

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3215

Appeal PA12-161

Hamilton Health Sciences

June 14, 2013

Summary: The appellant sought access to records relating to board member and executive expense claims paid by Hamilton Health Sciences (HHS). HHS located responsive records and issued a fee estimate of \$12,889.77 to process the access request. HHS then waived a portion of the fee and reduced its fee estimate to \$3,600. The appellant appealed the fee estimate decision and asked HHS to waive the fee. HHS denied the request for a fee waiver. This order upholds \$420 of the fee estimate and HHS'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 and Investigation Reports Considered: Orders M-203, M-583, M-706, PO-3035, PO-3205 and PO-3206.

OVERVIEW:

[1] Hamilton Health Sciences (HHS) 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."

[2] The requester subsequently clarified that she sought access to the requested information in the same format as the current year's expense claim information posted on the HHS web site, by calendar year.

[3] HHS located responsive records related to 64 individuals. It issued a fee estimate and indicated that although it had made no decision regarding access, it anticipated granting access to approximately 95% of the responsive records, subject to the application of the mandatory exemptions in sections 17 (third party information) and 21¹ (personal privacy) of the *Act*. HHS indicated that the cost for processing the request was \$12,889.77 due to the large volume of records, many of which had to be retrieved from off-site storage because HHS only retained on-site records from the fiscal year starting April 1, 2010, forward. However, HHS indicated in its letter that it was prepared to absorb the costs of retrieving records from off-site storage and it waived \$9,289.77, thereby reducing its fee to \$3,600.00. HHS asked the requester for a deposit of 50% of this fee before it would take further steps to process the request. In its fee estimate letter, HHS also suggested options for narrowing the request, which would reduce the cost of processing the request.

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

[5] During mediation, the appellant asked HHS to waive the fee on the basis that it was excessive and that dissemination of the information would benefit public health and safety. In response, HHS denied the appellant's request for a fee waiver. HHS explained that in making its decision, it considered the unreasonable burden it would have to assume to process the request if it waived the fee. It also noted that the appellant had not narrowed the scope of the request and did not consider the reduced cost of \$3,600.00 that it previously offered.

[6] The appellant subsequently narrowed 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 HHS began posting executive expenses on its web site in accordance with the requirements of the *Broader Public Sector Accountability Act (BPSAA)*.

[7] The appellant elected to pursue her appeal of HHS's decisions.

[8] Mediation did not resolve the appeal and it was moved to the adjudication stage where an adjudicator conducts an inquiry under the *Act*.

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

¹ In its fee estimate letter, HHS inadvertently identified "section 20" as the "Personal Privacy" exemption.

[10] In this order, I uphold HHS's denial of a fee waiver, and I uphold \$420 of the fee estimate.

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?

[11] Where the fee to process an access request exceeds \$25, an institution must provide the requester with a fee estimate.² 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.³

[12] 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.⁴ The fee estimate also assists requesters to decide whether to narrow the scope of a request in order to reduce the fees.⁵

[13] In all cases, the institution must include a detailed breakdown of the fee, and a detailed statement as to how the fee was calculated.⁶ 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.

[14] Section 57(1) requires an institution to charge fees for requests under the *Act*. That section reads, in part:

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,

² Section 57(3).

³ Order MO-1699.

⁴ Orders P-81, MO-1367, MO-1479, MO-1614 and MO-1699.

⁵ Order MO-1520-I.

⁶ Orders P-81 and MO-1614.

- (a) the costs of every hour of manual search required to locate a record;
- (b) the costs of preparing the record for disclosure;

...

[15] 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.
- 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.

...

HHS's Representations

[16] In its representations, HHS submits that it prepared its fee estimate based on the advice of individuals familiar with the requested records and their contents, and also based on its experience posting expenses pursuant to the *BPSAA* directive. HHS explains that four staff were involved in the initial search to compile the list of individuals whose invoices would need to be retrieved. The list of 64 individuals was then provided to the Accounts Payable Coordinator to complete the fee estimate based on her knowledge of accounts payable invoicing and her work on *BPSAA* expense reporting.

[17] HHS explains the process that its Accounts Payable Coordinator had to follow to determine the number of vendor invoices or expense reimbursements that corresponded to the request and had to be retrieved. This process included:

- determining the method by which an expense was reimbursed

- determining the number of vendor invoices or expense reimbursements that corresponded to the date or year specified in the request and had to be retrieved
- looking up in its Meditech software whether each individual had claimed expenses
- determining the nature or individual components of the payment by searching and accessing financial reports to analyze the various cost centres and expense codes that would have been used to report the expenses relating to the request
- determining the expense categories and expanding the scope of the search to include a review of both the expenses attributable to the individual and the third party vendor
- reviewing each expense account and category at a high level to determine which individual was charged with the expense relating to the request.

[18] HHS states the analysis of the Accounts Payable Coordinator described above, identified 518 expense files and 424 vendor files, for a total of 942 files that needed to be accessed from off-site storage. HHS estimates that retrieval of the files from its storage company will cost \$7,849.77, based on the storage company's cost structure.

[19] HHS states that the original invoice it provided to the appellant on March 9, 2012, incorrectly indicated that the reduced \$3,600 fee estimate represented its manual search costs under section 57(1)(a) of the *Act*. Instead, HHS states that its \$3,600 fee represents the preparation costs it calculated under section 57(1)(b). HHS submits that it will require 120 hours, at a cost of \$30 per hour, to prepare the responsive records for disclosure.

[20] HHS adds that it is implementing changes to improve its ability to locate records and minimize the cost of requests such as the one in the present appeal. For example, it is re-educating staff in its Finance Department to standardize the submission and processing of expense reimbursements; it is retaining all documentation of employee expense reimbursement on-site going forward; and it is looking into converting its paper based invoice system to an electronic system. It concludes by pointing out that these changes are not retroactive, and therefore, requests for historical information dating back to January 2007, will present the same challenges identified by it in this appeal.

The Appellant's Representations

[21] 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 period covered by her request, HHS eliminated approximately 440 jobs, and had to find savings of roughly \$47 million to balance its budget. In light of this, the appellant submits it is reasonable to expect that HHS closely monitors the expenses of its executives and board members.

[22] 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 HHS'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. The appellant states that HHS's estimate of 168 hours for manual searching suggests that the records are not being kept in an easily searchable manner.

[23] Regarding the off-site storage costs, the appellant asserts that no other Hamilton area hospital stores its records off-site. The appellant takes issue with the significant cost of this practice, which she complains adds almost \$8,000 to the cost of her request. The appellant also asserts that it "obviously isn't necessary to keep the files at the outside agency as all documentation associated with employee expenses will be housed on-site from now on." The appellant argues that the public should not bear the financial burden of HHS choosing such a costly way to store its files. The appellant adds that while she appreciates that HHS has waived these costs, doing so has stopped HHS from waiving its "unreasonable and excessive search costs."

[24] The appellant concludes by asserting that it is not "fair, logical or justifiable that it should cost \$12,889.77 to produce records regarding executive and board expense for recent fiscal years." She adds that even requiring \$3,600 for access to the requested records is prohibitively expensive and HHS should make the expense information she requested freely available on its web site if it is truly committed to quality, accountability and transparency.

Analysis and Findings

[25] I have carefully reviewed the representations in this appeal, and the fee estimate decision letter provided by HHS which shows how HHS 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 \$12,889.77 and the revised fee estimate of \$3,600 are excessive.

[26] At the outset, I acknowledge the appellant's concerns about the significant cost for the retrieval of the responsive records held in off-site storage. Because HHS has

waived the roughly \$8,000 associated with the retrieval of its off-site records, this portion of the fee is not at issue in this appeal, and therefore, I will not address it further in this order.

[27] Turning to the revised fee estimate of \$3,600, I note that HHS's representations on the calculation of this fee differ slightly from the calculation provided in its invoice of March 9, 2012. HHS states in its representations that the 120 hours of manual search of on-site records it provided in its invoice, should actually be 120 hours for preparing the records for disclosure under section 57(1)(b). Along with its representations, HHS attaches a breakdown of its costs to process the request; this attachment lists 120 hours of preparation time, as well as 48 hours of search time, for a total of 168 hours to respond to the request. HHS's written representations however, do not address the 48 hours of search time reflected in the attachment. I also note, that despite changing the basis for the calculation of its fee estimate in its representations, HHS has not provided me with adequate representations on why 120 hours of preparation time is required to prepare the records for disclosure. It does however, provide detailed representations on the steps it took to manually search for and locate responsive records. In the circumstances, I will consider both search and preparation costs in my discussion below.

[28] Dealing first with the 48 hours of search time, I find it is excessive due to the nature of the records and the defined scope of the request. The requested records are expenditure related and fall into a general category of information that should be readily and routinely available.⁷ The request consists of the expense claims of 64 individuals over a four and a half year period, starting in April 2007. The request is therefore well defined and the records are of recent origin. The appellant relies on Order PO-3035 in her representations and I agree that it applies.

[29] 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 that order, 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." Applying Assistant Commissioner Beamish's reasoning to this appeal, records from 2007 to 2011 should be maintained consistently and in a manner conducive to an easily performed search for four and a half fiscal years' worth of expenses claimed by HHS executives and board members.

⁷ Orders M-583 and PO-3205.

[30] Turning to the 120 hours of preparation time claimed by HHS, I find HHS's very brief explanation – that it will have to extract information from the responsive records and input the information into an electronic table format that lists the expenses by calendar year – insufficient to justify the \$3,600 fee. I am satisfied, however, that some preparation time will undoubtedly be required to extract the relevant information and input it into the agreed upon format and that this work can be charged under section 57(1)(b).

[31] Section 57(1)(b) is used by institutions to charge fees for the cost related to preparing a record for disclosure, such as, severing a record⁸ or running a computer report.⁹ Previous orders of this office have allowed institutions to require payment of fees under section 57(1)(b) that relate to the costs of compiling a new record containing information responsive to a request. For example, Orders M-203 and M-706 both upheld preparation costs under the municipal equivalent of section 57(1)(b), that related to putting the information requested into the form asked for by the requester. I adopt this approach and find that some portion of the preparation fee claimed by HHS should be upheld under section 57(1)(b).

[32] As I have found HHS's fee estimate for both search and preparation costs excessive, and HHS has not provided adequate representations to assist me in determining the appropriate amounts for search and preparation fees in this appeal, I will rely on two recent orders I issued in which the appellant in the present appeal made identical requests to two other hospitals, Orders PO-3205 and PO-3206.

[33] In Order PO-3205, I upheld ten hours of search time for St. Joseph's Healthcare Hamilton, which identified 46 individuals as falling within the scope of the request. I also upheld two hours of preparation time for the production of an executive expenses summary similar to that available on the hospital's web site.

[34] In Order PO-3206, I again upheld ten hours of search time for Joseph Brant Memorial Hospital, which, like HHS, uses Meditech software. I also upheld four hours of preparation time for the hospital to extract the individual expense claim information from its records and put it into the agreed upon expense reporting format, which like the present appeal, would mirror the information available on the hospital's web site which was mandated by the *BPSAA*.

[35] Taking into account the identical nature of the requests in this appeal and in Orders PO-3205 and PO-3506, and recognizing that HHS will also incur search and preparation costs to compile the expense information of 64 individuals into the agreed upon format, I find that 10 hours of search time, and four hours of preparation time is appropriate. I therefore uphold \$420 of the fee estimate for search and preparation costs under sections 57(1)(a) and (b) respectively.

⁸ Order P-4.

⁹ Order M-1083.

Issue B: Should the fee be waived?

[36] Section 57(4)(b) 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;

...

[37] 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.¹⁰

[38] 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.¹¹

[39] The institution or this office may decide that only a portion of the fee should be waived.¹²

Representations

[40] HHS submits that a fee waiver should not be granted because the actual costs that it will incur to collect and process the records, are much greater than the fee estimate. HHS argues that the appellant has not established a basis for a fee waiver under section 57(4) of the *Act*, which requires the appellant to demonstrate the benefit disclosure of the records would provide to public health or safety.

[41] In her representations, the appellant asserts that the fee should be waived because the information is a matter of public health or safety. The appellant argues that

¹⁰ Order PO-2726.

¹¹ Orders M-914, P-474, P-1393 and PO-1953-F.

¹² Order MO-1243.

cuts to care, staffing and programs made by the hospital, impact public health and safety. She further argues that the public needs to be satisfied that money is being spent properly and that cuts are being made in the right areas to protect public health and safety.

[42] The appellant also points out that she has twice agreed to narrow her request. First, she agreed to narrow the request so that it corresponds with the hospital's fiscal year; this compromise resulted in expense claims from January 1, 2007, to March 31, 2007, being excluded from the scope of the request. She also agreed to receive the expense claims in the online expense reporting format used by HHS for corporate accountability purposes as HHS already has procedures and software in place to provide the expenses in this manner. She notes that she agreed to HHS's web site expense reporting format even though this format omits certain categories of expenses.

[43] The appellant continues that the public should have affordable access to as many years as the *Act* allows. She states that hospitals changed the rules for executive and board expenses in anticipation of these expenses becoming public under the *BPSAA*; for example, executives were previously permitted to submit expense claims for gas, maintenance and insurance costs in addition to their car allowances, however, in August 2011, the rule was changed to include these costs in the car allowance. The appellant argues that in light of these changes, it is important to make expenses in the past years public, as the expenses currently posted on HHS's web site are not representative of past expenses. She argues that past expenses must be made public to show how taxpayer dollars were previously spent and compare how they are being spent now, to understand the changes, and to properly evaluate whether all the necessary changes were made.

[44] The appellant concludes by arguing that at a time of tight budgets and hospital cutbacks that have the potential to impact public health and safety, it is crucial that the public is aware of how hospitals spend money.

Analysis and Findings

[45] 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.¹³ Previous orders of this office have established that it is not sufficient 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.¹⁴

¹³ Order PO-1962.

¹⁴ Orders MO-1336, MO-2071, PO-2592 and PO-2726.

[46] The public health concern advanced by the appellant is the way in which taxpayer derived health care dollars are being spent by HHS. This concern is a valid one in a publicly funded health care system with limited financial resources; however, it cannot be said that the dissemination of expense claims paid in the past five years by the hospital, including those paid before the enactment of the *BPSAA*, will contribute meaningfully to the development or understanding of an important public health issue.

[47] In the health care context, this office has found that dissemination of records relating to the quality of care and service at group homes¹⁵ and long-term care facilities¹⁶ will benefit public health or safety. This office has also found that dissemination of records relating to the amount the province has paid for out of province health care for cancer treatment, and the types of treatment involved, will benefit public health and safety.¹⁷

[48] While I agree with the appellant that HHS's board and executive expenses should be publicly available and are of great public interest, I am not satisfied that the dissemination of the records in this appeal reaches the threshold set out in section 57(4)(c).

[49] Moreover, considering my significant reduction of the fee estimate above and the user-pay principle enshrined in the *Act*, I do not believe that it is fair and equitable in the circumstances, to consider a further waiver of the fee.

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

ORDER:

1. I reduce the search time claimed by HHS to ten hours, for a total fee of \$300.
2. I reduce the preparation time claimed by HHS to four hours, for a total fee of \$120.
3. I uphold HHS's decision to deny the request for a fee waiver.

Original Signed By: _____

June 14, 2013

Stella Ball

Adjudicator

¹⁵ Order PO-1962.

¹⁶ Orders PO-2278 and PO-2333.

¹⁷ Order PO-2566.