and the representations of the parties, I make the following findings regarding the fee estimate for the "readily accessible" records:

(1) The Ministry's estimate of $1,613 for photocopying 8065 pages of records is calculated in accordance with item 1 of section 6 of the Regulation, and I therefore uphold it. If, however, the number of copies differs from the estimate, the fee is to be adjusted accordingly. In this regard, I would encourage the parties to co-operate to determine whether there is any way to reduce the number of copies required.

(2) The Ministry's fee of $15 based on one-half hour of search time in connection with the Private Vocational Schools Branch is reasonable, and calculated in accordance with item 3 of section 6 of the Regulation, and I therefore uphold it.

(3) With regard to the Ministry's fee of $1,133.33 for preparation time, I find that the Ministry's basis for calculating this fee (20 seconds per page for 6800 pages, which amounts to 37.76 hours) is reasonable. However, there is a slight error in the Ministry's calculation. 37.76 hours times $30 per hour amounts, in fact, to $1,132.80. I uphold a fee of $1,132.80 for preparation time. In this regard, I note that the Ministry is **not** claiming preparation time for anything other than severing.

(4) The Ministry has not substantiated its fee for shipping charges, which is therefore not upheld.

In summary, I uphold a fee estimate in the amount of $2,760.80 with respect to this aspect of the matter.

Searches of Student Files

In relation to this part of the estimate, the Ministry submits that, to ensure that all complaints are located, it will be required to review the files of the estimated 14,402 students who have attended the educational institution between 1989 and 1996, and that locating and reviewing each such file will require 5 minutes for a total search time of 1200.17 hours.

The Ministry also indicates that the student files for 1989 - 1992 are in paper format, stored off_site, and not indexed by educational institution.

The Ministry further submits that the student files for the subsequent period are available electronically in CD-ROM format, and that it may take up to two and one-half minutes to retrieve each such file.

Based on the information provided to me, I find that five minutes to retrieve and review each file is excessive. In my view, an average time of three minutes to retrieve and review each file would be more reasonable.

A calculation based on 14,402 files at three minutes per file would result in a total search time of 720.1 hours. Based on $7.50 per fifteen minutes, or $30 per hour, this amounts to a fee of $21,603. I therefore uphold a fee estimate in that amount in relation to this aspect of the request.

In its representations, the Ministry indicates that the number of records expected to be located by this search, for which I have just upheld an estimated fee in excess of $20,000, is "nominal". This is not stated in the Ministry's decision letter, and it is not clear whether this information has ever been communicated to the appellant. On this basis, the appellant may decide not to proceed with this aspect of the matter, and my upholding this fee should not be construed as limiting in any way the appellant's right to make such a decision.

FEE WAIVER

Fee waiver is provided for by section 57(4) of the Act, which states:

> A head shall waive the payment of all or any part of an amount required to be paid under subsection (1) if, 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.

Section 8 of Regulation 460 provides as follows:

> 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.

2. If the amount of a payment would be $5 or less, whether the amount of the payment is too small to justify requiring payment.

Many previous orders have held that the onus is on the appellant to demonstrate that a fee waiver would be justified (e.g. Order P-530).

Financial Hardship

The appellant submits that payment of a fee of over $38,000 will be a financial hardship. While it may appear obvious that such a fee, or indeed the reduced total amount of $24,363.80 which I have upheld, would be a financial hardship for virtually anyone, there remains an onus on the appellant to demonstrate that this is so. I have not been provided with any specific data to substantiate this in the present case. Therefore, in my view, the appellant's entitlement to a fee waiver under section 57(4)(b) has not been substantiated.

Moreover, the Ministry has indicated that the number of records expected to be retrieved from the search of student files, which represents most of the fees being charged, would be "nominal". The appellant could decide to proceed with only the less expensive part of the search, which is expected to produce a high volume of responsive records. In this situation, I find in particular that it would not be "fair and equitable" to waive the estimated fee in relation to searching the student files, even if financial hardship had been established. In my view, it would represent a questionable use of public money to require the Ministry to absorb the very substantial costs associated with a search expected to produce few, if any, responsive records.

I find that the appellant is not entitled to a fee waiver on the basis of financial hardship.

Public Interest

The appellant argues that it would be in the public interest to grant a waiver because of the difficult situation faced by a number of students who have attended the educational institution. However, the Act and Regulation do not contemplate fee waiver in "the public interest". The only ground for a fee waiver that relates to the public interest appears in section 57(4)(c) of the Act, which refers to waiver where "dissemination of the record will benefit public health or safety". There is no suggestion that these records will have an impact on public health or safety. I find that this ground of waiver as advanced by the appellant is not supported by the Act or Regulation. In the result, the appellant is not entitled to a fee waiver.

ORDER:

1. I uphold a fee estimate in the amount of $2,760.80 in relation to the "readily available" files.

2. I uphold a fee estimate in the amount of $21,603 in relation to the search of individual student files, should the appellant wish to have this undertaken.

3. I do not uphold the appellant's request for a fee waiver.

Original signed by: June 6, 1997
John Higgins
Inquiry Officer