Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3593

Appeal PA15-420

Ministry of Aboriginal Affairs

March 31, 2016

Summary: The sole issue in this appeal is the appropriateness of the fee estimate provided by the ministry for access to records pertaining to a specific matter. In this order the ministry's fee estimate is upheld and the appeal is dismissed.

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

Orders Considered: PO-3205, PO-3206, PO-3215 and PO-3035.

OVERVIEW:

[1] The Ministry of Aboriginal affairs (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act* or *FIPPA*) for access to the following information:

> … [a]ll records regarding two aboriginal children refusing chemotherapy at McMaster Children's Hospital and the resulting Ontario court family division case between Hamilton Health Sciences and Brant Child and Family Services including but not limited to records regarding the Nov. 14, 2014 decision and April 24, 2015 clarification.
>
> If the information is available in electronic format, [the requester asked] that it be released in that format to reduce any potential costs.

[2] The requester also asked that the ministry consider a fee waiver for the request, on the basis that any information released "is intended to be used to serve the public's interest".

[3] In its preliminary decision letter, the ministry advised that it conducted a preliminary search for responsive records and set out a fee estimate of $2,080.00 for processing the request.

[4] The letter further provided as follows:

> As discussed, media scans and/or newspaper articles were not included in our search.

[5] With respect to the fee waiver, the letter advised the requester that:

> … the *Act* provides that the fees can be waived if in the head's opinion it is fair and equitable to do so considering whether the payment will cause the requester financial hardship and whether the dissemination of the records will benefit public health or safety. At this time the ministry is not in a position to determine if it would be fair and equitable to waive the fees on these grounds. It is not clear that the release of the records would benefit public health and safety. If you are interested in proceeding with a request under s. 57(4)(b) to waive the fees for financial hardship reasons, we would require sufficient evidence regarding your financial situation, including information about income, expenses, assets and liabilities, to support any waiver claims.

[6] In addition, the ministry advised that it may rely on section 21 (invasion of privacy) of the *Act* to deny access to many of the responsive records and that the exemptions at sections 13 (advice or recommendations) and 19 (solicitor-client privilege) "may also be relevant". The ministry also advised that:

> … some records may be unable to be disclosed due to the prohibitions in the *Child and Family Services Act.*

[7] The requester (now the appellant) appealed the ministry's fee estimate.

[8] Mediation did not resolve the appeal and it was moved to the adjudication stage of the appeals process 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.*

[10] The sole issue in this appeal is whether the fee estimate should be upheld.

DISCUSSION:

[11] 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.[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]

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

[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.[5] 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:

> 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;
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> (b) the costs of preparing the record for disclosure;
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> (c) computer and other costs incurred in locating, retrieving, processing and copying a record;
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> (d) shipping costs; and
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> (e) any other costs incurred in responding to a request for access to a record.

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[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.

[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:
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> …
>
> 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.

The ministry's representations

[16] The ministry submits that the fee estimate it provided in its preliminary decision letter was based on actual time spent in searching for responsive records, and in consultation with ministry staff from the program areas with knowledge of the records and expertise in processing access to information requests.

[17] The ministry submits:

> … The ministry program areas were asked to provide information that included the number of hours (in ¼ hour increments) that were undertaken as part of this search, and also the number of pages of responsive records located. Ministry staff from each program area that were familiar with the nature of the record keeping processes and protocols in their offices, and had experience in responding to access to information requests were consulted as part of the search. Identical instructions and wording of the request was sent to each program area representative. Records that were outside of the scope of the request or that were not responsive were excluded.

[18] The ministry submitted that its search "included both paper and electronic files, stored in the offices shared drives, personal drives, physical offices, email, electronic files, etc." It submits that the records it located included the following types, in both paper and electronic formats:

- Correspondence (including emails)
- Briefing and information notes
- Presentations

- Reports
- Memoranda
- Meeting agendas/invitations
- Court documents

[19] The ministry submits that:

> The majority of the records are in electronic format. Ministry employees and staff are encouraged when searching electronic records to use a key-word search at this initial stage of locating the records to narrow the number of potentially responsive records that they are required to review and minimize review time. There may be variation between how emails and electronic files are organized and stored by individual ministry staff, based on their specific program area filing guidelines, personal preference, and duties. A representative from each program area was identified to search shared drives and common filing locations of that office to avoid duplication of search effort.

[20] The ministry set out a breakdown of the search time spent in a chart it provided with its representations, which is reproduced below.

Ministry Program Area	**Number of Hours to Search**	**Approximate number of pages/estimate of responsive records**
Legal Services Branch	5 hours	1350 pages
Strategic Policy and Planning Division	½ hour	55 pages
Negotiations and Reconciliation Division	2 ½ hours	250 pages
Aboriginal Relations and Ministry Partnerships Division	3 hours	50 pages
Deputy Minister's Office	3 hours	300 pages
Minister's Office	7 hours	350 pages
Communications Branch	3 hours	600 pages

TOTAL	24 hours	2700 pages (approximately)

[21] The ministry explained that the number of hours (in ¼ hour increments) reflects time spent by each program area searching and locating responsive records and does not include time for reviewing or applying exemptions. It further submits that it spent a total of 24 hours manually searching the records for responsiveness and set out a search fee in the sum of $720.00, which reflected the actual time spent searching, in its preliminary decision letter.

[22] With respect to preparing the records for disclosure the ministry submits:

> The total number of responsive records located by the ministry is approximately 2700 pages. In the Interim Decision Letter, the ministry estimated approximately 45 hours of time for Record Preparation (…). The nature of the request, the responses received from ministry employees, and a consideration of the records located was factored into the estimate of 45 hours of time required to prepare the records for disclosure.
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> In its Interim Decision Letter, the ministry noted that the request involves records relating to the health care and treatment of two individuals and that access to the records may be denied under Section 21, that protects personal information and prevents disclosure of records that would constitute an unjustified invasion of personal privacy (...). Severances would therefore be required in order to protect the privacy of the individuals involved.
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> The ministry also noted that other sections of the *Act,* in particular sections 13 and 19 may be relevant to the decision to grant access to the records, and that some records may be unable to be disclosed due to prohibitions in the *Child and Family Services Act.* Based on a review of a sample of the records, the Ministry's Privacy and Information Analyst identified that records from the following program areas would require severance or redaction prior to being disclosed: Legal Services Branch, Aboriginal Relations and Ministry Partnerships Division, Negotiations and Reconciliation Division, Communications Branch.

[23] The ministry submits that in considering a sample of the records and in consultation with the relevant branches and ministry employees, the ministry is of the opinion that it would be reasonable to conclude that at least half of the records would require severance as part of preparing the records for disclosure. Given this, the Ministry estimated that 50 per cent or approximately 1350 pages of the records would likely require severances.

[24] The ministry submits that should the time required to prepare the records be less

than the estimated 45 hours, it would reduce the fee to reflect the actual time required for preparing the records for disclosure.

[25] With respect to other costs, the ministry submits that:

> In the initial request made of the ministry, the appellant asked that "[i]f the information is available in electronic format, that it be released in that format to reduce any potential costs." The ministry therefore did not include printing costs in the interim fee estimate. In accordance with Regulation 460(6)(2), the ministry did include in the fee estimate the cost of $10.00 for one CD. This cost is reflected in the ministry's Interim Decision Letter on page one.

The appellant's representations

[26] The appellant's representations focus on the case which gave rise to the request, which she submits is of great public importance. They also focus on how the fee is excessive and how the fee taken alone or in conjunction with two other requests is so high as to amount to a barrier to access.

[27] She submits:

> This case dealt with difficult questions relating to the rights of parents - particularly aboriginal parents - that could have a broad impact on society. It was a Canadian first from the outset as a hospital had never before taken a children's aid society to court for refusing to intervene and force medical treatment on a child.

[28] She submits that the request is for recent records covering a short time period and that all the searches "should be entirely electronic".

[29] She also submits that:

> The records are regarding a very specific case so should be easily searchable. It does not request specific records because there is no way for me to know what records exist. I was given little information during mediation that would help me determine what records would be of most interest to the public. This case is of great public importance making accountability and transparency paramount.

[30] She submits that during mediation she agreed to exclude newspaper articles and media scans from her request and that she would further limit her request to responsive emails and attachments. She states:

> I was informed by the mediator that this would not be helpful as it would not significantly reduce the records. I was unwilling to narrow my request

> further than emails and their attachments and so I requested to end mediation as it was clear there was no chance of a resolution.
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> I feel the fact that narrowing my request to emails and attachments would make no significant difference in the number of records proves the documents should be easily searchable electronically.

[31] The appellant also refers to Order PO-3035 which she submits stands for the principle that an "appellant should not bear the financial burden of an institution's failure to implement proper record management practices."

[32] With respect to the fee estimate at issue in this appeal, the appellant submits that the ministry "estimated a search time of 24 hours or more than half a work week."

[33] With respect to the preparation fee the appellant states that the ministry "says it requires 45 hours of preparation time or more than one work week."

[34] The appellant then submits that the amount of the fee estimate in this appeal on its own, or in conjunction with the fee estimates given in other appeals dealing with similar requests, but made to different institutions, amounts to a barrier to access.

[35] She submits that, in addition to the fee estimate at issue in this appeal, she was given a fee estimate of $3,055.00 for processing the request at issue in appeal PA15-418 and $4,200.00 for processing the request at issue in appeal PA15-419, totalling $9,335.00.

[36] She submits:

> Each fee on its own would be a barrier to the public having access to this information but together, it is particularly insurmountable making accountability and transparency next to impossible in this case.
>
> I also believe the fees are excessive for documents that should be easily searchable electronically.

[37] With respect to search time for processing the requests, she states:

> I was told it would take 140 hours of search time by the Attorney General in PA15-419. That is equivalent to three-and-a-half full-time work weeks. I have no understanding of why records on a very specific case would take that long to search electronically.
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> The Ministry of Child and Youth Services in PA15-418 estimates a search time of 34 hours which is close to one work week - again a very long time for an electronic search of a specific case.

> The Ministry of Aboriginal Affairs in PA15-420 estimated a search time of 24 hours or more than half a work week.
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> Collectively, they claim they need almost 200 hours to electronically search a very specific case. That is almost five full work weeks.

[38] With respect to the number of pages of responsive records, the appellant submits:

> The Ministry of the Attorney General in PA15-419 estimates it has 52,800 pages of documents on this case. That is a phenomenal amount of pages. Considering the average novel is 250 pages, that would be more than 211 books worth of documents.
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> Put together with the 7,145 pages of documents the Ministry of Child and Youth Services outlines in PA15-418 and the 2,700 pages at the Ministry of Aboriginal Affairs in appeal PA15-420 and it comes out to a total of 62,645 pages of documents or more than 250 novels worth of documents.
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> I believe the preparation time costs are unreasonable because the sheer number of documents is beyond belief. The Ministry of Child and Youth Services claims it needs 67.5 hours of prep time - 1 1/2 work weeks in PA15-418. The Ministry of Aboriginal Affairs says it requires 45 hours of preparation time or more than one work week. The Attorney General has not yet even calculated costs for prep time suggesting there is a chance the fee will be even higher than the current estimate in the end.

[39] The appellant relies on Orders PO-3205, PO-3206 and PO-3215 arguing that, "in these three cases - also involving records of great public interest - combined fees of $7,748 were brought down to a reasonable combined amount of $1,228 which allowed the public access to the records." She further submits:

> In these cases the request covered four-and-a-half years compared to 16 months in this case. The records also went back to 2007 in these cases while they only go back to 2014 in this case.
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> If four-and-a-half years of records going back to 2007 are expected to be easily searched. "without taking an entire work week to do so" than surely 16 months' worth of records going back to 2014 should not take longer.

The ministry's reply representations

[40] In response to the appellant's submissions that the records relate to a case of great public importance and interest, the ministry submits that this consideration is not relevant to the discrete issue on the appeal, which is limited to whether the ministry's fee estimate is reasonable and therefore should be upheld.

[41] With respect to the appellant's submissions that the ministry's search time estimate is unreasonable, and that the volume of responsive records identified by the ministry is "beyond belief", the ministry submits that the time required to complete the search, as well as the volume of responsive records, are due to the breadth and generality of the appellant's request.

[42] The ministry also takes issue with the appellant's submissions on its record keeping practices and distinguishes the orders cited by the appellant. It submits:

> In her representations, the appellant questioned the Ministry's record-keeping practices and referred to IPC Order PO-3035, which 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 also referred to Orders PO-3215, PO-3205 and PO-3206, which cite and apply this principle.
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> The ministry submits that the facts in this appeal can be distinguished from the IPC Orders referred to by the appellant. Orders PO-3035, PO-3215, PO-3205 and PO-3206 relate to requests for expense claim records, which the IPC held is a general category of information that should be readily and routinely available. [Footnote omitted] In contrast, in Orders PO-3375 and PO-3384, the IPC distinguished the expense claim Orders based on the limited scope of such requests to particular areas for search. In those orders, the IPC upheld the institution's fee estimate as the breadth and scope of the request would engage records from multiple branches and divisions of the institution. Similarly, the request in this appeal is not a focused request for expense records which could reasonably be expected to be located in one area for search. The records that are responsive to the request in this appeal span seven program areas, consist of both paper and electronic files, and include a number of different types of records. …

Analysis and finding

[43] Although the appellant initially requested a fee waiver she did not pursue it. Accordingly, I am not addressing a fee waiver in this appeal.

[44] To begin, I do not accept the appellant's position that I ought to consider as a factor the "collective" fee estimates to be paid for the three requests she has made to three separate ministries. The fee provisions in the *Act* are clearly set out and based on a "user-pay" principle. Each institution is required to review its own record holdings for responsive records and charge fees and provide fee estimates as set out in the *Act*. The fact that the appellant has made separate requests to separate ministries, which results

in a large combined fee estimate, does not impact my review of the appropriateness of the particular fee estimate in this appeal.[6]

[45] With respect to the search time under section 57(1)(a), I agree with the ministry that the appellant's request is very broad and that the range of the search is at the root of the large search fee. In her representations, the appellant refers to Order PO-3035, in which Commissioner Brian Beamish stated that records of recent origin should be kept in a consistent and easily searchable manner and that the requester in that case should not bear the financial burden of the university's failure to implement proper record management practices. Orders PO-3205, PO-3206 and PO-3215 are based on this premise. While I agree with Commissioner Beamish's findings, I find that they are not applicable to the facts of this appeal. In Order PO-3035, the requester sought access to copies of all expense receipts submitted to a university for all domestic and international flights taken by a named individual for a five year period. In this appeal, the appellant seeks all records under the ministry's custody or control relating to the case that gave rise to the appeal.

[46] During mediation, the appellant offered to limit the scope of the search to exclude newspaper articles and media scans and only be for responsive emails and attachments. However, despite this narrowing of scope, I find that the appellant's request is still extremely broad.

[47] Based on my review of its representations, I find that the ministry provided me with sufficient evidence to substantiate the actual time required to locate responsive records. In arriving at its search fee estimate under section 57(1)(a), I find that the ministry properly sought the advice of individuals who were familiar with the type and contents of the requested records. For these reasons, I uphold the fee for search time under section 57(1)(a) of $720.00, which is the actual fee for its search and location of responsive records.

[48] With respect to the record preparation component of the fee which is governed by section 57(1)(b) of the *Act*, the ministry allocated 45 hours at a cost of $30 per hour, with a total of $1,350.00 in its fee estimate, as the time required for preparing the records for disclosure. The ministry indicates that, based on a representative sample, this time is required to sever exempt information, such as information exempt under sections 13, 19 and 21 of the *Act*. Generally, this office has accepted that it takes two minutes to sever a page that requires multiple severances.[7] Using this formula, I find that the ministry's estimate of $1,350.00 would cover the preparation of 1350 pages of responsive records. In light of the appellant's broad request, I find that it is not unreasonable for the ministry to estimate that it will be required to prepare approximately 1350 pages of records for disclosure. Accordingly, I also uphold this part

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[6] I note that fee waiver is not an issue in this appeal.
[7] Orders MO-1169, PO-1721, PO-1834 and PO-1990.

of the fee estimate. However, I note that if the actual preparation of records takes less time, the ministry should reduce the fee, as appropriate.

[49] In addition, the $10.00 cost of a CD under section 6(2) of Regulation 460 is also reasonable.

[50] Finally, where a request is broad and involves records that are likely to be dispersed through an institution, high search and preparation fees may apply.[8] In that regard, it is the breadth of the appellant's request that result in the estimated fee. It is therefore the scope of the request and not the method of calculating the estimated fee that results in the amount to be charged for processing the request.

[51] Accordingly, in all the circumstances I uphold the ministry's fee estimate and dismiss the appeal.

ORDER:

I uphold the ministry's fee estimate and dismiss the appeal.

Original Signed by: March 31, 2016
Steven Faughnan
Adjudicator

[8] See Orders PO-3375 and PO-3379.