

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4354

Appeal PA20-00250

Ontario Human Rights Commission

February 13, 2023

Summary: Under the *Freedom of Information and Protection of Privacy Act* (the *Act*), the appellant requested from the Ontario Human Rights Commission (OHRC) all records relating to its then-Chief Commissioner's business and travel expenses over a five-month period. Based on an estimated 6,500 pages of responsive records, the OHRC issued a fee estimate of \$2,200 to process the request. This order concerns the appellant's appeal of the OHRC's fee estimate and its denial of his fee waiver request on financial hardship and public health or safety grounds. In this order, the adjudicator allows the appeal in part. She reduces the OHRC's fee estimate to \$460, in part based on the parties' agreement to a fee reduction for disclosure of electronic (rather than paper) records. She upholds the OHRC's denial of a fee waiver.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31, sections 57(1) and 57(4); Regulation 460 under the *Freedom of Information and Protection of Privacy Act* (RRO 1990, Reg 460), sections 6 and 8.

OVERVIEW:

[1] This order addresses the appellant's appeal under the *Freedom of Information and Protection of Privacy Act* (the *Act*) of a fee estimate and a fee waiver denial by the Ontario Human Rights Commission (OHRC) in response to the appellant's request for a broad range of records covering a five-month period in 2017. In this order, I allow the appeal in part. I order a reduction of the OHRC's fee estimate, and I uphold the OHRC's denial of the appellant's fee waiver request.

[2] The appeal arises from the appellant's request under the *Act* to the OHRC for access to all records regarding the business and travel expenses of the then-Chief Commissioner over a five-month period in 2017. The appellant specified that his request covers record formats including but not limited to:

- a. Briefing notes, meeting notes, meeting minutes, reports, inquiries, and Commission correspondence including to/from all outside institutions;
- b. Emails, SMS, PIN to PIN and other mobile messages, and voice mails and other correspondence;
- c. Notes, costs, receipts, schedules, itinerary, keynotes, speeches, list of appointments,
- d. All other records already released under [the *Act*] by the [OHRC] on this Subject.

[3] In response to the request, the OHRC issued a fee estimate and interim access decision on an estimated 6,500 pages of responsive records. The OHRC advised that it anticipated granting access to the majority of these records, with some potential severances based on the mandatory personal privacy exemption at section 21(1) of the *Act*.

[4] In this decision, the OHRC also provided a fee estimate of \$2,200 for access to the records, based on its estimated costs for search, preparation, and photocopying of the records. As the fee estimate exceeded \$100, the OHRC asked the appellant to pay a deposit of 50 per cent of the estimated fee, or \$1,100, in order to proceed with the request. The OHRC advised the appellant that he could request a fee waiver under the *Act* (for example, on financial hardship grounds). It explained that a fee waiver request would need to be accompanied by evidence to support the request.

[5] The appellant was dissatisfied with the OHRC's decision and appealed it to the Information and Privacy Commissioner of Ontario (IPC).

[6] Throughout the appeal, the appellant has asserted that after receiving the OHRC's fee estimate and interim access decision, he immediately sent the OHRC a fee waiver request by fax, but received no response despite numerous follow-up faxes, letters, and calls to the OHRC. The IPC mediator raised this matter with the OHRC, which said it had no record of receiving the appellant's fax, and could not locate the fax after conducting a search. However, the OHRC agreed to consider the appellant's fee waiver request at the mediation stage if the appellant (or the IPC, on the appellant's consent) would resend the request. The OHRC also advised that it could significantly reduce the fee estimate if the appellant would agree to receive the records in electronic format.

[7] By the end of the mediation stage, the appellant had not agreed to resubmit his fee waiver request, or to have the IPC do so on his behalf. He had not agreed to

receive the records in electronic format. He also raised issues of conflict of interest and bias on the part of the IPC and the OHRC.

[8] As the appeal was not resolved at mediation, it proceeded to the adjudication stage. I conducted an inquiry, during which I shared the parties' representations with one another in accordance with the IPC's *Code of Procedure* and *Practice Direction 7*.

[9] During the inquiry, the appellant continued to take issue with the OHRC's failure to respond to his original fee waiver request sent by fax. He sent me a number of documents to show that he had sent this fax, and to support his broader complaints that while he has followed up frequently and diligently with the OHRC on his fee waiver request and on other matters, the OHRC has not been responsive to him. He also took issue with certain events at the mediation stage. Among other things, he denied having been invited to resubmit his fee waiver request, and he asserted that the IPC had displayed bias in favour of the OHRC.

[10] During my inquiry, the appellant consented to share with the OHRC his original fee waiver request as part of his representations, and the OHRC made a decision on the fee waiver request. Thus I will not be further addressing in this order the appellant's complaints about the OHRC's failure to initially address his fee waiver request, which issue is now moot. I will also not be addressing in this order the appellant's more general complaints about the OHRC's conduct in its dealings with him, or its handling of a human rights matter in which he was involved, neither of which are matters for determination under the *Act*.

[11] Furthermore, while I gave the appellant an opportunity during the inquiry to elaborate on his allegations of conflict of interest and/or bias on the part of the IPC and the OHRC, his representations on this topic do not establish a reasonable basis for these claims. I do not agree, for example, with the assertion that the IPC has prioritized the claims of the OHRC over those of the appellant by documenting in the mediator's report the OHRC's position on the issues. The appellant's generalized claims about the prevalence of institutional bias favouring government bodies over members of the public do not establish bias, or a reasonable apprehension of bias, on the part of the IPC.

[12] The appellant's allegations directed at the OHRC are largely focused on his dissatisfaction with its handling of a human rights matter that is not within the scope of this appeal under the *Act*. To the extent the appellant links his bias allegations to matters under the *Act*, they amount to a claim that if there is no conflict of interest and institutional bias on the part of the OHRC, there should be no problem granting him the records he seeks. These arguments do not establish a reasonable basis for his allegations of conflict of interest and bias, and I will not be further addressing them in this order.

[13] This order addresses the appellant's appeal of the OHRC's fee estimate and its

denial of his fee waiver request. In the result, given some discrepancies in the OHRC's explanation of the components of its fee estimate, and the appellant's agreement during the inquiry to receive responsive records in electronic format, I reduce the OHRC's fee estimate from \$2,200 to \$460. I also uphold the OHRC's denial of the appellant's fee waiver request.

RECORDS:

[14] The appellant seeks all records regarding the business and travel expenses of the then-Chief Commissioner over a five-month period in 2017. The OHRC has estimated a total of 6,500 pages of records responsive to his request.

ISSUES:

- A. Should the IPC uphold the OHRC's fee estimate of \$2,200?
- B. Should the OHRC waive its fee?

DISCUSSION:

A. Should the IPC uphold the OHRC's fee estimate of \$2,200?

[15] The issue to be decided under this heading is the appropriateness of the OHRC's fee estimate under the *Act*. For the reasons set out below, I reduce the OHRC's fee estimate from \$2,200 to \$460.

[16] Institutions are required to charge fees for requests for information under the *Act*. The IPC can review an institution's fee and can decide whether it complies with the *Act* and regulations.

[17] Section 57 governs fees charged by institutions to process requests. Section 57(1) sets out the items for which an institution is required to charge a fee. In this appeal, the relevant portions of section 57(1) state:

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[.]

[18] More specific fee provisions applicable to general access requests are found in section 6 of Regulation 460. The relevant portions of section 6 of the regulation state:

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.

[19] Under section 57(3), an institution must provide a fee estimate where the fee is more than \$25. The purpose of the fee estimate is to give the requester enough information to make an informed decision on whether or not to pay the fee and pursue access.¹ The fee estimate also helps requesters decide whether to narrow the scope of a request to reduce the fee.²

[20] The institution can require the requester to pay the fee before giving access to the record.³ If the estimate is \$100 or more, the institution may require the person to pay a deposit of 50 per cent of the estimate before it takes steps to process the request.⁴

[21] Where the fee is \$100 or more, the fee estimate can 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

[22] In all cases, the institution must include:

- a detailed breakdown of the fee; and
- a detailed statement as to how the fee was calculated.⁶

[23] In this case, the OHRC issued a fee estimate of \$2,200, based on an estimated

¹ Orders P-81, MO-1367, MO-1479, MO-1614 and MO-1699.

² Order MO-1520-I.

³ Regulation 460, section 9.

⁴ Regulation 460, section 7(1).

⁵ Order MO-1699.

⁶ Orders P-81 and MO-1614.

6,500 pages of responsive records. Its interim decision to the appellant sets out the following components of its fee estimate:

- Search: 15 hours @\$30 per hour =\$450
- Preparation: 15 hours @\$30 per hour =\$450
- Photocopying: 6,500 pages @\$0.20 per page =\$1,300.

[24] The OHRC noted that the above calculations are based on an estimate and so subject to revision after completion of its search and its examination of the responsive records.

[25] During the inquiry, the OHRC offered to reduce the fee estimate by \$1,300 if the appellant agreed to receive the records electronically. The appellant eventually agreed to receive the records in electronic format. As a result, I reduce the OHRC's original fee estimate by \$1,300, by removing the photocopying costs.

[26] The appellant asked that the OHRC provide the records to him on portable media, in an electronic format that will enable him to print and to conduct Optimal Character Recognition (OCR) searches. The OHRC agreed to provide the appellant with the records on a USB or disc, but says it cannot guarantee that the Adobe application it uses will have all the functionality he seeks. I will allow the OHRC to charge a \$10 fee for the USB or disc, in accordance with paragraph 2 of section 6 of Regulation 460.⁷ I will not order the OHRC to ensure the electronic files allow for printing and OCR searches, as the appellant asks me to do. I agree with the OHRC that there is no such requirement in the *Act*. The appellant also asks that I comment in this order on issues around the OHRC's original photocopying fee, but as the issue is now moot, I decline to do so.

[27] Next I consider the OHRC's estimate of \$450 for preparation of the records. In its interim access and fee estimate decision, the OHRC stated that it anticipated severing some of the records to remove the personal information of other individuals qualifying for exemption under section 21(1) of the *Act*. The IPC has found that the preparation fee under section 57(1)(b) of the *Act* can include a charge for the time spent severing (redacting) a record, and has generally accepted that it takes two minutes to sever a page that requires multiple severances.⁸ Thus, on its face, the OHRC's estimate of 15 hours to prepare 6,500 pages for disclosure appears to be reasonable. However, in its representations during the inquiry stage, the OHRC states that its fee estimate does not include time for redacting records, and it provides no explanation about what other activities are involved in preparing the records for disclosure. As I have been provided with no evidence to support this component of the fee estimate, I will disallow it.

⁷ This paragraph permits a \$10 charge for each CD-ROM provided to a requester. As USB or disc is an analogous portable medium to CD-ROM, I will allow the OHRC to charge the same fee.

⁸ Orders MO-1169, PO-1721, PO-1834 and PO-1990.

[28] Lastly, I consider the OHRC's estimate of \$450 for search time. The OHRC notes that the appellant's request is broad and covers a period of five months, and is expected to yield an estimated 6,500 pages of responsive records in paper and electronic formats. Among the expected record types are expense reports, receipts, speeches, agendas, emails, mobile messages, voicemails, itineraries, and registration forms. When the OHRC refers under this heading to an estimated 30 staff hours, I understand the OHRC to be indicating that it has claimed a smaller number of hours (15 hours) of search time than is actually required to complete the search. The appellant's representations under this heading are focused on his complaints about the OHRC's handling of his original fee waiver request, and do not address the fee estimate directly.

[29] In the circumstances, I accept that 15 hours is a reasonable estimate for the search time required to identify and locate records responsive to the appellant's broad request. The OHRC's estimated fee of \$450 accords with the allowable charge under the *Act* for the search time it has claimed. I thus allow the OHRC's \$450 estimated fee for search.

[30] In summary, I uphold the OHRC's estimated fee of \$450 for search time, and allow \$10 for providing the records on a USB or disc. The total allowable fee estimate is \$460, a reduction from its original fee estimate of \$2,200.

B. Should the OHRC waive its fee estimate?

[31] Under this heading, I will consider the appellant's request that the OHRC waive the fee estimate on financial hardship and public health and safety grounds. For the reasons that follow, I uphold OHRC's denial of the appellant's fee waiver request.

[32] The *Act* requires an institution to waive fees, in whole or in part, if it is fair and equitable to do so. Section 57(4) of the *Act* and section 8 of Regulation 460 set out matters the institution must consider in deciding whether to waive a fee. Those provisions state:

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,

(a) the extent to which the actual cost of processing, collecting and copying the record varies from the amount of the payment required by subsection (1);

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

(c) whether dissemination of the record will benefit public health or safety; and

(d) any other matter prescribed in the regulations.

8. The following are prescribed as matters for a head to consider in deciding whether to waive all or part of a payment required to be made under the Act:

1. Whether the person requesting access to the record is given access to it.
2. If the amount of a payment would be \$5 or less, whether the amount of the payment is too small to justify requiring payment.

[33] A fee must be waived, in whole or in part, if it would be “fair and equitable” to do so in the circumstances.⁹ Factors that must be considered in deciding whether it would be fair and equitable to waive the fee are those set out in paragraphs (a) to (d) of section 57(4), and section 8 of Regulation 460, reproduced above. The institution must also consider other relevant factors, which I will address further below.

[34] The appellant seeks a fee waiver on the grounds that payment of the fee would cause him financial hardship, and that there is a public interest in disclosure of the records to him.

[35] With respect to the appellant’s request for a fee waiver on financial hardship grounds (section 57(4)(b) of the *Act*), the appellant initially declined to share with the OHRC certain financial information that he provided to the IPC in seeking a fee waiver. The appellant maintained that sections 21 and/or 17 of the *Act*¹⁰ prevent him from disclosing financial and other personal details to the OHRC for the purposes of a fee waiver request, and he asked if it were legal for the OHRC and/or the IPC to require him to supply such information. He also complained that neither the OHRC nor the IPC had defined the precise documentation needed to demonstrate that payment of the fee estimate would cause financial hardship.

[36] In a letter to the appellant to address this submission and others, I explained that the sections of the *Act* cited by the appellant are mandatory exemptions from the right of access that apply to prohibit the disclosure by an institution of particular information in certain circumstances. These sections do not apply to an individual’s provision of information to an institution to support a fee waiver request. I also noted that the decision to grant or not to grant a fee waiver is made by the institution to which the fee waiver request is made, not by the IPC. It is only in the context of an

⁹ See *Mann v. Ontario (Ministry of Environment)*, 2017 ONSC 1056.

¹⁰ Section 21(1) of the *Act* states: “A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except ...”

Section 17(1) of the *Act* states: “A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to [...]”

appeal of an institution's decision on a fee waiver request that the IPC may review the institution's decision, and can uphold or modify the institution's decision.¹¹

[37] The appellant later agreed to my sharing with the OHRC the financial information he had provided to the IPC, which consisted of a statement of his income and his expenses for one month in 2022. However, at a later stage of the inquiry, after the OHRC refused his financial hardship claim based on the information provided, the appellant again cited section 21 of the *Act* as a basis for refusing to provide financial information. The appellant also complained again that the OHRC had not specified the evidence or records it needs to decide on his financial situation.

[38] With respect to the request for a fee waiver on public health or safety grounds (section 57(4)(c) of the *Act*), the appellant reports that he was terminated from his position at a public institution in reprisal for having filed a human rights complaint. He describes the current focus of his research as systemic discrimination by government institutions contrary to the Ontario *Human Rights Code*, and the health effects on employees and students of violations of the *Code*. The appellant reports that his research strongly suggests a correlation between *Code* violations at the public institution that formerly employed him and a decline in complaints under the *Code* after the then-Chief Commissioner visited that institution. He says that his access request is significant to the public health and safety question of whether the OHRC and former Chief Commissioner performed their fiduciary duties in dealing with systemic discrimination at his former employer. Finally, he describes himself as an accomplished researcher with internationally reviewed and praised publications, which I understand to be an argument in support of granting the fee waiver because the appellant will widely disseminate his research based on the information he receives through his access request.

[39] While the above is a summary only of the appellant's lengthy representations on this issue, I have considered his submissions in their entirety in making my decisions in this appeal.

[40] The fee provisions in the *Act* establish a "user-pay" principle. The fees referred to in section 57(1) and outlined in Regulation 460 are mandatory unless the requester can show that they should be waived.¹² I conclude that the appellant has not established a basis for a fee waiver here.

[41] I find reasonable the OHRC's denial of the appellant's fee waiver request on financial hardship grounds based on the insufficiency of the evidence he provided. For section 57(4)(b) to apply, the requester must provide evidence regarding the requester's financial situation, including information about income, expenses, assets and liabilities.¹³ To address a claim the appellant made repeatedly during the inquiry

¹¹ Section 57(5). See also Orders M-914, MO-1243, P-474, P-1393 and PO-1953-F.

¹² Order PO-2726.

¹³ Orders M-914, P-591, P-700, P-1142, P-1365 and P-1393.

process, I see no obligation in the *Act* for the OHRC to specify the precise documentation needed to succeed on a financial hardship claim.

[42] In this case, the OHRC advised the appellant that his evidence of one month's income and a statement of his expenses for that same month, without further supporting documentation, was insufficient to establish financial hardship, and it described other information that could assist in his claim, such as evidence about his assets, his financial situation in other months and years, and his overall ability to make the required payment. The appellant was also directed during the inquiry to the IPC's guidance on this topic titled *Fees, Fee Estimates and Waivers*,¹⁴ which among other things cites a number of past orders of the IPC that have considered this issue. However, the appellant chose not to provide additional evidence to demonstrate financial hardship, and I find reasonable the OHRC's decision to deny his financial hardship claim on this basis.

[43] I also find reasonable the OHRC's denial of the appellant's fee waiver request based on public interest arguments. The focus of the factor at section 57(4)(c) is "public health or safety." It is not enough to show that there is a "public interest" in the records – the public interest must relate to gaining information about a public health and safety issue.¹⁵ As noted by the OHRC, the IPC has found this factor applicable in circumstances where records at issue related to public health or safety matters like compliance with air and water discharge standards;¹⁶ a proposed landfill site;¹⁷ a proposed industrial quarry that could affect the groundwater supply;¹⁸ nuclear safety;¹⁹ and health effects from the use of wind turbines.²⁰

[44] I am not satisfied that the appellant has established there is a public interest in the records at issue in this appeal that relates to a "public health or safety" issue within the meaning of section 57(4)(c). Even accepting the claim that the information in the records will be widely disseminated through the appellant's research, I do not agree that the records would yield a public benefit by disclosing or otherwise meaningfully addressing a public health or safety concern. While the appellant submits that the information he seeks about OHRC business and travel expenses will establish something essential to his research on broader issues of systemic discrimination, the appellant's interest in the records is in my view largely a private interest. I am unpersuaded of the connection he proposes between the subject matter of the records and matters of broader public interest affecting public health or safety.

[45] In addition to the enumerated factors at section 57(4), an institution that

¹⁴ June 2018. Available online here: [Fees, Fee Estimates and Fee Waivers - IPC](#).

¹⁵ Orders MO-1336, MO-2071, PO-2592 and PO-2726.

¹⁶ Order PO-1909.

¹⁷ Order M-408.

¹⁸ Order MO-2163.

¹⁹ Orders P-270 and P-1190.

²⁰ Order PO-3074.

receives a fee waiver request must consider any other relevant factors when deciding whether a fee waiver would be "fair and equitable" in the circumstances. Relevant factors may include:

- the manner in which the institution responded to the request,
- whether the institution worked constructively with the requester to narrow and/or clarify the request,
- whether the requester worked constructively with the institution to narrow the scope of the request,
- whether the request involves a large number of records,
- whether the requester has offered a compromise that would reduce costs,
- whether the institution provided any records to the requester free of charge, and
- whether the waiver of the fee would shift an unreasonable burden of the cost from the requester to the institution.²¹

[46] Having considered these factors, I conclude that a fee waiver would not be fair and equitable in the circumstances. As a result of my findings, above, the fee estimate will be reduced to \$460. I acknowledge the OHRC's submission that the fee will not cover the full costs of search time needed to locate and identify the large number of records expected to be responsive to the request; this is a relevant factor for consideration under section 57(4)(a).²² I also recognize that the OHRC has attempted to work constructively with the appellant to narrow the scope of the request, with a view to further reducing the fee. While the appellant characterized the OHRC's invitation to narrow the scope of his request as a threat and as potential evidence of conflict of interest,²³ I see no reasonable basis for the appellant's interpretation of the OHRC's actions. I am satisfied that the OHRC has attempted to work cooperatively with the appellant during the inquiry process, and that waiving any part of the fee in these circumstances would shift an unreasonable burden of the cost of the appellant's request onto the OHRC, and thus onto the public.

²¹ Orders M-166, M-408 and PO-1953-F.

²² Section 57(4)(a) states: "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 [...] the extent to which the actual cost of processing, collecting and copying the record varies from the amount of the payment required by subsection (1)."

²³ Among other things, the appellant states: "The Appellant asks [the IPC] if this is not a threat vis-à-vis the issue of fee waiver? Is this not a real or potential conflict of interest in "gatekeeping" records? It appears that the logic of the OHRC is stating that if you agree not ask for the records that we do not want to provide to you (and the OHRC wishes to keep secret from the public) we will waive the fees, but if you do want the records that we want to keep secret from the public, we will deny the fee waiver."

[47] For all these reasons, I uphold the OHRC's denial of a fee waiver.

ORDER:

I allow the appeal in part.

1. I order the OHRC to reduce its fee estimate to \$460.
2. I uphold the OHRC's denial of a fee waiver.

Original Signed by: _____
Jenny Ryu
Adjudicator

February 13, 2023 _____