Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3486

Appeal PA12-419

University of Ottawa

April 29, 2015

Summary: The appellant submitted a request to the University of Ottawa for records relating to its decision to remove the president of the university's blog from the internet. The appellant also requested a CD containing information posted on the president's blog for a specified time period. The university advised that no records relating to its decision to remove the blog existed. During mediation, the university issued a fee estimate for computer costs to create a CD copy of the blog. The appellant appealed the university's search and fee decisions to this office and also raised questions about the scope of his request and manner of access proposed by the university. The adjudicator orders the university to issue two fee estimates and upholds the university's search and proposed manner of access.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, 24, 30, 57(1) and (4).

OVERVIEW:

[1] The appellant submitted a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the University of Ottawa (the university) for the following items for:

> All records about:

1) The decision to remove the President's "Rock Talk" blog from the University's web site.

2) All content previously posted on the "Rock Talk" blog [for a specified time period].

[2] In response, the university sent a decision letter to the appellant advising him that no responsive records exist with respect to part 1 of his request. The university denied the appellant access to the records responsive to part 2 of his request on the basis that these records were publicly available (section 22(a)).

[3] The appellant appealed the university's decision to this office and a mediator was assigned to the appeal. During the mediation stage of the appeal process, the following occurred:

- the university conducted a further search for records responsive to part 1 of the appellant's request, but claimed that it could not find any records. In response, the appellant indicated that he still believes that responsive records must exist;

- the university offered to provide the appellant with a password and link, which would enable him to access the archives of the "Rock Talk" blog (part 2 of his request), but the appellant advised that he prefers to receive the blog's contents on a CD and raised an issue as to whether the manner of access proposed by the university was in accordance with section 30;

- the university issued a fee estimate decision indicating that it would cost an excess of $860 to provide the appellant with a CD containing the blog's contents. In response, the appellant appealed the reasonableness of the university's fee estimate.

[4] The issues remaining in dispute at the end of mediation were transferred to the adjudication stage of the appeals process, in which an adjudicator conducts an inquiry under the *Act*. During the inquiry process, the parties exchanged representations and the university provided reply representations. In its representations, the university indicates that it is no longer relying on the discretionary exemption in section 22(a). Accordingly, this issue is no longer at issue.

[5] The appeal was subsequently transferred to me to issue a decision.

[6] In this order, I uphold the university's search decision and find that it met its obligations under section 30. However, I order the university to issue an access decision and fee estimate to respond to the appellant's request for the Word documents posted on the blog. I also found that the fee estimate the university issued for its

computer costs was not in accordance with the *Act* and order it to issue a revised fee estimate.

ISSUES:

A. What is the scope of the request? Is the university required to provide the appellant with a CD of the Word documents?

B. Did the university conduct a reasonable search for responsive records?

C. Should the university's fee estimate be upheld?

DISCUSSION:

A. What is the scope of the request? Is the university required to provide the appellant with a CD of the Word documents?

[7] The second part of the appellant's request sought access to "[a]ll content previously posted on the "Rock Talk" blog".

[8] Initially, the university denied the appellant access to the records responsive to the second part of the request on the basis that they were publicly available. However, during mediation the university offered to provide the appellant with a special password and link that would enable him to access the archives of the blog. The mediation report states that the appellant:

> … indicated that he did not wish to receive the special password and requested to receive the "Rock Talk" blog content on a CD. He advised the mediator that if he were to use the special password to download the content himself, "the manual labour involved on his part would be significant…

[9] In response, the university issued a fee estimate advising that the services of an external firm was required to transfer the blog content onto a CD and, as a result, its fee would be at least $860.00. The appellant takes the position that the university's fee estimate is not reasonable. The issue of whether or not the university's fee is reasonable will be addressed later in this order.

[10] However, during mediation the appellant asked for an explanation as to why the services of an external firm is necessary to transfer the blog content onto a CD. The mediator discussed the appellant's concerns with the university who responded in an email, dated June 3, 2013. The university's email is from its Director of Web Communications (Web Director) who advises that an expensive system upgrade would

be required to extract or take screenshots of the blog and copy these images on a CD. However, the Web Director goes on to state that "…[a]nother avenue that can be explored is using the original Word documents for the blog posts which serve as the formal digital record. These can be saved as PDF files and similarly burned to the CD." The university's June 3, 2013 email was shared with the appellant.

[11] The appellant advises that during mediation he was prepared to settle the portion of his appeal seeking access to records previously posted on the blog if the university provided him the original Word documents. The mediator obtained clarification from the university that the Word documents would only include written information which was prepared in Word format and posted on the blog. As a result, information that would have been posted directly on the blog, such as posted comments, questions or answers would not be included in these records.

[12] In his representations, the appellant indicates that he advised the mediator that he was still interested in pursuing access to the original Word documents even though information posted directly on the blog would not be included. Along with his representations, the appellant provided a copy of an email he sent to the mediator confirming his position. In the email, the appellant states "…I acknowledge that this would limit the scope of my request and I accept that".

[13] The university takes the position that providing the appellant with the Word documents would not address the full scope of the appellant's request for information posted on the blog. As a result, the university did not provide the appellant with a CD copy of the Word documents or issue a fee estimate for any costs associated with providing the Word documents to the appellant. In its reply representations, the university states its position, as follows:

> …the University wishes to clarify that [the Web Director's] reference to the original Word documents was simply a suggestion. The University is of the view that a search of the original Word Documents may not result in a complete and/or as accurate record as providing access to the blog itself which is directly responsive to the appellant's request for "All content previously posted on the "Rock Talk" blog.

Analysis and Decision

a) Manner of access

[14] Where an institution determines that it will grant access to responsive records, section 30 prescribes the manner in which this process is to take place. The university takes the position that it has met its obligations under sections 30(1) and (2). Section 30(1) states:

> **Copy of record**
>
> Subject to subsection (2), a person who is given access to a record or a part thereof under this Act shall be given a copy thereof unless it would not be reasonably practicable to reproduce the record or part thereof by reason of its length or nature, in which case the person shall be given an opportunity to examine the record or part thereof in accordance with the regulations.

[15] The university submits that it met its obligation under section 30(1) by making available a CD copy of the blog's contents upon payment of its requested fee. Section 30(2) states:

> **Access to original record**
>
> Where a person requests the opportunity to examine a record or a part thereof and it is reasonably practicable to give the person that opportunity, the head shall allow the person to examine the record or part thereof in accordance with the regulations.

[16] The university also submits that it met its obligation under section 30(2) by offering the appellant an opportunity to "…examine the record in its original format at no cost".

[17] The appellant submits that "…providing access to the 'original Word documents' would be very simple and low-cost, and that the University should be required to provide these records immediately".

[18] Having regard to the submissions of the parties, I am satisfied that the university met its obligations under sections 30(1) and (2) in responding to the appellant's original request for information posted on the blog. The university provided the appellant with two options to access the information he requested in his original request. In my view, the appellant's request for the original Word documents constitutes a different request for similar information. I will go on to determine whether the appellant's request for the original Word documents falls within the scope of his original request.

b) Scope of the appellant's request

[19] Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's

favour.[1] To be considered responsive to the request, records must "reasonably relate" to the request.[2]

[20] Typically when this office reviews whether an institution met it's obligations with respect to section 24, there is a question as to whether the institution unilaterally narrowed the scope of the request or failed to inform the requester of a defect in the request and offer assistance in reformulating the request.

[21] However, the issue in this appeal is that during the course of mediation the appellant reformulated his request in an effort to lower the costs associated with his request for a CD of the materials posted on the blog. It is not clear whether the appellant's narrowed request will result in cost-savings as this option was not fully canvassed by the university. In my view, the appellant's narrowed request for copies of the Word documents posted on the blog reasonably relate to his original request. Accordingly, I find that the Word documents are responsive to his request and order the university to issue an access and fee estimate decision to the appellant treating the date of this order as the date of the request for the Word documents.

B. Did the university conduct a reasonable search for responsive records?

[22] The first part of the appellant's request sought access to records relating to the decision to remove the president's blog from the university's website. The university submits that it conducted a search for responsive records during the request and mediation stage, but no responsive records were located.

[23] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 24.[3] If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[24] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.[4]

[25] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.[5]

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[1] Orders P-134 and P-880.
[2] Orders P-880 and PO-2661.
[3] Orders P-85, P-221 and PO-1954-I.
[4] Orders P-624 and PO-2559.
[5] Orders M-909, PO-2469 and PO-2592.

[26] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.[6]

[27] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.[7]

[28] The appellant takes the position that records relating to the university's decision to remove the blog should exist, particularly having regard to its significance. In his representations, the appellant states that:

> … [the president] must have been involved in any decision to take down the "Rock Talk" blog, because this blog was a significant undertaking of the President and a central part of his outreach strategy to the university community. There must be records involving the President about the decision to remove the "Rock Talk" blog.

[29] The university advises that upon its receipt of the appellant's request, its Access to Information and Privacy Coordinator (Coordinator) sent an email request to the office of the president and three vice-presidents to conduct a search for records responsive to the first part of the appellant's request. The university also advises that its communication departments, including Web Communications, also received an email request for responsive records. In support of its position, the university provided a copy of the Coordinator's email request with its representations. It also provided the following affidavits:

- Affidavit from an Administrative Officer for the Access to Information and Privacy Office (FOI office) stating that three individuals from the university's Communication Directorate and another three individuals from various vice-president's offices completed and returned the search form attached to the Coordinator's email request, but that these individuals did not locate any responsive records. The search forms completed by these individuals indicate that their searches were conducted in paper files, including handwritten notes along with emails and electronic files.

- Affidavit from the president's Chief of Staff stating that he searched his records, but did not locate any responsive records. The president's Chief of Staff also states that one of his duties was the oversight of the president's blog along with the former Director of Corporate Communication (Communications Director). He advises that the decision to remove the blog was one resulting from verbal conversations he had

[6] Order MO-2185.
[7] Order MO-2246.

with the university's Communications Director to simply proceed with alternative avenues for the president to communicate with the University community and the general public.

- Affidavit from the university's Director of Web Communications (Web Director) stating that she conducted a search for responsive records but did not locate any. She also advises that in February 2012, the university's Communications Director made a verbal request to have her team discontinue the president's blog and remove it from the university's public website. The search form completed by this individual indicates that she conducted searches in her email and electronic files.

- Affidavit from the university's Manager of Media Relations stating that she conducted a search for records within the USB containing the former Communications Director electronic work files and emails, but that no responsive records were located.

[30] The appellant's submissions also raised a question as to whether the university conducted a search of the president's record holdings. In this regard, the appellant states that the Chief of Staff's affidavit:

> … may appear to imply that President Rock was not involved in the decision to take down his "Rock Talk" blog; however, the appellant submits that such a conclusion cannot be arrived at without explicit evidence to this effect, none of which is provided. The appellant submits that a reasonable search would include a search of the President's email records, and that the University must provide an affidavit affirming that the President's email records have been searched for respondent records in order to satisfy the requirements of a reasonable and/or complete search for respondent records in this request.

[31] Finally, the appellant submits that the university's failure to identify the original Word documents as records responsive to the request "casts doubt on the reasonableness and/or completeness of its search…".

[32] I have carefully reviewed the representations of the parties and find that the university's search for records relating to the decision to remove the president's blog from the university's website was reasonable. I am satisfied that the university's search was conducted by experienced employees knowledgeable in the subject matter of the request. I am also satisfied that reasonable effort was expended to locate electronic and hard copy responsive records. In making my decision, I accept the university's evidence that its decision to remove the blog was made by the individuals responsible for the oversight of blog – the president's Chief of Staff and Communications Director. Accordingly, I am satisfied that the university's decision to not conduct a search of the

president's record holdings is reasonable, having regard to the significant responsibility and autonomy of the individuals holding the office of the Chief of Staff and Director of Corporate Communications would typically have. In other words, I do not share the appellant's view that a reasonable search for responsive records would require the university to search the electronic and paper records of the president, as the record holdings of the individuals responsible for the oversight of blog were adequately searched. I also do not share the appellant's view that the existence of Word documents available on the university's hard drives demonstrates that the university failed to identify responsive records or adequately search its hard drives for blog posts. In my view, there was no ambiguity in the appellant's original request for the records posted on the blog and the university's initial and subsequent searches for responsive records related to this request was reasonable.

[33] Having regard to the above, I find that the university's search with respect to the first part of the appellant's request is reasonable.

C. Should the university's fee estimate be upheld?

[34] An institution must advise the requester of the applicable fee where the fee is $25 or less. Where the fee exceeds $25, an institution must provide the requester with a fee estimate [Section 57(3)].

[35] 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.[8]

[36] 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.[9] The fee estimate also assists requesters to decide whether to narrow the scope of a request in order to reduce the fees.[10]

[37] In all cases, the institution must include a detailed breakdown of the fee, and a detailed statement as to how the fee was calculated.[11] In its May 17, 2013 access decision and fee estimate, the university advises that the cost for transferring the blog content on a CD would cost approximately $860.00 plus $100/hour for "out of scope issues". The university requested that the appellant pay a deposit in the amount of

[8] Order MO-1699.
[9] Orders P-81, MO-1367, MO-1479, MO-1614 and MO-1699.
[10] Order MO-1520-I.
[11] Orders P-81 and MO-1614.

$430.00 before it took any further steps to process the request. The university also provided the following breakdown of its estimated fee:

Transferring content of blog on a CD:	=$850.00
Out of scope issues: x hours @ $100/hours	= TBD
CD Rom: 1 x $10.00	= 10.00
	$860.00

[38] The appellant questioned the reasonableness of the university's fee and appealed the university's fee estimate to this office. 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.

[39] During mediation, the university advised that its fee takes into account costs it must pay an external service provider to transfer the contents of the blog onto a CD. The university advised that it could not do the transfer itself due to technical issues. The university provided an affidavit from its Web Director with its representations. In her affidavit, the Web Director advises that the university's Freedom of Information and Privacy (FOI) office contacted her team to inquire whether the blog content could be transferred to a CD. She advises that in response she sent an email to the university's FOI office. A copy of that email was provided to the appellant during mediation. The email states:

> As discussed, there are technical challenges for the format that has been requested.
>
> The RockBlog site was coded in WordPress which produces .php files, instead of .html. In order to view .php files, it requires a web server with a .php processor to generate a Web page. This is not possible with a CD format.
>
> In addition, the now inactive site was coded in an earlier version of WordPress. In order to get at the files, the WordPress distribution needs to be updated before the files can be extracted or screencaptured. My team has provided you with cost estimates that reflect this option.
>
> With additional funds to upgrade a system which we no longer support, we can provide screenshot versions of the President's blog posts in PDF which then can be burned to the CD.
>
> Another avenue that can be explored is using the original Word documents for the blog posts which serve as the formal digital record. These can be saved as PDF files and similarly burned to the CD.

> Please let me know which avenue you would like us to pursue.

[40] The appellant's submissions do not specifically address the issue of whether the university's fee is reasonable. Instead, the appellant takes the position that the fee issue would be resolved if the university provided him with a CD copy of the original Word documents.

[41] 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.

[42] More specific provisions regarding fees are found in sections 6, 6.1, 7 and 9 of Regulation 460.

Calculation of university's fee

[43] The university's fee is comprised of three parts. First, the university advises that it will cost an external firm $850.00 to transfer the blog content onto a CD. Second, the university indicates that the requester should budget for another $100.00 per hour for the external firm to resolve "out of scope" issues. Third, the university advises that the appellant is responsible for the $10.00 cost for the CD.

[44] Given that the university's $10.00 charge for the CD is in accordance with Regulation 460, section 6.2, I find that it is reasonable.

[45] Section 57(1)(c) provides that requesters are expected to pay fees in the amounts prescribed by the regulations for computer and other costs incurred in locating retrieving, processing and copying a record. Regulations 460, sections 6.5 and 6.6 specify these amounts. These 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:
>
> 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.

[46] I accept the university's evidence that its system would require an upgrade before the contents of the blog could be extracted or captured on a screen and transferred to the CD requested by the appellant. However, I find that the university's estimated fee for computer costs is not in accordance with the regulations.

[47] The regulations provide institutions with two options to recover their computer costs associated with retrieving digital records. Where the computer work is completed in-house, the institution can charge $60.00 per hour ($15/per 15 minutes) to develop a computer program or other method to produce a record from a machine readable record [Regulation 460, section 6.5].

[48] Where the work is completed by an external firm, the institution can charge for costs in locating, retrieving, processing and copying the record as long as those costs are specified in an invoice [Regulation 460, section 6.6].

[49] The university's revised access decision and fee estimate letter, dated May 17, 2013 advises that transferring the content of the blog on CD would "…require the expertise of an external firm". The university goes on to advise that it asked the external firm to provide an "estimate of the costs to be incurred". However, the email the university's Web Director sent to the FOI office states that "…with additional funds to upgrade … we can provide screenshot versions of the President's blog posts in PDF which then can be burned to the CD". Her email also indicates that her team provided the FOI office with "cost estimates".

[50] The university did not provide a copy of the cost estimates referred to in its fee estimate to this office. Accordingly, it is not clear whether the estimate the university relies upon in support of its position was provided by an external firm or is the estimate provided by the Web Director's team. I have carefully reviewed the university's fee estimate along with its representations and find that its computer costs were not specified in an invoice as required by Regulation 460, section 6.6.. Accordingly, I find that the computer costs identified in the university's fee estimate are not reasonable.

[51] 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. Though I am disallowing the university's fee related to its estimated computer costs, I am of the view that the appellant should carry a portion of any reasonable computer costs, particularly when the appellant has declined the opportunity to view the blog via a link and password without any fee.

[52] 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.[12]

[53] I also note that the university's May 17, 2013 fee estimate did not advise the appellant that the *Act* permits the waiver of payment of all or part of the fee, in certain circumstances.

[54] Having regard to the user-pay principle and the fact that the appellant's request for a CD copy of the blog contents may require a system upgrade performed by the Web Director's staff or an external firm, I have decided to order the university to issue revised fee estimate for its computer costs.

[55] If the university decides that the work is to be performed by an external firm, then a detailed invoice must accompany its fee estimate. If the work is to be performed by individuals employed by the university then the amount charged should reflect the prescribed rate set out in Regulation 460, section 6.5. Finally, the university's revised fee estimate should also advise the appellant that he may be entitled to a fee waiver and identify the type of evidence required to make a fee waiver determination. Upon his receipt of the university's revised fee estimate, the appellant will have an opportunity to ask for a fee waiver and provide detailed information to support the request. The university, in turn, is obligated to consider the fee waiver request and provide the appellant with a decision in writing. This office may review the university's decision to deny a request for a fee waiver, in whole or in part, and may uphold or modify the institution's decision.

ORDER:

1. I find the university's search for records responsive to part one of the appellant's original request reasonable;

[12] Order PO-2726.

2. I order the university to issue an access and fee estimate decision for the appellant's request for the Word documents posted on the blog, treating the date of this order as the date of the appellant's narrowed request;

3. I order the university to issue a revised fee estimate to the appellant by **May 29, 2015**, for its computer costs prescribed under Regulation 460, sections 6.5 and 6.6 to respond to part two of the appellant's original request;

4. The university's fee estimates must advise the appellant that he may be entitled to a fee waiver and identify the type of evidence required to make a fee waiver determination. In addition, the university's fee estimates must notify the appellant of his right to appeal its fee and fee waiver decisions to this office; and

5. In order to verify compliance with order provisions 2 and 3, I reserve the right to require a copy of the university's access decision and fee estimates to be provided to me.

Original signed by: April 29, 2015
Jennifer James
Adjudicator