

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3191

Appeal PA12-171

eHealth Ontario

April 25, 2013

Summary: The appellant sought access to information on contracts worth over \$200,000 awarded during the 2010/2011 fiscal year by eHealth Ontario. eHealth provided a fee estimate of \$5,400 to process the request. The appellant appealed the fee estimate. eHealth reduced its fee estimate to \$1,259.75. The appellant requested a fee waiver, which was denied by eHealth. This order reduces the fee estimate to \$30 and upholds eHealth'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)(b); section 6 of Regulation 460.

Orders Considered: PO-3035 and PO-2299.

OVERVIEW:

[1] In February 2012, eHealth Ontario (eHealth) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information on the total value of each contract for goods and services valued at more than \$500,000 that it awarded to external entities in the fiscal year 2010/2011, and a description of the work that was to be performed under each contract.

[2] The requester subsequently revised his request, clarifying that he was interested in the total value of each contract for goods and/or services valued at more than \$200,000 (before taxes) that eHealth awarded to external entities/individuals in the

fiscal year 2010/2011, including a description of work for each contract. For privacy reasons, and in order to expedite the processing of the request, the requester asked that the names of individuals be deleted from any responsive records relating to eHealth's contracts with individuals.

[3] In accordance with section 27(2) of the *Act*, eHealth notified the requester that it required an extension of 60 days to respond to the request as it had to search through a large number of records. In the same correspondence, eHealth provided a fee estimate for the request pursuant to section 57(3) of the *Act*, in which it estimated a fee of \$5,400 for processing the request, based on a representative sample of the records. eHealth stated that its calculation of the fee estimate was based on 180 hours of anticipated search time at a cost of \$30 per hour. It further noted that additional costs could be incurred as part of the ongoing search for and severing of responsive records. eHealth asked the requester for a deposit of 50 per cent of the estimate before it continued to process the request.

[4] The requester and eHealth had subsequent communications about the fee estimate, in which eHealth provided details of the search required to respond to the request. Following these communications, the requester, now the appellant, appealed the fee estimate to this office.

[5] During the mediation stage of the appeal process, eHealth issued a revised fee estimate in the amount of \$1,259.75. eHealth advised that as it was in the process of moving from several legacy systems for record management to one consolidated contract management system, it would waive fees related to searching for records in the legacy system. Accordingly, eHealth stated that its revised fee estimate of \$1,259.75, reflected what the cost of processing the request would have been if all of the responsive records and information were located in the consolidated contract management system.

[6] The appellant asked eHealth to waive the fee on the basis of financial hardship. eHealth denied the request for a fee waiver on the basis that the appellant provided insufficient evidence in support of his claim of financial hardship.

[7] As further mediation was not possible, the appellant asked that a determination of the validity of the fee estimate and the denial of the fee waiver be moved to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*.

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

[9] For the reasons that follow, I reduce the fee estimate to \$30 and I uphold eHealth's decision to deny the appellant's fee waiver request.

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?

[10] 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

[11] 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

[12] 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

[13] 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 eHealth. To discharge this burden, eHealth 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.

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.

⁵ Orders P-81 and MO-1614.

[14] 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.

[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.

...

eHealth's Representations

[16] In its representations, eHealth submits that the *Act* requires requesters to pay for the time taken to search for responsive records. eHealth explains that its initial fee estimate of \$5,400 was based on "search and preparation time based on reviews of representative samples and the advice of individuals familiar with the type and content

of the records.” eHealth also states that although it is not obliged to create a record that does not exist, it was “still prepared to review in excess of 140 purchase orders in order to respond to the request.”

[17] eHealth states that an initial search was conducted by its Senior Director, Strategic Sourcing and Vendor Management (SSVM), in the SSVM Department, for contracts worth more than \$500,000. eHealth reports that this initial search took 20.5 hours to return a list of responsive information and it entailed “preparing a unique list of all contracts, the description of work and the value of each contract.” eHealth continues that the Senior Director estimated that an additional 100 hours would be required to complete the rest of the search for a total estimated search time of 120.5 hours. eHealth asserts that once the request was revised and broadened, a subsequent search was conducted to identify and then return a list of contracts worth \$200,000 or more. It claims that ten hours were initially devoted to this search, and 20 more hours were estimated to be needed to “prepare the remaining material.”

[18] eHealth states that there are more than 200 responsive records and their preparation may take up to one hour each, for an estimated 200 hours of preparation time. eHealth submits that in light of the 180 hours of time required to conduct a manual search and create a list for disclosure, the estimate is on the low end of the scale at \$5,400.

[19] eHealth submits that it reduced its fee estimate in an attempt to resolve the appeal. The revised and more detailed fee estimate it provided to the appellant was based on both a representative sampling of records and the advice of individuals familiar with the type and content of the records.

[20] In addition, eHealth states that because it is in the process of moving from several legacy systems for record management into one consolidated contract management system, a search has to be done in several databases. This search has taken 30.5 hours so far; 20.5 hours for the first 41 responsive records (over \$500,000) and an additional 10 hours for the revised search (over \$200,000). At the time the original fee estimate was provided, eHealth estimated that it would take at least another 100 hours in order to search for and locate the remaining responsive information.

[21] eHealth relates that it advised the appellant it was willing to waive the time spent looking for records and information in the legacy record management system “given IPC orders that have been issued on this matter.” It asserts its belief that had all of the responsive information been located in the contract management system, it would have taken 18.66 hours to search for and locate all the information based on the following steps:

- Query and review 140 purchase orders in the financial records system (2 minutes).
- Query and then review the related responsive contracts in the contract management system (2 minutes).
- Pull the associated information together to ensure it is responsive to the request (5 minutes per purchase order).

[22] eHealth submits that the revised fee estimate for the SSVM search is \$599.80, based on 18.66 hours at a rate of \$30 per hour. eHealth states that after the above information was generated, its Freedom of Information (FOI) office determined that approximately 23 hours would be required to put the information provided by SSVM into a record to send to the appellant, which would result in \$699.95 in preparation fees.

[23] eHealth concludes by stating that its revised fee estimate is fair and equitable considering the large volume of records requested, the time required to retrieve information from three departments and a number of computer systems, and the time required by its FOI office to review and compile a list to disclose to the appellant. eHealth also submits that while it has shown good faith in trying to work with the appellant to arrive at a reduced fee, the appellant has not shown an interest in reaching a compromise solution and has filed five other similarly comprehensive requests with eHealth since February 2012, three of which have been abandoned.

[24] Along with its representations, eHealth submits two affidavits; one from the Senior Director and one from its Counsel & FOI Manager.

[25] The Senior Director deposes that:

- She has been engaged in her procurement and contract management duties with eHealth for two years.
- As no responsive records existed within the SSVM department, she and a staff member searched eHealth's contract management system and legacy system to identify contracts that fell within the scope of the request.
- It took her 20.5 hours to review 140 purchase orders to determine which contracts fell within the financial threshold of the request.
- She estimated that an additional 100 hours would be required to complete the search.
- After the request was revised, she conducted another search of 10 hours, to identify and return a list of contacts awarded over \$200,000. She estimated that she would need an additional 20 hours to search for and then prepare the remaining material. As a result, she estimated 50 hours as an appropriate timeframe to search for information and prepare a responsive list.
- If all of the responsive information had been located in eHealth's consolidated contract management system, 18.66 hours of search and preparation time would be required based on the following steps:

- Query and review in excess of 140 purchase orders in the financial records system.
- Query the related responsive contracts in the contract management system.
- Query and review 180 invoices to come up with the total value amount awarded.
- Pull the associated information together to ensure it is responsive to the request.

[26] The Counsel & FOI Manager deposes that:

- For two years, she has worked with eHealth program area directors, managers and staff, who are knowledgeable and experienced in their areas of specialty regarding the availability of the required information in eHealth's records as well as the estimated time it may take to compile the information and the number of photocopies required.
- Through discussion with the SSVM department and program area directors, managers and knowledgeable staff, it was determined that no responsive records existed. Rather, databases and files would have to be searched and information pulled together into a new record, created specifically to respond to this request.
- The responsive information was in the custody of the Senior Director. She believed the Senior Director's estimate of 120 hours of search time to be true.
- Once the Senior Director provided the responsive information to her, it would take her one hour to review each of the 200 responsive contracts and redact any third-party information and then prepare a separate responsive record for disclosure, for a total preparation cost of \$1,800 for 60 hours.
- Following mediation, she provided a reduced fee estimate of \$1,259.75 which reflected the cost of the search time that would have been required if the responsive information were stored on the contract management system. The Senior Director advised her of the following required steps:
 - Query and review more than 140 purchase orders in the financial records system.
 - Query the related responsive contracts in the contract management system to ensure the contracts were responsive to the request.
- The Senior Director also advised her that fewer contracts than originally estimated were responsive to the revised request, resulting in less time that would be required by her to prepare the records for disclosure. She estimated that it would take 23.31 hours to review any third-party information and then prepare a record for disclosure. Therefore, the revised preparation fee was \$699.95.

Appellant's Representations

[27] In his representations, the appellant asserts that eHealth is "using a highly legalistic, and antagonistic approach to blocking release of basic information about its spending of large amounts of public money."

[28] The appellant states that he did not limit the scope of his request because he could not do so in a way that would meet his information needs, however, he points out that he abandoned three of his requests with eHealth and this represents a dramatic narrowing both of scope and costs. The appellant adds that while he has acted in good faith, he is not convinced that eHealth has, as it revised the fee estimate only after he commenced his appeal, and it rejected his fee waiver request without explanation.

[29] The appellant argues that eHealth has now devoted vastly far more resources to denying his application for a fee waiver than the cost of the fees themselves. He asserts that from a public interest perspective, this is an irresponsible use of public money that thwarts the intention of the *Act*. The appellant states that the release of the requested information is in the public interest.

Analysis and Findings

[30] Having carefully reviewed the representations in this appeal, including the detailed descriptions provided by eHealth of the various steps it claims it must take to locate and prepare records responsive to the request, I cannot accept eHealth's fee estimate as reasonable. I accept that eHealth relied on experienced employees familiar with the requested records to conduct its initial searches and to estimate the additional time required to complete the search for responsive information. I also note that eHealth reduced its initial fee estimate of \$5,400, in recognition of the fact that it is not appropriate to charge a requester search fees that are a result of records being maintained inefficiently in many legacy systems. However, I agree with the appellant that the request is for "basic information" on how eHealth is spending large amounts of public funds, and that information of this type should be much more readily available.

[31] Accordingly, for the reasons set out below, I find that the revised fee estimate of \$1,259.75 is excessive.

[32] The estimated search cost of \$599.80 calculated under section 57(1)(a) is unreasonable considering the nature of the request. The request is narrow and defined in that it is for information about the nature and value of contracts worth more than \$200,000 that were awarded in a single fiscal year, specifically, the fiscal year immediately preceding that of the request. Such a relatively straightforward request should not require 18.66 hours of search time if eHealth's consolidated record management system is adequate, particularly when the purchase orders and the related

contracts can, according to eHealth, be searched electronically in its financial records system and its contract management system.

[33] Additionally, the responsive records are of recent origin as the appellant requested information on contracts awarded during the 2010/2011 fiscal year in February 2012. 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."

[34] Applying Assistant Commissioner Beamish's reasoning to this appeal, records from the 2010/2011 fiscal year should be maintained consistently and in a manner conducive to easily performed defined and narrow searches. The multi-step and time-consuming process that eHealth, according to its representations, has to follow to locate the responsive records demonstrates that the records are not so maintained, and the appellant should not bear the financial burden of this failure.

[35] I also find it difficult to accept that an institution whose purpose includes the creation of electronic record management systems, is not capable of locating a narrow and defined number of responsive records of recent origin within a reasonable amount of time. In this regard, I note that less than nine years ago, this office considered a similar fee estimate appeal involving the Ministry of Health and Long-Term Care, and eHealth's predecessor, Smart Systems for Health Agency.

[36] In that appeal, the appellant had requested information similar to that requested in the present appeal; specifically, a list of all consultants hired for the E-Physician Project, a description of what each consultant was hired to do, and the amount each consultant was paid or was being paid. Former Assistant Commissioner Tom Mitchinson adjudicated that appeal and, on June 30, 2004, issued Order PO-2299. In his order, the former Assistant Commissioner considered the original fee estimate of \$8,820, which was reduced to \$1,785, for the search and preparation of 105 contracts held by the ministry and eHealth's predecessor. In drastically reducing the search fee, the former Assistant Commissioner wrote the following:

It is also reasonable to assume that the contracts themselves, which are the only records required in order to identify the description of responsibilities the appellant seeks, would be readily accessible without the time consuming search activities identified by the Ministry.

In the circumstances, I do not uphold the \$687.50 search fees identified by the Ministry. I find that the records containing the listing of consultants and their total fees can be located electronically, at no cost. I also find that manual searches for the various contract documents themselves, copies of which would presumably be readily available from the Ministry accounting departments if not from the two program areas, could not reasonably take longer than one hour to locate. Therefore, I will allow a search fee in the amount of \$30.

[37] I adopt the approach and reasoning of both Assistant Commissioner Beamish and former Assistant Commissioner Mitchinson in this appeal, and I find that 18.66 hours of search time is not reasonable. Taking into account the defined and narrow nature of the request; the fact that the requested records are of recent origin and relate to a single fiscal year; the fact that eHealth is able to search for the records electronically; and the principle that the appellant should not bear the financial burden of eHealth's failure to implement proper records management practices that ensure its records are maintained in a consistent manner that is conducive to easily focused searches, I find that one hour is a reasonable amount of time for eHealth to search for records responsive to the request for information on contracts valued at over \$200,000. I therefore reduce the search time in this appeal to one hour, for a total cost of \$30.

[38] In respect of the preparation costs of \$699.95 calculated under section 57(4)(b), eHealth submits that approximately 23 hours are required to put the responsive information into a newly created record for the appellant. I find that this fee is unreasonable as well.

[39] eHealth is not obligated in this appeal to create a new record, but it has elected to do so in order to provide the requested information to the appellant in a single document. The appellant has not requested a list or a newly compiled record, he has simply requested information. The information the appellant has requested, including a description of the work for each contract, and the value of each contract, exists in the contracts themselves and in the purchase orders eHealth possesses with respect to the relevant contracts. eHealth acknowledges this in its submission regarding preparation costs where it states that it must review the purchase orders in the financial records system and the related responsive contracts in the contract management system in order to "pull the associated information together" into a single responsive record.

[40] Considering the number of records that are responsive to the request, eHealth's approach of preparing a single responsive record is a reasonable option, as it may be more useful to the appellant to receive the information in a single record. In the alternative, the requested information could be gleaned through an examination of each of the 140 purchase orders and related contracts, and the 180 invoices that are referred to in eHealth's representations and in the affidavits of its Senior Director, and Counsel &

FOI Manager. This second option would involve photocopying costs at 20 cents per page or costs for providing the records electronically at \$10 for each CD-ROM, and likely, costs for severing information that is exempt from disclosure from the records at a rate of two minutes per page at \$30 per hour. In my estimation, this second option would be significantly lower than the \$699.95 in preparation costs estimated by eHealth. I note that eHealth did not discuss its approach or any alternative options with the appellant at the request stage, even after the appellant raised concerns about the estimated fee for processing the request. Considering the appellant's concerns about the fee estimate, I am convinced that had he been given both options, he would have selected the less costly of the two. I find, therefore, that while eHealth has the option of creating a new record, the time required to do so should not exceed the time it would take to prepare the records and disclose them electronically or in hardcopy.

[41] Finally, I note that in the affidavit of eHealth's Counsel & FOI Manager, the redaction of third-party information is included in the explanation of the calculated preparation costs. This is perplexing because eHealth does not state anywhere in its representations that it will disclose the responsive contracts to the appellant. Rather, it maintains throughout its representations, that it will create a new record at a significant cost. Charging the appellant a fee for redacting information from the responsive contracts, is not consistent with eHealth's position that it must and will create a new record containing the requested information.

[42] Had eHealth indicated in its representations that it would disclose the responsive contracts, purchase orders and invoices to the appellant, and provided a detailed breakdown of the time it estimated would be required to sever any information that is exempt from disclosure under the *Act* and the associated copying costs, I would not have hesitated to uphold any reasonable, related preparation costs. However, this is not the case.

[43] Accordingly, having found that 23 hours of preparation time is excessive, and that it is not appropriate for eHealth to charge more for creating a new record than what it would charge for providing copies of the existing records, I do not uphold any preparation costs related to the creation of a new record compiling all of the responsive information.

Issue B: Should the fee be waived?

[44] 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,

...

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

...

[45] 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

[46] 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

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

[48] In its representations on this issue, eHealth argues that the appellant has not provided sufficient information to establish the basis for his fee waiver request. eHealth states that while the appellant provided a financial statement setting out his salary range for the previous years, and a statement about the anticipated fee he may receive for a proposed article he will write with the requested information, he has provided no proof of his income, expenses, assets and liabilities to make a case of financial hardship. eHealth also submits that while it has reduced its fee by almost half, the appellant failed to work co-operatively with it to narrow the scope of the request and did not offer a compromise solution which would reduce the costs. Finally, eHealth states that given the significant time required to respond to the request, waiving the fee would shift an unreasonable burden of the cost from the appellant to the institution, and would not be fair and equitable.

[49] In his representations, the appellant states that he provided a financial statement of his income in good faith, even though he found the requirement and the experience humiliating. He adds that in response to his financial statement of income, eHealth did not specify what would meet its needs as "proof" and instead, simply rejected his submission. The appellant also states that eHealth's submission that he did not work cooperatively with it to narrow the scope of the request or offer a compromise solution to reduce costs, is unfair. He states that he did not limit the scope of the

⁶ Order PO-2726.

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

⁸ Order MO-1243.

request because he could not see a way to do so that would meet his information needs. He also notes that he has abandoned three of his requests, which represents a dramatic narrowing both of scope and costs. Finally, the appellant asserts that eHealth has not acted in good faith throughout his request and appeal.

Analysis and Findings

[50] Under section 57(4)(b), the appellant has the onus of establishing financial hardship. To discharge this onus, the appellant provides some information about his income for the past five years, along with the amount of income he projects he will earn from the sale of an article on the requested information. The appellant's income information on its own, without additional information on his financial circumstances, including his expenses, assets and liabilities, is not adequate to establish financial hardship under section 57(4)(b). I also note that the appellant's projected income from writing an article about the requested information, is not a relevant factor in my consideration of whether section 57(4)(b) applies in this appeal.

[51] Accordingly, I find that the appellant has not established financial hardship under section 57(4)(b), and I uphold eHealth's denial of a fee waiver in this appeal.

ORDER:

1. I reduce the search time claimed by eHealth to one hour, for a total fee of \$30.
2. I do not uphold the preparation costs in eHealth's fee estimate.
3. I uphold eHealth's decision to deny the request for a fee waiver.

Original signed by: _____
Stella Ball
Adjudicator

_____ April 25, 2013