

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER PO-3205

Appeal PA12-162

St. Joseph's Healthcare Hamilton

May 29, 2013

Summary: The appellant sought access to records relating to board member and executive expense claims paid by St. Joseph's Healthcare Hamilton (SJHH). SJHH located responsive records and issued a fee estimate of \$2,850 to process the access request. The appellant appealed the fee estimate and requested a fee waiver. SJHH denied the fee waiver, but reduced the fee estimate to \$1,778. This order upholds \$380 of the fee estimate and SJHH's denial of a fee waiver.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 57(1) and 57(4)(c); section 6 of Regulation 460.

Orders Considered: M-417, M-583, and PO-3035.

BACKGROUND:

[1] St. Joseph's Healthcare Hamilton (SJHH) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to "all expense claims made by Board of Director members, the hospital CEO, executives and any others reporting directly to the CEO from January 1, 2007 to the present." The requester subsequently clarified that she sought access to expense claims consistent with the expense reporting available on the SJHH web site under the link "Corporate Accountability, Executive Expenses."

[2] SJHH located responsive records related to 46 individuals. It issued a fee estimate of \$2,850, based on a representative sample of responsive records. The fee estimate letter also indicated that SJHH had made no final decision regarding access, as it had to notify affected third parties and anticipated that the mandatory personal privacy exemption in section 21 of the *Act* would apply to some of the responsive records. SJHH asked the requester for a deposit of 50% of the fee before it would take further steps to process the request.

[3] The requester, now the appellant, appealed the fee estimate to this office.

[4] During mediation, SJHH issued a revised fee estimate of \$2,540, correcting some miscalculations from its first fee estimate letter.

[5] Also during mediation, the appellant submitted a fee waiver request to SJHH on the basis that the fee estimate was excessive and that dissemination of the requested information would benefit public health and safety. In addition, the appellant indicated that she was prepared to narrow the time period of her request to include only the period of April 1, 2007, to November 30, 2011, which was the date on which SJHH began posting executive expenses on its web site in accordance with the requirements of the *Broader Public Sector Accountability Act (BPSAA)*.

[6] SJHH agreed to grant a partial fee waiver to the appellant by reducing one year of expenses "by an additional 50% to reflect the expenses posted on [the] web site pursuant to the [*BPSAA*]." In its fee waiver decision, SJHH proposed two options to reduce the fee; reduce the number of years of expenses sought, or reduce the number of individuals to be included in the request. The hospital provided the following revised fee estimate for the appellant's consideration:

<u>Number of years</u>	<u>Total fee estimate</u>
2	\$762
3	\$1,270
4	\$1,778
5	\$2,540

[7] Also, to demonstrate how the partial fee waiver was applied to the final fee estimate, SJHH provided the following breakdown:

<u>Number of years</u>	<u>Total fee estimate of \$2,540 for 5 years</u>	<u>Partial fee waiver applied</u>
2	\$1,016	\$762
3	\$1,524	\$1,270
4	\$2,032	\$1,778

[8] The appellant remained unsatisfied and elected to pursue her appeal of the fee estimate and fee waiver decision.

[9] The appeal was therefore moved to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*.

[10] During my inquiry into this appeal, I sought and received representations from the parties which were shared in accordance with section 7 of this office's *Code of Procedure and Practice Direction 7*.

[11] In this order, I uphold SJHH's denial of a fee waiver, and I uphold only ten hours of search time at a cost of \$300, two hours of preparation time at a cost of \$60, and \$20 for photocopies.

ISSUES

Issue A: Should the fee estimate be upheld?

Issue B: Should the fee be waived?

DISCUSSION:

Issue A: Should the fee estimate be upheld?

[12] Where the fee to process an access request exceeds \$25, an institution must provide the requester with a fee estimate.¹ 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.²

[13] 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.³ The fee estimate also assists requesters to decide whether to narrow the scope of a request in order to reduce the fees.⁴

¹ Section 57(3).

² Order MO-1699.

³ Orders P-81, MO-1367, MO-1479, MO-1614 and MO-1699.

⁴ Order MO-1520-I.

[14] In all cases, the institution must include a detailed breakdown of the fee, and a detailed statement as to how the fee was calculated.⁵

[15] This office may review an institution's fee and determine whether it complies with the fee provisions in the *Act* and Regulation 460, as set out below. In determining whether to uphold a fee estimate, my responsibility under section 57(5) is to ensure that the estimated fee is reasonable. The burden of establishing the reasonableness of the fee estimate rests with SJHH. To discharge this burden, SJHH must provide me with detailed information on how the fee estimate was calculated in accordance with the applicable provisions of the *Act*, and it must produce sufficient evidence to support its claim.

[16] 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.

[17] More specific provisions regarding fees are found in section 6 of Regulation 460, which reads, in part:

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.

⁵ Orders P-81 and MO-1614.

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.
- ...

SJHH's Representations

Search Time – section 57(1)(a)

[18] SJHH states that the request is for information relating to 46 individuals and spans a five year period. SJHH points out that its estimated search time of 70.5 hours amounts to just over one and a half hours per individual. It explains that the individuals included in the request vary from year to year based on the individuals' period of appointment or employment, and this fluctuation significantly increases the complexity of the search.

[19] SJHH submits that its estimated search time is reasonable considering the results in Orders PO-3035 and M-417. In respect of Order PO-3035, SJHH asserts that the four hours upheld as a reasonable amount of search time to locate the expenses of one individual during a five year period, is more than the one and a half hours it claims. Relying on Order PO-3035 as an indicator of a reasonable search time for five years of expenses, SJHH calculates 184 hours of search time for 46 individuals' expenses over five years, and asserts that its significantly lower search fee shows its recordkeeping efficiency.

[20] Regarding Order M-417, SJHH notes that 25 hours of search time to search for records relating to the expenses of two individuals over a five year period was allowed as reasonable. It argues that the 12.5 hours per individual allowed in Order M-417 are far greater than the one and a half hours per individual for its search. Using Order M-417 as a gauge for reasonable fees when searching for expense records, SJHH argues that 575 hours could be calculated for 46 individuals' expenses for five years.

[21] SJHH submits that taken together, Orders PO-3035 and M-417 allow for search fees that far exceed its search fee estimate of 1.53 hours per year per individual, or 7.65 hours for each individual for five years, for a total cost of \$2,115.00.

Computer and other locating costs – section 57(1)(c)

[22] SJHH states that its estimate of 13.5 hours calculated under section 57(1)(c) for a total of \$405.00, is based on creating expense report spreadsheets, linking tables, compiling a list and producing summaries. It notes that the appellant asked that the

responsive records be provided in the same form as its disclosure of executive expenses on its web site.

[23] SJHH explains that its finance department developed software to proactively disclose executive contracts and expenses and board member expenses on its web site, as part of its corporate accountability initiatives. It adds that this work by its finance department established the groundwork for processing the appellant's request and benefited the appellant by reducing the fees. SJHH states that the estimated number of responsive pages was reduced to 100 because the data will be linked in a table. It adds that this work also eliminated the charge for review under section 6.4 of Regulation 460.

[24] SJHH concludes by asserting that its fee estimate is reasonable, conservative and calculated in accordance with the *Act*.

The Appellant's Representations

[25] The appellant asserts that the fee estimate is excessive and a barrier to access, given the straightforward nature of her request, and the fact that it is clearly in the public interest that the requested information be brought to light. She states that the Government of Ontario and the Minister of Health and Long-Term Care, Deb Matthews, have identified the release of hospital executive and board expenses to the public as measures "necessary to protect the interests of the taxpayers and to strengthen the government's accountabilities for the organization it funds." The appellant further states that the accountability and transparency demanded by the *BPSAA* is crucial at a time of tight hospital budgets and difficult fiscal decisions hospitals have to make regarding cuts to staffing, programs and/or care. She states that during the time covered by her request, SJHH eliminated approximately 185 jobs and 26 complex continuing care beds, and had to find savings of roughly \$18 million in its budget. In light of this, the appellant submits it is reasonable to expect SJHH closely monitors the expenses of its executives and board members.

[26] In respect of the search fees, the appellant states that the records are relatively recent, dating back to April 2007, and it is therefore reasonable to expect that SJHH's records from this period are kept in a consistent and easily searchable manner. She argues that Order PO-3035 stands for the principle that an appellant should not bear the financial burden of an institution's failure to implement proper record management practices.

[27] The appellant further argues that it is not reasonable for SJHH to take the cost of the search time allowed in Order PO-3035 for records relating to one person, and multiply it by the number of individuals covered by her request, as this approach does not address the reasons behind SJHH's search costs. The appellant states that unlike her request, the expenses requested in Order PO-3035 were the expenses of the

spouse of an employee of the university; they were not for an executive or board member of the university. She points out that Order PO-3035 recognized that additional effort was required to identify the responsive records in that appeal because the responsive records were a subset of the employee's expense records, and it allowed higher search costs on this basis. The appellant states that her request does not involve any such effort on the part of SJHH.

[28] The appellant also asserts that Order M-417, relied on by SJHH, relates to a different organization and deals with additional information which she has not requested. The appellant reiterates that it is not reasonable for SJHH to take the cost of the search allowed in Order M-417 and multiply it by the number of individuals covered by her request. Rather, she stresses SJHH must explain its reasons for its search costs and demonstrate why they are reasonable.

[29] In addition, the appellant argues that the computer and other costs for locating, processing and copying the records are excessive. She states that while she is pleased a software solution is in place to lower costs for disclosing the information she has requested, the substantial time and resources that went into developing this software solution were paid by Ontario taxpayers. She continues that this software was developed so SJHH could comply with the requirements of the *BPSAA*; it was not developed for her benefit or for the benefit of future requests for access to information under the *Act*. The appellant concludes by stating that the public should benefit from more affordable access to information from the software it funded.

Analysis and Findings

[30] I have carefully reviewed the representations in this appeal, and the fee estimate decision letters provided by SJHH which show how SJHH calculated its fee. Based on all of the evidence before me, and for the reasons set out below, I find that the fee estimate of \$2,540, and the revised fee estimate of \$1,778, to locate and prepare less than five years' worth of expense claim records for the individuals included in the request, are excessive.

[31] At the outset, I note that SJHH relies in its representations on Order PO-3035 to argue that its search time of 70.5 hours for 46 individuals over four and a half years is reasonable when compared to the four hours of search time upheld in Order PO-3035 for the search of one individual's expenses over a five year period. SJHH also relies on Order M-417 to submit that its search time is reasonable when compared to the 25 hours of search time upheld in Order M-417 for the search of two individuals' expenses over a five year period. I agree with the appellant that it is not reasonable for SJHH to take the cost of search time allowed per person in previous orders of this office and multiply the cost by the number of individuals in this request; this approach does not address the fact that SJHH's fee estimate must be based on the actions necessary and the actual amount of time needed to locate the requested records in this appeal.

[32] The orders relied on by SJHH are based on different facts and considerations than those in the present appeal. Order PO-3035 considered a search for an employee's spouse's expense records over a five year period, and therefore, the search dealt with a subset of an employee's records, which required additional effort. In this appeal, the expense records are those of the identified individuals, and accordingly, the search is more straightforward. In Order M-417, the request was for more information than is the case in this appeal. Also, only five hours of search time were upheld in Order M-417 to search for computer records of expense account documents during a two year period.

[33] I also note that Order M-417 was issued in 1994, almost 20 years ago. The expectation that institutions be able to locate records, particularly, general records regarding expenses reimbursed by institutions, in a reasonable amount of time based on appropriate records management systems, is much greater now than it was in 1994. In this regard, I note that in 1995, Former Commissioner Tom Wright issued Order M-583, in which he included a postscript regarding this office's expectations of institutions with respect to their management and disclosure of general information such as expenditure related information. In affirming that expense related information is a general category of information that institutions should make readily and routinely available to the public going forward, the former Commissioner wrote:

I believe it's time for all government organizations to make expenditure-related information routinely available to the public. Such information should include the expenses incurred by senior officials for which they will be reimbursed by the organization. In my view, this "routinely available" approach has equal application to all general records held by government.

[34] With the former Commissioner's statement in mind, I will now consider the breakdown of SJHH's fee estimate as it appears in SJHH's fee estimate correspondence.

[35] SJHH claims it requires 70.5 hours of search time to locate records responsive to the request, with two of these hours being devoted to identifying the 46 board members and senior SJHH executives who fall within the request. While I accept that SJHH must conduct searches in both its human resources and administration departments to identify the 46 individuals, I find that two hours to do so is unreasonable considering this information is being searched electronically, and, considering the names of the members of its Board of Directors and its senior executives are readily retrievable information that is generally publicly available information on most hospitals' web sites. I find that this part of the search should take, at most, a few minutes.

[36] SJHH calculates that its finance department requires 34 hours of search time for "data entry." SJHH does not provide details on the data entry, why it is required, or its basis for including this in its search time calculated under section 57(1)(a). I therefore do not uphold this portion of the search fee.

[37] The remainder of SJHH's search time consists of 34.5 hours of "record search" in its finance department broken down as: 26.25 hours to search accounts payable; 22.5 hours to search credit cards; 8.5 hours to search petty cash; and 11.25 hours to search payroll. SJHH provides no further details or explanation to justify the number of hours claimed under each record category. I accept that SJHH's records are stored and maintained in a manner that necessitates searching in four payment categories within its finance department. However, I have difficulty accepting that 34.5 hours is a reasonable amount of time to conduct searches in these payment categories.

[38] The appellant's request relates to a defined group of individuals, board members and senior executives, and the expenses they claimed over a four and a half year period. The scope of the request is, therefore, well defined. As well, the request is for recent records, which date back to April 2007. In Order PO-3035, Assistant Commissioner Brian Beamish stated that when dealing with records of recent origin, it is reasonable to expect that the records "should be kept in a consistent and easily searchable manner." In Order PO-3035, Assistant Commissioner Beamish considered a fee estimate related to records from January 5, 2005, to December 31, 2010, and found that 32 hours of actual search time to produce the responsive records demonstrated that the university's "records management process [was] unwieldy and not conducive to easily focused searches for a well defined class of records." Assistant Commissioner Beamish further noted that an "appellant should not bear the financial burden of the university's failure to implement proper records management practices."

[39] Applying Assistant Commissioner Beamish's reasoning to this appeal, records from 2007 to 2011 should be maintained consistently and in a manner conducive to easily performed defined and narrow searches. The time-consuming process that SJHH has described as necessary to locate the responsive records demonstrates that the records are not so maintained, and the appellant should not bear the resulting financial burden.

[40] Accordingly, taking into account the defined scope of the request; SJHH's ability to search for the records electronically; the fact that the records are of recent origin; the understanding that expense information is a general category of information that should be readily and routinely available; and the principle that the appellant should not bear the financial burden of SJHH's failure to maintain its records in a consistent and easily searchable manner, I find that ten hours is a reasonable amount of time to search. I therefore reduce the search time in this appeal to ten hours, for a total cost of \$300.

[41] SJHH also claims that in accordance with section 57(1)(c), it requires 13.5 hours at a total cost of \$405, to provide the responsive information to the appellant in the same form as its executive expenses disclosure on its web site. SJHH's fee estimate indicates that this cost is based on three hours to compile a Board of Directors list,

three hours to create a Board of Directors spreadsheet, and seven and a half hours to produce an executive expenses summary. The activities SJHH describes as forming the basis of this part of the fee estimate, are not contemplated by section 57(1)(c).

[42] Section 57(1)(c) relates to "computer and other costs incurred in locating, retrieving, processing and copying a record", and it allows institutions to charge for the cost of photocopies, computer printouts and/or CD-ROMs, as well as, the cost for developing a computer program. From my review of the evidence, the only costs that SJHH may recover from the appellant under section 57(1)(c) are the photocopying costs of \$20 for 100 pages of copies.

[43] I find that some of the remaining activities charged by SJHH in its fee estimate are recoverable under section 57(1)(b), which deals with preparing a record for disclosure; specifically, the compilation of the individual expense claim information in the agreed upon format. I allow two hours at a cost of \$60 to be charged for the compilation of this record.

[44] In summary, I uphold ten hours of search time at a cost of \$300, two hours of preparation time at a cost of \$60, and \$20 for photocopies.

Issue B: Should the fee be waived?

[45] Section 57(4)(c) of the *Act* requires an institution to waive fees in circumstances where payment of the fee would cause financial hardship. It states:

57. (4) 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,

...

(c) whether dissemination of the record will benefit public health or safety;

...

[46] The fee provisions in the *Act* establish a user-pay principle which is founded on the premise that requesters should be expected to carry at least a portion of the cost of processing a request unless it is fair and equitable that they not do so. The fees referred to in section 57(1) and outlined in section 6 of Regulation 460 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.⁶

⁶ Order PO-2726.

[47] A 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. 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.⁷

[48] The institution or this office may decide that only a portion of the fee should be waived.⁸

Representations

[49] SJHH argues that the appellant has not established a basis for a fee waiver under section 57(4) of the *Act*. SJHH states that the appellant is a member of the media, and is employed by a company that publishes newspapers for profit. SJHH acknowledges that dissemination of the information would be of some public interest. In this regard, it states it has embraced the *BPSAA* and has posted the expenses of its executives and board members on its web site. However, SJHH asserts that dissemination of the records would not benefit public health or safety as contemplated by section 57(4)(c).

[50] SJHH asserts that it fosters quality, accountability and transparency. It states that it reduced its fee estimate during mediation of the appeal, demonstrating its willingness to work with the appellant to reach a successful conclusion to the issue of the fee waiver. SJHH adds that it carefully considered the application of the *Act* before responding to the fee waiver request. It concludes by asserting that the fee estimate is justified and calculated in accordance with the *Act* and Regulation 460.

[51] In her representations, the appellant reiterates that executive expenses have been identified by the provincial government as key to accountability and transparency in publicly funded institutions. She asserts that it is clearly in the public interest for the newspaper to report executive expenses to allow Ontarians to make educated decisions. The appellant also points out that the expenses she is requesting are not available on SJHH's web site. She adds that only one year's worth of expense are published on SJHH's web site.

Analysis and Findings

[52] The focus of section 57(4)(c) is "public health or safety." Under this section, the appellant bears the onus of demonstrating that a fee waiver is justified. To discharge this onus, the appellant must establish that the records relate directly to a public health or safety issue.⁹ Previous orders of this office have established that it is not sufficient

⁷ Orders M-914, P-474, P-1393 and PO-1953-F.

⁸ Order MO-1243.

⁹ Order PO-1962.

that there be only a "public interest" in the records or that the public has a "right to know"; there must be some connection between the public interest and a public health and safety issue.¹⁰ While I agree with the appellant that hospital board and executive expenses should be publicly available and are of public interest, I am not satisfied that the dissemination of the records will "benefit public health or safety" as required by section 57(4)(c).

[53] Accordingly, I uphold SJHH's denial of a fee waiver in this appeal.

ORDER:

1. I reduce the search time claimed by SJHH to ten hours, for a total fee of \$300.
2. I uphold two hours of preparation time, for a total fee of \$60.
3. I uphold \$20 for photocopying costs.
4. I uphold SJHH's decision to deny the request for a fee waiver.

Original signed by: _____

Stella Ball
Adjudicator

_____ May 29, 2013

¹⁰ Orders MO-1336, MO-2071, PO-2592 and PO-2726.