

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4215

Appeal PA19-00272

Ministry of the Solicitor General

November 29, 2021

Summary: This order deals with an appeal of an access request for training materials for the Drager DrugTest 5000, and education/training and conference materials for drug and driving education. The ministry issued an interim access decision and a fee estimate of \$3069. The appellant appealed the ministry's fee estimate. In this order, the adjudicator upholds the fee estimate, in part. She finds that a portion of the ministry's search fee estimate is not reasonable and orders the ministry to reduce it by 50%. The ministry's fee estimate is reduced by \$1155 from \$3069 to \$1914.

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

Orders and Investigation Reports Considered: Orders P-184, PO-3384 and PO-3855.

OVERVIEW:

[1] The appellant submitted an access request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ministry of the Solicitor General (the ministry) for training materials for the Drager DrugTest 5000, and education/training and conference materials for drug and driving education.

[2] In response, the ministry issued to the appellant an interim access decision and fee estimate of approximately \$2979¹ with the following breakdown:

Search	
Total search time hours to locate document	78.5
Search time charge per hour per the <i>Act</i>	\$30
Total charge for search [corrected charge]	\$2265² [\$2355]
Photocopying	
Estimated number of pages to be released	1020
Photocopying charges per page per the <i>Act</i>	\$0.20
Total charge for photocopying	\$204
Severance	
Total hours required to sever 1020 pages	17
Severance time charge per hour per the <i>Act</i>	\$30
Total charge for severing	\$510
Shipping	
Total charge for shipping document to applicant	\$0
Total fee estimate [corrected total fee estimate]	\$2979³ [\$3069]

[3] The ministry's decision letter further stated that its preliminary review of the requested information is that the majority of it is likely excluded from the Act under section 65(6), and/or exempt from disclosure under the discretionary exemptions in sections 14(1)(c), 14(1)(1) and 17(1) of the Act.

¹ This amount should be \$3069 based on the ministry's fee estimate breakdown and its representations.

² The ministry's search fee estimate was \$2265 but the calculation for 78.5 hours at \$30 per hour is \$2355.

³ Due to the calculation error in the ministry's estimated search fee, the revised total fee estimate is \$3069.

[4] The appellant appealed the ministry's decision to the Information and Privacy Commissioner of Ontario (IPC).

[5] The appeal was assigned to a mediator to explore a possible resolution of the issues. Mediation did not resolve the appeal and it was transferred to the adjudication stage of the appeal process, where an adjudicator may conduct an inquiry under the *Act*.

[6] The adjudicator originally assigned to this appeal decided to conduct an inquiry. He sought representations from the ministry, which were then shared in their entirety with the appellant in accordance with the IPC's *Code of Procedure and Practice Direction 7*. While he also sought representations from the appellant, none were received.

[7] The appeal was then transferred to me to continue with the adjudication of the matter.⁴ In this order, I reduce the ministry's fee estimate by \$1155 from \$3069 to \$1914.

DISCUSSION:

[8] The sole issue is whether the ministry's fee estimate of \$3069 should be upheld.

[9] 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 pursuant to section 57(3) of the *Act*. 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.⁵

[10] 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.⁶ The fee estimate also assists requesters to decide whether to narrow the scope of a request

⁴ I have reviewed all the file material and representations and have determined that I do not require further information before making my decision.

⁵ Order MO-1699.

⁶ Orders P-81, MO-1367, MO-1479, MO-1614 and MO-1699.

in order to reduce the fees.⁷

[11] In all cases, the institution must include a detailed breakdown of the fee, and a detailed statement as to how the fee was calculated.⁸ In reviewing the ministry's fee estimate, my responsibility is to ensure that the estimated amounts are reasonable in the circumstances of this appeal and that they have been calculated in accordance with the fee provisions in the *Act* and Regulation 460, as set out below. The burden of establishing the reasonableness of the estimates rests with the ministry.⁹ To meet this burden, the ministry is required to provide an adequate explanation of how the fee estimates were calculated, as well as sufficiently detailed evidence to support the estimates. I may uphold the fee estimate or vary it.

[12] 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.

[13] More specific provisions detailing the fees for access to general records are found in sections 6, 7 and 9 of Regulation 460. The relevant 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:

1. For photocopies and computer printouts, 20 cents per page.

⁷ Order MO-1520-I.

⁸ Orders P-81 and MO-1614.

⁹ Order 86.

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.

Representations

[14] The ministry submits that the fee estimate is reasonable and should be upheld. It explains that the Ontario Police College (OPC) holds records responsive to the first part of the request (training materials for Drager DrugTest 5000) and part of the second part of the request (drug and driving education/training materials), while the Centre of Forensic Sciences (CFS) holds the conference materials responsive to the second part of the request (drug and driving conference materials).¹⁰

[15] It also explains that the education/training materials include lesson plans, student handouts and instructor notes, while the conference materials consist of 102 presentations contained in slide decks, most of which were made by external presenters (i.e., not ministry employees).

[16] In developing its fee estimate, the ministry submits that it consulted with knowledgeable program area personnel at the OPC and CFS, including the Acting Chief Instructor at the OPC and the Quality Assurance Manager at the CFS, who are familiar with the responsive records and the *Act*. It also submits that because it consulted with highly trained personnel, there was no need to base its fee estimate on a representative sampling of the records.

[17] The ministry submits that it will take 78.5 hours to search for all of the responsive records, including 3.5 hours to search for the conference materials. The ministry submits that while the conference materials are stored electronically in one database with the CFS, it will still take some time to search for and print 102 conference presentation materials. Due to the large volume of records to be retrieved and printed, the ministry submits that 3.5 hours is a realistic estimate for conducting this part of the search.

[18] With respect to the remainder of the records related to non-conference training materials (education/training materials), the ministry submits it will take 75 hours to search for them because:

¹⁰ Both the OPC and the CFS fall under the authority of the ministry.

- there are between 2000 to 3000 pages of responsive records;
- the records are stored in different places at the OPC and not all of the records are stored electronically, meaning that paper copies will also have to be searched;
- the ministry would have to verify whether the drug and driving education materials were edited each time there was a new intake of students at the OPC, which occurs three times per year; and
- current instructors will have to search their own records, while the records of former instructors will have to be searched by others, which will require additional coordination.

[19] The ministry submits that the fee estimate includes photocopying 1020 pages from the conference materials based on an estimate of 10 pages for each of the 102 conference presentations. It submits that while each presentation will likely be longer than ten pages, it has adopted a conservative number for the purpose of this estimate.

[20] The ministry submits that it will take one minute to apply any severances to each record of conference materials, which is half the time that is generally allotted.

[21] The ministry's position is that it has applied significant "fee concessions" to its fee estimate, which is much lower than what it could have been, because thousands of pages of records have been requested, the timeframe of the request is for at least five years and the records are stored in multiple locations, in electronic and non-electronic formats.

[22] The ministry submits that it has applied the following fee concessions:

- it charged photocopying and severance fees for conference materials only and not for any other responsive records;
- it charged a lower fee than is generally authorized to sever records (one minute per page rather than two minutes), even for multiple severances; and
- it did not include any shipping costs, even though it could have.¹¹

[23] Despite being able to do so, the ministry submits that it did not include any photocopying and severance fees for responsive non-conference training materials

¹¹ The ministry refers to Order PO-2310, where shipping costs were upheld as part of a fee estimate.

(which form a significant majority of the responsive records) because it believes many may be subject to exemptions or an exclusion and it does not want to charge the appellant for records to which access may ultimately be denied. It also submits that the extent to which conference materials may also be exempted is unknown, as this would partially depend on whether the external presenters object to the release of their conference materials.

[24] The ministry submits that the adjudicator in Order PO-3855 considered fee concessions in deciding on the reasonableness of the fees the institution was going to charge.¹² It submits that I should do the same.

[25] As noted above, the appellant did not submit any representations.

Analysis and findings

[26] As explained below, I reduce the ministry's fee estimate from \$3069 to \$1914 because I find that its estimated search fee for education/training materials is not reasonable and I reduce it by 50%.

[27] I note that the ministry has based its fee estimate on the advice of individuals familiar with the responsive records. I also note that the records sought are for general information and not for the appellant's personal information. As such, under section 6 of Regulation 460, the ministry can charge fees for manually searching for and preparing the responsive records. I further note that the ministry has chosen not to charge fees for some responsive records that may be subject to exemptions/exclusion under the *Act*, in order to avoid including in its fee estimate photocopy fees for responsive records that are unlikely to be disclosed to the appellant.

[28] I also begin by acknowledging that in Order PO-3855, Adjudicator Loukidelis considered the fee concessions made by the institution in its fee estimate in her analysis of whether the fee estimate in that appeal was reasonable. In making my findings below, I have similarly considered the ministry's fee concessions outlined above as part of my decision on whether the ministry's fee estimate is reasonable. It is not the fact that fee concessions were made that is relevant to my analysis, but rather the fact that the fee concessions have resulted in a fee estimate for photocopying and preparing the records for disclosure that is lower than it could have been under the *Act* and Regulation 460.

[29] I begin my analysis by looking at the ministry's fee estimate for photocopying and preparing the records for disclosure. The fees that can be charged by the ministry

¹² See paragraphs 34, 36, 37 and 39.

for these items fall under section 57(1)(b) of the *Act* and paragraphs 1 and 4 of section 6 of Regulation 460, respectively. Using an estimate of ten pages for each of the 102 presentations, the ministry has estimated the total number of pages as 1020, even though each presentation may have more than ten pages in length. I find that photocopying fees of \$204 for an estimated 1020 pages at \$0.20 per page is a reasonable fee estimate, pursuant to section 57(1)(b) of the *Act* and paragraph 1 of section 6 of Regulation 460.

[30] The rate for severing records is \$30 per hour pursuant to paragraph 4 of section 6 of Regulation 460. The ministry has allocated 17 hours to sever the estimated 1020 pages of records for disclosure. Generally, the IPC has accepted that it takes two minutes to sever a page that requires multiple severances.¹³ The ministry has chosen to use one minute as its basis for severing each page, including those that may require multiple severances. I accept that 17 hours for severing the records (1020 pages based on one minute per page) for a total of \$510 is a reasonable fee estimate for severing the records, pursuant to section 57(1)(b) of the *Act* and paragraph 4 of section 6 of Regulation 460.

[31] I find that the ministry has provided me with sufficient evidence to substantiate the estimated time to photocopy and prepare the responsive records for disclosure and I uphold the estimated fee of \$714 to do so (\$204 for photocopying and \$510 for severing), pursuant to section 57(1)(b) of the *Act*.

[32] I also note that the ministry has chosen not to charge any shipping costs or other costs involved in responding to this request under sections 57(1)(d) and (e) of the *Act*.

[33] I now turn my analysis to the portion of the ministry's fee estimate related to its search for responsive records. Under section 57(1)(a) of the *Act* and paragraph 3 of section 6 of Regulation 460, the ministry may charge a fee of \$7.50 for each 15 minutes for search records, which is effectively an hourly rate of \$30. The ministry submits that it will take 78.5 hours (\$2355) to search for all of the responsive records, comprised of 3.5 hours to search for the conference materials (\$105) and 75 hours to search for education/training materials (\$2250).

[34] With respect to its search for conference materials, the ministry submits that the conference materials are stored electronically in one database and it needs 3.5 hours to search for, retrieve and print the 102 conference presentation materials, which it estimates contain 1020 pages. I find that the ministry has provided me with sufficient

¹³ Orders MO-1169, PO-1721, PO-1834 and PO-1990.

evidence to substantiate the estimated time to locate and retrieve these conference materials, however, the ministry is not permitted to include the time for printing these materials as part of its search fee estimate.¹⁴ I note that the ministry has already included in its fee estimate the cost of photocopying the 1020 pages of conference materials (\$204). Accordingly, I order the ministry to reduce its search time from 3.5 hours to 2.5 hours and to reduce its search fee estimate from \$105 to \$75 for conference materials under section 57(1)(a) of the *Act*.

[35] With respect to its search for education/training materials, the ministry says it sought and relied on the advice of the OPC's Acting Chief Instructor in calculating its fee estimate and submits it will take 75 hours to search for responsive records. It explains the approximate number of records it expects to locate (2000-3000 records), how the records are stored (multiple locations at the OPC; electronic and paper records), the likelihood that the records will have multiple versions and the need to coordinate searches to be performed by current instructors and others at the OPC for former instructors.

[36] As noted above, the ministry has the burden of establishing the reasonableness of its fee estimate, including providing an adequate explanation and sufficient evidence of how the fee estimate was calculated.

[37] Order PO-3384 dealt with a request for records related to a university partnership centre. The institution provided a fee estimate of \$1890, including 58 hours of search time. It explained the name of the branch and division conducting the search, the number of staff in each division conducting the search and the amount of time required by each division to conduct the search. It also explained that 31 staff within two divisions would need to undertake a search for responsive records. In that order, the adjudicator upheld the fee estimate, finding that the institution provided her with sufficient evidence to demonstrate the amount of time that staff from the different branches and divisions would be required to search in order to locate the responsive records.

[38] In contrast, the ministry's representations in the current appeal do not provide me with sufficient evidence to demonstrate how and why 75 hours of search time are required to search for the requested education/training materials, or how it arrived at its estimate of 2000 to 3000 records. It has not explained how many documents/files/folders will have to be searched to locate records, the number of

¹⁴ See Order P-184, where the adjudicator found that \$.20 per page is the maximum amount that may be charged for photocopying, which includes the cost of an individual "feeding the machine"; and Order MO-1083, where the adjudicator applied Order P-184 and found that the institution was not able to include the time to actually photocopy the records within the calculation of preparation time.

current instructors who will be conducting searches, the number of former instructors whose documents/files/folders will need to be searched by others at the OPC, or how long it will take each instructor to conduct their search. While I appreciate that the ministry will need time to coordinate and conduct its search for education/training materials at the OPC, I find that the estimated search time of 75 hours is excessive, in the absence of further explanation and evidence.

[39] In the circumstances of this appeal, I find that a 50% reduction of the 75 hours claimed, namely, 37.5 hours, is reasonable for the ministry to conduct its search for education/training materials. At a search rate of \$30 per hour, I will allow an estimated search fee of \$1125 for education/training materials, which together with the \$75 search fee estimate for conference materials, results in a total estimated search fee of \$1200.

[40] In conclusion, I have decided to reduce the ministry's estimated search fee by one hour for conference materials and to reduce its estimated search fee by 50% for education/training materials. It is my view that the ministry has provided me with sufficient evidence to substantiate its fee estimates for photocopying and severing responsive records, and that its fee estimates for these activities comply with the provisions of the *Act* and Regulation 460. In making these conclusions, I am mindful of the fee concessions made by the ministry in respect of those items as outlined above.

ORDER:

I uphold the ministry's fee estimate, in part. I order the ministry to reduce its fee estimate by \$1155 from \$3069 to \$1914.

Original signed by: _____
Valerie Silva
Adjudicator

November 29, 2021