



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

ORDER PO-2921

Appeal PA09-397

University of Western Ontario



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NATURE OF THE APPEAL:

The University of Western Ontario (the university) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to e-mails exchanged within a specified time frame between nine identified individuals that contained any reference to the requester and/or an identified student organization.

After discussing the access request with the appellant, the university issued its initial decision. The university confirmed with the requester that because of the volume of potentially responsive records, the request would be divided into two parts. The first part of the request would be for e-mail records referring to the requester. The second part of the request would be for access to “general records” relating to the identified student organization.

The within appeal deals with the second part of the request, namely for access to e-mails exchanged within a specified time period between nine identified individuals that contained any reference to an identified student organization. In this order, I will describe this as the request at issue in this appeal. The first part of the request is the subject of a separate appeal. In that separate appeal the university ultimately only claimed fees for photocopying charges of \$1.60.

As set out in the university’s representations, a copy of which was shared with the appellant, in a subsequent discussion, the appellant revised the time frame for the request at issue in this appeal and advised the university that the following could be excluded from its scope:

- Duplicate copies of e-mails,
- E-mails which the appellant initiated and received, and
- E-mails that also contained his last name.

The university began processing the request at issue in this appeal and issued a fee estimate of \$426.50 under section 57(3) of the *Act* for searching and preparing responsive records for disclosure. The fee estimate included projected photocopying charges.

In response, the requester sent e-mail correspondence to the university requesting a fee waiver under section 57(4) of the *Act*.

In his e-mail, the requester provided the following grounds for his fee waiver request:

- He is a student without a full-time job, with full time education related expenses and paying the estimated fee would cause him financial hardship,
- While the fee estimate refers to general records, his request is associated with highly personal matters,
- He is not convinced that a search for an identified student organization by keyword requires 10.5 hours of search time. He submits that “[w]ith present-day

information and technology systems, it takes only minutes to search for a single term within e-mail folders. What I am requesting amounts to a simple Boolean search for nine (9) university employees. At most, each search should take only 10 minutes – not 70 minutes (on average).”

The university responded with correspondence to the appellant requesting details of his financial situation. It advised that this may include information about income, assets and expenses and that “[e]vidence could include a copy of a tax return(s) and or any other relevant documents.”

In a further e-mail, the requester added that he is a full-time student with significant, “largely education related” debt and the estimated fee represents, for him, “98% of a single monthly rental payment.” He also questions whether the amount of the fee “is intended to be obstructionist.”

The university denied the fee waiver request.

The requester (now the appellant) appealed the university’s fee estimate and its refusal to grant a fee waiver.

Mediation did not resolve the matter and it was moved to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*.

The adjudication was commenced by sending a Notice of Inquiry setting out the facts and issues in the appeal to the university. The university provided representations in response. A Notice of Inquiry, along with the complete representations of the university, was then sent to the appellant. The appellant advised that although he wished to continue with the appeal, he would not be providing responding representations.

FEE FOR ACCESS

Section 57(1) requires an institution to charge fees for requests under the *Act*. That section reads:

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.

More specific provisions regarding fees are found in sections 6, 6.1 and 7 of Regulation 460. Those sections read:

6. 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 records provided on CD-ROMs, \$10 for each CD-ROM.
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.

Section 6.1 of Regulation 460 provides that 57(1)(a) does not include the search time for manually searching a record for the requester's personal information. That section reads:

The following are the fees that shall be charged for the purposes of subsection 57(1) of the *Act* for access to personal information about the individual making the request for access:

1. For photocopies and computer printouts, 20 cents per page.
2. For records provided on CD-ROMs, \$10 for each CD-ROM.
3. 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.
4. 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.

Section 7(1) of regulation 460 sets out that if a head gives a person an estimate of an amount payable under the *Act* and the estimate is \$100 or more, the head may require the person to pay a deposit equal to 50 per cent of the estimate before the head takes any further steps to respond to the request.

The purpose of a fee estimate is to give the requester sufficient information to make an informed decision on whether or not to pay the fee and pursue access [Orders P-81, MO-1367, MO-1479, MO-1614 and MO-1699]. The fee estimate also assists requesters to decide whether to narrow the scope of a request in order to reduce the fees [Order MO-1520-I]. In all cases, the institution must include a detailed breakdown of the fee, and a detailed statement as to how the fee was calculated [Orders P-81 and MO-1614]. This office may review an institution's fee and determine whether it complies with the fee provisions in the *Act* and Regulation 460.

Where the fee is \$100 or more, the fee estimate may be based on either

- the actual work done by the institution to respond to the request, or
- a review of a representative sample of the records and/or the advice of an individual who is familiar with the type and content of the records [Order MO-1699].

Generally, this office has accepted that it takes two minutes to sever a page that requires multiple severances [Orders MO-1169, PO-1721, PO-1834, PO-1990].

The university's representations

The university provided detailed representations in support of its fee estimate. In its decision letter, the university based its fee estimate of \$426.50 on a review of a representative sample of records. The university states in its representations that its fee estimate is based on the following:

- completed search time of 12 1/2 hours for responsive records with an estimated 7 hours of search time remaining. The university reduced the amount by one-half "to account for the fact that the university cannot charge for the time spent manually searching for personal information: \$292.50."
- record preparation time of \$120.00 using an estimate of 120 pages of responsive records. The university stated that this did not include an additional 400 pages of records that were "yet to be searched."
- photocopy costs of \$24.00 based on its estimate of 120 pages of responsive records. The university again stated that this did not include an additional 400 pages of records that were "yet to be searched."

The university's representations provide further detail in support of its fee estimate. In its representations, the university divided the search and preparation time into three headings: manual search time, record preparation and photocopy costs.

Manual search time

The university submits that it based the fee estimate for its manual search on three factors:

- (1) actual time spent searching for e-mail records;
- (2) a search through a representative sample of the resulting records; and
- (3) the advice of staff who are knowledgeable about the type and content of the records.

The university submits that with respect to actual search time, staff in the offices of the nine individuals identified in the request spent 10 1/2 hours searching their e-mail records. It states that this was necessary because the appellant submitted a request for both general records and his own personal information.

The university submits:

... The university's Information and Privacy Coordinator [Coordinator] asked each office to conduct all of the searches rather than searching in August for records responsive to the first part of his request and then searching again in September for records responsive to the second part. This was done to save time and maximize efficiency given the likelihood that there would be overlap in the two sets of records. The nine offices logged their search times and the [Coordinator] reduced the total by fifty-percent to account for the fact that one-half of it was spent searching for the requester's own personal information (which cannot be included in manual search charges).

The university states that staff in each of the nine offices searched their Inbox, Outbox and local e-mail folders for the appellant's specified search terms and then reviewed the resulting messages for timeframe and responsiveness. The university states that staff members must open the e-mails to determine whether they contain responsive information quite apart from the timeframe. In addition, the university states that its Legal Counsel had to manually search his e-mail messages to review for timeframe and responsiveness.

The university submits:

The searches outlined above produced approximately 1500 pages of printed e-mail messages. This preliminary batch contained records that were responsive to both parts of the appellant's requests. The [Coordinator] did not receive these printed e-mail messages in any discernible order because the offices conducted searches in different sequences and printed records in different orders. A further

search step was, therefore, required to locate the specific records responsive to each part of the request.

The university submits that the Coordinator responded to the first part of the request by searching the e-mails to locate records containing the appellant's last name. The Coordinator located 42 responsive records, totalling 59 pages. The remaining records consisted of duplicates, e-mail messages that the appellant initiated or received, or messages that were not responsive to the first part of the request. The university further submits that this batch must be searched again by the Coordinator to locate the records containing the name of the student group.

The university states that in order to estimate the time remaining to complete the search process the Coordinator conducted a search of a representative sample of records. The university explains that the Coordinator spent 2 hours searching approximately 1/4 of all the pages and located approximately 74 responsive records (207 pages). Based on this sample search, the university estimates that it will take six more hours to complete searching the final 3/4 of records.

The university submits that, in addition to these searches, staff that are knowledgeable about the type and content of the records in two offices advised that they each have an additional paper file folder to search. The university states:

In the case of the Vice-Provost (Academic Programs and Students) [Registrar], the file folder consists of hard copies of e-mail messages that the Vice-Provost printed and gave to his assistant. In the case of the Vice-Provost (School of Graduate & Postdoctoral Studies), the file folder consists of printed e-mails, agendas and annual reports that the Vice-Provost's assistant maintains to provide the Vice-Provost with a history of communications, decisions and confirmation of meetings related to the student group.

The [Coordinator] viewed the files and noted that each is approximately one-inch thick. The Coordinator estimated that there are approximately 200 additional pages in each file folder. This estimate is based on the IPC's publication, "Fees, Fee Estimates and Fee Waivers" which states that, "an average one-inch paper file folder holds approximately 150-200 (single-sided) pages". The university estimates that it will take 1/2 hour to search each file folder for a total of one additional hour. In context, this is equal to nine seconds per page. Again, this is well within the timeframe established by the IPC.

In summary, the university submits that its fee estimate comprises 12 1/2 hours of completed search time (calculated as 10 1/2 hours actually expended plus 2 hours from the representative sample) plus an estimated 7 remaining hours of search time, which amounts to \$585.00 (calculated as 19 1/2 hours at \$30.00 an hour). The university then reduced this estimated fee by one-half in an effort to reflect that it cannot charge for the time spent manually searching for personal information. The university states that the total fee estimate for manual search time is, therefore, \$292.50 or 9 3/4 hours at \$30.00 an hour.

Record Preparation

The university submits that its record preparation fee of \$120.00 is based on the search of the representative sample of records. In reviewing the 74 responsive records, discussed above, the university submits that it found that severances would be needed for approximately 20 records, comprising 30 pages. Extrapolating from this result the university submits that similar severances would appear to be needed for approximately 120 pages. The university estimates that based on 2 minutes a page, it will take a total of 4 hours to prepare 120 pages for disclosure.

Photocopy Costs

The university submits that it charged the appellant \$24.00 at a rate of \$0.20 per page to photocopy the responsive records for disclosure. The university states that this is based on its estimate that 120 pages would be released and, therefore, photocopied.

Analysis and finding

The appellant's position is that there are more efficient methods for locating responsive records and that the search time claimed by the university is excessive.

In Order PO-2904, I wrote:

This office has previously stated that government organizations are not obliged to maintain records in such a manner as to accommodate the various ways in which a request for information might be framed [See the postscript to Order M-583]. However, this office has also stated that institutions have an obligation to maintain their electronic records in formats that ensure expeditious access and disclosure in a manner or form that is accessible by all members of the public. In the electronic age, this is essential for an open and transparent government institution. [See Order MO-2199]. Furthermore, in the postscript to Order P-1572, former Assistant Commissioner Mitchinson emphasized that as parts of government become increasingly reliant on electronic databases to deliver their programs, it is critically important that public accessibility considerations be part of the decision-making process on any new systems design.

I ultimately determined in that Order that no search fee should be charged. That said, in my view, the facts of this appeal are entirely distinguishable and the university has provided extensive and convincing representations in support of its fee estimate.

As set out above, the university is entitled to charge \$7.50 for each 15 minutes of time spent searching for and preparing records for disclosure. Furthermore, a fee estimate can be based on a representative sample of records. In my view, the manner in which the university estimated the fee is reasonable and I have no difficulty in upholding the university's fee estimate. Therefore, I uphold the university's estimate of \$292.50 for search time, \$120.00 for record preparation time and \$24.00 for estimated photocopying cost for a total fee estimate of \$426.50.

FEE WAIVER

Section 57(4) of the *Act* requires an institution to waive fees, in whole or in part, in certain circumstances. The relevant parts of this provision states that:

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,

- (b) whether the payment will cause a financial hardship for the person requesting the record;

The requester must first ask the institution for a fee waiver, and provide detailed information to support the request, before this office will consider whether a fee waiver should be granted. On appeal, this office may review the institution's decision to deny a request for a fee waiver, in whole or in part, and may uphold or modify the institution's decision [Orders M-914, P-474, P-1393, PO-1953-F]. The institution or this office may decide that only a portion of the fee should be waived [Order MO-1243].

There are two parts to my review of the university's decision under section 57(4)(b) of the *Act*. I must first determine whether the appellant has established the basis for a fee waiver under the criteria listed in that section. If I find that a basis has been established, I must then determine whether it would be fair and equitable for the fee to be waived.

As stated previously, the burden of proof for establishing that its fee estimate is reasonable and is calculated in accordance with the fee provisions in the *Act* and Regulation rested with the university. Those fees are mandatory unless the requester can present a persuasive argument that a fee waiver is justified on the basis that it is fair and equitable to grant it or the *Act* requires the institution to waive the fees [Order PO-2726]. For section 57(4)(b) to apply, the requester must provide some evidence regarding his or her financial situation, including information about income, expenses, assets and liabilities [Orders M-914, P-591, P-700, P-1142, P-1365 and P-1393].

In response to the appellant's position that the payment of the requested fee would cause him financial hardship, the university submits:

A long line of IPC orders indicate that, for section 57(4)(b) to apply, the requester must provide some evidence regarding his financial situation, including information about income, expenses, assets and liabilities ...

IPC Orders MO-1821, PO-2833 and PO-2856, particularly, involve students who claimed that the fees associated with their access requests would have caused them undue financial hardship. The IPC determined that the appellants in these cases failed to prove that paying the requested fee would cause financial hardship because they did not provide sufficient financial documentation to support their claim.

The university refers to its letter to the appellant in response to the fee waiver request that asked the appellant to “provide documentation that would substantiate his claims that the payment of the estimated fee would cause him financial hardship.” In its letter, the university indicated that the appellant could submit a tax return or any other relevant documentation. The appellant declined to do so. The university submits that as a result, it cannot determine whether payment of the fee estimate would cause the appellant financial hardship. Furthermore, the university takes the position that the appellant has not provided any other grounds for a fee waiver under the *Act*.

The university further submits that in a telephone conversation with the appellant and in its initial decision letter it advised him that there may be a large volume of e-mail records containing the name of the student group and that search and preparation fees might apply. Furthermore it submits that in this telephone conversation and in its fee estimate letter the university advised the appellant “of the possibility of reducing the fee by revising his request,” but the appellant declined to do so.

The university concludes:

In summary, the appellant’s access request directed the university to search through the records of nine senior university members. This search produced a preliminary batch of records that responded to both parts of his request and an additional search is required to locate the records that specifically contain the name of the student group. As well, there are two large paper file folders that must be searched. Given the search and preparation time involved, the university submits that waiving the fees associated with this request would shift an unreasonable burden of the cost from the appellant to the university.

Analysis and finding

While I accept that the appellant’s finances might be strained by the payment of the fee estimate (of which 50 per cent is due before the head takes any further steps to respond to the request) the appellant has failed to lead sufficient evidence to establish that the payment of the estimated fee will cause him financial hardship. Simply put, the appellant did not present a persuasive argument that a fee waiver is justified on the basis of financial hardship.

Given my finding that financial hardship under section 57(4)(b) has not been established by the appellant, it is not necessary for me to consider whether it would be fair and equitable to waive the fee on this basis.

ORDER:

1. I uphold the university’s fee estimate.

2. I uphold the university's decision not to grant the appellant a fee waiver.

Original signed by: _____
Steven Faughnan
Adjudicator

_____ October 18, 2010