Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-2592

Appeals PA06-220, PA06-224 and PA06-226

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NATURE OF THE APPEAL:

The Ontario Secretariat for Aboriginal Affairs (OSAA) received three separate requests under the *Freedom of Information and Protection of Privacy Act* (the *Act)* for access to information related to the native standoff in Caledonia. Because the parties and issues are similar in the three requests, I decided to join them together for the purposes of addressing the issues during the adjudication stage. I have set out below, each request, decision and results of mediation.

PA06-220

This request specifically stated:

> I would like any and all correspondence, including emails between the Ontario Secretariat for Aboriginal Affairs and/or the Minister Responsible and Haldimand County between January 1, 2006 and the present with regards to the native standoff in Caledonia.

The requester clarified this request as follows:

> I would like any and all correspondence, including emails between the Ontario Secretariat for Aboriginal Affairs and/or the Minister Responsible and the Minister's staff and anybody who works for Haldimand County between January 1, 2006 and the present with regards to the native standoff in Caledonia.

In response, OSAA advised that on a preliminary review, it estimates that there are approximately 960 pages of responsive records, which include correspondence and emails. The estimated fee for the records that may be released was calculated as follows:

Search Time - 27 hours x $30.00 per hour	=	$810.00
Record preparation - 16 hours x $30.00	=	$480.00
Photocopies - 960 pages x $0.20	=	$192.00
Fee estimate Total		**= $1,482.00**

In addition, OSAA provided an interim access decision in which it indicated that a portion of the records may be withheld in accordance with section 13(1) (advice to government), section 15 (relations with other governments), and section 19 (solicitor- client privilege) of the *Act*.

The requester, now the appellant, appealed the fee estimate decision. In doing so, the appellant confirmed she is not seeking a fee waiver.

During the mediation process a conference-call was held with the appellant, OSAA and the mediator in an attempt to review the issues and possibly revise the fee estimate. It should be noted that all three appeals were discussed during this call.

As a result of the conference call discussions, the appellant advised that she would consider narrowing her request in Appeal PA06-220. She asked for a revised fee estimate on the basis

that records from the Legal Branch, records from the Negotiations Department and letters to the Ministry from members of the public be excluded.

In response, OSAA provided a revised fee estimate. It explained that if the appellant excluded records maintained by the Legal Branch, the Negotiations Department and letters from members of the public, the search time would involve 19 staff members searching for a total of 8 hours. The revised fee estimate would be as follows:

Search time - 8 hours x $30.00	= $240.00
Record preparation - 5 hours x $30.00	= $150.00
Photocopies *360 pages x $0.20 cents	= $ 72.00
Total	**$ 462.00**

In the alternative, OSAA advised that if the appellant also excluded emails from the records search the fee estimate would be further reduced as follows:

Search time - 8 hours x $30.00	= $240.00
Record preparation 45 min @ $7.50 per 15 min.	= $ 22.50
Photocopies 90 pages x $0.20 cents	= $ 18.00
Total	**$ 280.50**

*360 pages include a 260 page report attached to an email

The appellant reviewed OSAA's revised fee estimate, which was based on her modified request, and advised that she wished to continue with this appeal. She indicated that she wished to pursue the appeal as an appeal of the revised fee estimate of $462.00. To clarify, she wished to exclude a search for records in the Legal Branch, the Negotiations Department and letters from the public, but continues to seek access to email records.

PA06-224

This request specifically stated:

> I would like any and all correspondence, including emails between the Ontario Secretariat for Aboriginal Affairs and/or the minister Responsible and Six Nations band council between January 1, 2006 and the present with regards to the native standoff in Caledonia and/or the Douglas Creek Estates.

The appellant clarified this request to include:

> Any and all correspondence, including emails between the Ontario Secretariat for Aboriginal Affairs and/or the minister Responsible and the minister's staff and

> Six Nations band council between January 1, 2006 and the present with regards to the native standoff in Caledonia and/or the Douglas Creek Estates.

In response, OSAA advised that on a preliminary review it estimated that there are approximately 1150 pages of responsive records, which include correspondence and emails. The estimated fee for the records that may be released was calculated as follows:

Search Time - 25 hours x $30.00 per hour	= $750.00
Record preparation - 19 hours x $30.00	= $570.00
Photocopies - 1150 pages x $0.20	= $230.00
Fee Estimate Total	**$1,550.00**

In addition, OSAA provided an interim access decision in which it indicated that a portion of the records may be withheld in accordance with section 13(1) (advice to government), section 15 (relations with other governments), and section 19 (solicitor- client privilege) of the *Act*.

The appellant appealed the fee estimate decision and confirmed she is not seeking a fee waiver.

This appeal similarly underwent considerable mediation. As a result of the conference call discussions referred to above, the appellant advised that she would consider narrowing her request. She asked for a revised fee estimate on the basis that records from the Legal Branch and records from the Negotiations Department be excluded.

In response, OSAA provided a revised fee estimate. It explained that if the appellant excluded the Legal Branch and the Negotiations Department the search time would involve 19 staff members searching for 13 hours. The revised fee estimate would be as follows:

Search time - 13 hours x $30.00	= $390.00
Record preparation - 17 hours x $30.00	= $510.00
Photocopies 1047 pages X $0.20 cents	= $209.40
Total	**$ 1,109.40**

In the alternative, OSAA advised that if the appellant also excluded emails from the request the fee estimate would be reduced further as follows:

Search time - 13 hours x $30.00	= $390.00
Record preparation 1.5 hours x $30.00	= $ 45.00
Photocopies 105 pages x $0.20 cents	= $ 21.00
Total	**$ 456.00**

The appellant reviewed OSAA's revised fee estimate, which was based on her modified request and advised that she wishes to continue with this appeal. She indicated that she wished to pursue the appeal of the revised fee estimate of $1,109.40. To clarify, she wished to exclude a search for records in the Legal Branch and the Negotiations Department, but continues to seek access to email records.

PA06-226

The request specifically stated:

> I would like any and all records held by the Ontario Secretariat for Aboriginal Affairs and/or the minister responsible related to Haldimand County between January 1, 2006 and the present with regards to the native standoff in Caledonia. This request should include, but not be limited to emails, letters, memos, briefing notes, backgrounders, reports or media lines.

The appellant clarified this request as follows:

> I would like any and all records held by the Ontario Secretariat for Aboriginal Affairs and/or the minister responsible and the Minister's staff related to Haldimand County between January 1, 2006 and the present with regards to the native standoff in Caledonia. This request should include, but not be limited to emails, letters, memos, briefing notes, backgrounders, reports or media lines.

In response, OSAA advised that on a preliminary review it estimates that there are approximately 6050 pages of responsive records, which include correspondence and emails. The estimated fee for the records that may be released was calculated as follows:

Search Time - 109 hours x $30.00 per hour	= $3,270.00
Record preparation - 101 hours x $30.00	= $3,030.00
Photocopies 6050 pages x $0.20	= $1,210.00
Total	**$7,510.00**

The OSAA again provided an interim access decision in which it stated that a portion of the records may be withheld in accordance with section 12(1) (cabinet records), section 13(1) (advice to government), section 15 (relations with other governments), and section 19 (solicitor-client privilege) of the *Act*.

The appellant appealed the fee estimate decision and again confirmed she is not seeking a fee waiver.

As a result of the above-referenced conference call discussions, the appellant advised that she would consider narrowing her request. She asked for a revised fee estimate excluding records

from the Legal Branch, records from the Negotiations Department, records from the Communication Department and emails. In addition, the appellant agreed to consider limiting her request for house book notes, Q&As, briefing notes and media lines for the specific dates of February 28, April 20, 21, 24, 25, May 18, June 9, and June 22, 2006.

The OSAA provided a revised fee estimate based on the narrowed request. The revised fee estimate would involve 19 staff searching for 30 hours and the revised fee estimate would be as follows:

Search time – 30 hours x $30.00	= $900.00
Record preparation 18 hours x $30.00	= $540.00
Photocopies 1090 pages x $0.20 cents	= $218.00
Total	**$ 1,658.00**

After reviewing OSAA's new fee estimate, the appellant advised that she wished to pursue the appeal of the revised fee estimate of $1,658.00.

Summary of fees

As a result of mediation, the following fees are at issue in these appeals:

PA06-220 - $ 462.00
PA06-224 - $1,109.40
PA06-226 - $1,658.00

I decided to seek representations from the OSAA, initially. As noted above, the appellant indicated that she is not formally requesting a fee waiver because she does not believe that she meets the criteria under the *Act*, presumably referring to sections 57(4)(b) (financial hardship) and (c) (public health and safety). Nevertheless, she has also indicated that she believes the OSAA should reduce (or waive) a portion of the fees it is charging, which she believes are excessive. Part of her rationale for believing this, it appears, stems from the responses she has received from other institutions for similar requests, wherein she has received records quickly at almost no cost. I did not raise fee waiver as an issue in these appeals, but noted that the appellant's position raises questions about whether there are any other circumstances under which a fee can be waived by the institution and, if so, what factors should be considered in making this determination. The OSAA was invited to make any preliminary observations on this issue if it wished, but was advised that it would be provided with an opportunity to fully address the issue in the event that the appellant wishes to pursue it.

In addition, the appellant queried whether some of the costs across the requests might be shared, where, for example, the same files or locations have to be searched in order to respond to each request. This question was put to the OSAA.

The OSAA submitted representations in response and consented to sharing them with the appellant in their entirety. I attached these submissions to the copy of the Notice that I sent to the appellant. In the event that the appellant continues to believe that the OSAA has the ability to reduce the fees it intends to charge as she suggests, the appellant was asked to provide submissions on the questions raised regarding the issue of fee waiver identified above, or the basis, pursuant to the *Act*, under which the OSAA may reduce the fees.

The appellant submitted representations in response, including submissions on the issue of fee waiver, and I decided that they raised issues to which the OSAA should be given an opportunity to reply. The appellant consented to sharing her representations with the OSAA, in their entirety and they were provided to it.

The OSAA provided reply submissions.

DISCUSSION:

FEE ESTIMATE

General principles

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. Where the fee is over $25 and under $100, the fee estimate must be based on the actual work done by the institution to respond to the request. 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. [MO-1699]

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 [Orders P-81, MO-1367, MO-1479, MO-1614, MO-1699].

In all cases, the institution must include a detailed breakdown of the fee, and a detailed statement as to how the fee was calculated [Order P-81, MO-1614].

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.

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.

More specific provisions regarding fees are found in sections 6, 6.1, 7 and 9 of Regulation 460. Only sections 6, 7 and 9 are relevant to this discussion. They 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.
>
> 2. For floppy disks, $10 for each disk.
>
> 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.
>
> 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.

> 7.(1) If a head gives a person an estimate of an amount payable under the Act and the estimate is $100 or more, the head may require the person to pay a deposit equal to 50 per cent of the estimate before the head takes any further steps to respond to the request.
>
> (2) A head shall refund any amount paid under Subsection (1) that is subsequently waived.
>
> 9. If a person is required to pay a fee for access to a record, the head may require the person to do so before giving the person access to the record.

Preliminary matter

Due to the similarities between the appellant's three requests, I asked the OSAA whether responsive records would likely be located in the same locations/files. If so, I asked the OSAA whether the search fee identified for each request reflected the conduct of one search for each request or whether it assumed that three separate searches would be conducted. I also asked whether it was possible to combine the three requests into one search in such a way as to reduce the costs associated with search time. Finally, I asked whether it is possible or likely that responding to each of the three requests would produce duplicates of records. If that was the case, I asked the OSAA whether duplicates had been identified and/or removed from each of the estimates.

The OSAA responds that initially, the appellant submitted nine requests for information and that due to the similar subject matter of all nine requests, with a few exceptions, all responsive records would be found in the same locations, paper files and electronic files. The OSAA confirms that only one search was conducted in order to locate responsive records for all nine requests, which include the three remaining at issue. The OSAA notes that at the appellant's request, it gave separate fee estimates for each of the original nine requests so that she could select which ones to pursue. In order to do so, the OSAA indicates that the search time was prorated for each request based on the volume of records that would respond to each one.

With respect to preparation of the records for disclosure, the OSAA acknowledges that the processing of the three requests would lead to some duplicates, although they have not yet been identified. It confirms, however, that it plans to eliminate duplicates during its decision-making process.

The appellant's submissions on this issue are somewhat confusing. On the one hand, she takes issue with the fact that the OSAA initially combined all of her requests and originally provided one fee estimate. On the other she seems to be concerned that the fee estimates as they have been broken down contain duplicate work.

The OSAA points out that this office has recognized that combining requests, where the subject matter is the same and records are located in the same places, is an appropriate approach to take

(Order PO-943). I agree. The very concerns raised by the appellant regarding possible duplication of effort in searching for and preparing records for disclosure are avoided by a single comprehensive search. Although such an approach could, admittedly, result in a much larger fee, in this case, the OSAA has, quite reasonably, taken the appellant's concerns regarding excessive fees into consideration and by prorating the fee across the various requests, has provided the appellant with a more manageable amount and the ability to select those requests she wishes to pursue.

I find the OSAA's approach to be reasonable and am satisfied that the estimated fees do not include duplication of effort in searching for responsive records. Moreover, although the estimated fee may include duplication of effort in preparing the records for disclosure, the OSAA has indicated that it will amend its estimate once the number of duplicates is known and this will be reflected in the final fee.

Search time

In explaining the steps it took to search for responsive records, the OSAA outlined the background to the incidents that gave rise to the requests. According to the OSAA, the incidents began on February 28, 2006, when a group of people identifying themselves as Aboriginal people held a demonstration at a housing development called Douglas Creek Estates in Caledonia. Between that time and the date of the appellant's requests (May 2006) a number of meetings, negotiations and activities occurred. The OSAA indicates that the parties continue to work together to resolve the situation. The OSAA notes that when the requests were submitted, the protest was an urgent on-going file and that virtually all of the responsive records were only available from the workspaces of individual staff members.

The OSAA indicates further that each staff member who conducted a search for records was working on the Caledonia protest issue at least 50% of his or her time and in many cases, 100% of the time. Further, these staff members were creating the records that were requested by the appellant, and were thus qualified to undertake the electronic search through their own e-mails, their electronic files and through the paper files in their own office space.

The OSAA states that the records, at the time of the request, were primarily stored on each staff member's e-mail system in anywhere from two to 50 sub-files. All staff members have inbox and sent e-mail boxes and most have also created sub-folders according to their own needs.

As well, the OSAA indicates that electronic records were located on the employee's computer workspaces and in some cases on a shared drive. The OSAA notes that where records were on a shared drive, only one person per program area was requested to search for records responsive to the request.

In addition to these two primary locations, the information sought by the appellant was located in files on desks, in brief cases, credenzas and file cabinets.

For the three requests at issue in these appeals, searches were conducted initially in the following program areas:

- Minister's Office
- Deputy Minister's Office
- Assistant Deputy Minister's Office
- Policy and Relationships Branch
- Negotiations Branch
- Communications Branch
- Legal Services Branch
- Six Nations Team.

The OSAA notes that during mediation, several of these program areas were removed from the scope of the request. The OSAA set out in its representations, which were shared with the appellant, the names of the staff involved in searching for responsive records for each program area, the estimated amount of time to search in each area and the estimated number of photocopies to be produced by each area.

In doing so, the OSAA indicates that it has completed approximately 80% of its searches and 10% of its review of the records. Accordingly, it submits that the evidence presented at this time is based on a large representative sample from experienced program area staff and the Freedom of Information Office.

The OSAA then describes, in detail, the steps taken by staff in conducting their searches. For example, the OSAA notes that many staff members in the Policy and Relationships Branch were involved in the response to the Caledonia protest and each member conducted searches. According to the OSAA, nine people were involved in conducting searches of their workstations in this branch alone. In doing so, they began by conducting an electronic keyword search through the inbox and sent boxes of e-mails, their file folders and/or directories, and correspondence files, using a number of specified terms. They then reviewed the e-mails and files that came up as a result to determine timeframe and responsiveness. They searched the active paper files at their workstations as well as other files that might contain responsive records.

According to the Deputy Director of the Policy and Relationships Branch, six of the nine staff members who located records each spent approximately half an hour to conduct the above searches (for a total of three hours collectively spent by this group of individuals). Three of the six staff members did not locate records, but collectively took three quarters of an hour to conduct their searches.

The OSAA provided similar breakdowns of the steps taken for each program area and for each of the three requests. Recognizing that the breakdown of the search time noted in the example above is a prorated amount of the total time taken to respond to the three requests, it appears that

the total time that the six staff members referred to above took or estimated to locate records that were responsive to all three requests amounted to:

- PA06-220 - ½ hour each; 3 hours collectively
- PA06-224 - ½ hour each; 3 hours collectively
- PA06-226 - 2.5 hours each; 15 hours collectively.

In responding to the OSAA's representations, which detailed the steps taken to search for responsive records, the appellant states:

> It is well established that the search an institution completes has to be done by knowledgeable staff and that the records be maintained in accordance with some regularized and managed system. Order PO-1943 states that it is not reasonable to expect that a requester should pay for the institution's staff to become informed.
>
> The OSAA was not itself in a state of transition or flux so there does not appear to be a reason for there not being a regularized information management system to be in place. It was an evolving issue – there's no doubt. However the protest began Feb. 28, 2006. My request was dated May 17, giving OSAA two and a half months to get some sort of regularized system in place.

The appellant notes that the request was very specific, within a specified timeframe on a particular subject. She cannot understand why it would require such an extensive number of hours to search for responsive records if there is a systematic and regularized system in place.

The appellant also indicates that the Freedom of Information Co-ordinator told her that she did not know where records were located at the time the appellant made her request and that it is possible that she would be in a position, now that the searches have been undertaken, to better respond to a similar request.

The appellant refers to other requests she has submitted to other ministries and indicates that not only did they respond immediately, their fees were significantly lower or non-existent and records were provided. She doesn't understand why these three requests should be any different.

The appellant states that the breakdown provided by the OSAA was insufficient to enable her to determine whether the time taken for each task was reasonable. Moreover, she does not believe that the staff members that conducted the searches were reasonably knowledgeable in conducting searches or with the Freedom of Information processes. By way of example, the appellant notes that had the staff members used the "find mail message" tool in Microsoft Outlook, there would have been no need to open e-mails to determine whether they fell within the timeframe of the request as that information would be readily available as this tool would allow the messages to be sorted by date.

The appellant also notes that the Co-ordinator misspelled the name of an individual in her representations and queries whether this had an impact on the search undertaken by the OSAA.

Finally, the appellant takes issue with the revised breakdown of fees alternatively provided by the OSAA during mediation. She notes that although the OSAA suggested that she could reduce the fees further if she removed e-mails from the requests, the time estimated for search remained the same. Since the appellant has chosen to include the e-mails within the scope of her request, I do not find this argument to be relevant to the issue before me, and will, therefore, not address it in this order.

In response to the appellant's concerns, the OSAA reiterated the steps taken by staff members in conducting their searches for responsive records. The OSAA maintains that the staff members that conducted the searches were experienced. With respect to having a regularized information management system, the OSAA states that it was involved in the Caledonia protest from February 28, 2006 and used many different staff available at its disposal. The OSAA notes that its involvement changed in mid-April 2006, when negotiations began, and then escalated after barricades went up on April 20, 2006. At this point, the files and number of people involved in the file changed dramatically, and stayed at a heightened intensity through the month of May.

The OSAA also indicates that the Co-ordinator's representations contained a typographical error in the spelling of an individual's name, but that the experienced staff conducting the searches knew the correct spelling.

Findings

In Order PO-1943, I discussed in some detail what constitutes a reasonable search for responsive records. In that case, the institution in question had undergone an extensive re-organization, which might have had an impact on its ability to locate responsive records with a resultant inflation of the search fees. I stated:

> In previous orders of this office dealing with the reasonableness of an institution's search for responsive records, it has been well established that the search which an institution undertakes must be conducted by knowledgeable staff in locations where the records in question might reasonably be located (see, for example, Order M-624). In other words, the *Act* contemplates that searches for responsive records will be conducted by reasonably informed staff. Further, the *Act* contemplates that records will be maintained in accordance with some regularized and managed system so that a reasonably informed or knowledgeable staff member will be able, upon a reasonable effort, to locate those that are responsive to the request. If an institution's reorganization results in staff not knowing where specific types of records might be located, then in my view, it would not be reasonable to expect that a requester should pay for the institution's staff to become informed.

> The chronology of the Ministry's reorganization indicates that between 1995 and 2000, it underwent a number of changes, which resulted in the relocation of staff and functions (and ultimately records). The major changes appear to have occurred in July 1996, January 1997 and July 1999. It is possible that during the time at which the changes were occurring, transitional inefficiencies may have been created as a result of the disruption caused by reorganization. It is also possible that staff might have some difficulty responding to an access request in any kind of regularized or efficient manner during the transition period. While the *Act* clearly contemplates that users of the *Act* should pay for the time spent searching for responsive records, I would have some difficulty requiring a requester to pay for additional time that might be needed to locate responsive records during such times of disruption. In my view, this goes well beyond what former Commissioner Tom Wright contemplated in Order M-583 when he stated that "government organizations are not obliged to maintain records in such a manner as to accommodate the various ways in which a request for information might be framed."
>
> However, the appellant's request was made in April 2000, well after the last major stage in the Ministry's reorganization. I am satisfied, based on the Ministry's submissions on this issue, that its offices were not in a state of transition at the time the appellant made his request. Therefore, I am satisfied that the amount charged to the appellant was not inflated as a result of transitional inefficiencies that might have existed as a result of the Ministry's reorganization.
>
> It was not readily apparent on first reading of the Ministry's representations whether staff were required to expend time to search for responsive records in order to first determine where responsive records might exist following the reorganization. I am satisfied, however, that in raising the impact of its reorganization on the search that was conducted, the Ministry was simply attempting to explain why records were not maintained in a manner that would accommodate the appellant's request. The Ministry has clearly explained why and how records are maintained in its various branches and it would appear that "they are organized in a way that makes them most accessible to the area holding them". I agree with the Ministry that in this case it is not obliged to maintain its records in such a way as to accommodate the appellant's request.

As the appellant acknowledges, the OSAA was not undergoing a re-organization at the time it was responding to the appellant's requests. Rather, she suggests that the situation where a current and dynamic situation is evolving is akin to the effects of a re-organization which has resulted in an inflation of the time taken to search for responsive records.

I do not agree. Institutions, and particularly the OSAA in the circumstances of these appeals, are not static. In my view, it is not always possible to place records in a specific location that would make them readily available to anyone who wishes to see them. I find that the records

responsive to the appellant's requests are organized in a way that makes them most accessible to the area holding them. The evidence before me does not support a finding that in doing so inefficiencies in the nature of those discussed in Order PO-1943 were created.

Although the Co-ordinator may not have known where all of the records were located, she quite appropriately directed the requests to the various branches that might have records in order for those staff members most knowledgeable with respect to the types of records and their specific locations to conduct the actual searches. There is no requirement that these staff be experts in the Freedom of Information process. Rather, they must be knowledgeable insofar as the subject matter of the requests is concerned. I find that they were. Indeed, I am persuaded that having those staff members most familiar with their own workstations to conduct the searches for responsive records in what was clearly a dynamic environment, was likely the most efficient way of responding to the requests.

Although there may be different methods of conducting computer searches, with attendant efficiencies, I do not find that the approach taken by the OSAA in this case to be unreasonable. Moreover, it is likely that staff members would have had to open the e-mails in any event to determine whether they contained responsive information quite apart from determining the timeframe. In addition, it is noteworthy that each staff member spent only one half of an hour conducting the entire search of his or her workstation, which involved a number of different types of files. I find that any savings in using the approach suggested by the appellant would have been negligible.

It is apparent that each individual search was not particularly time consuming. Rather, the amount of time taken to search for responsive records is a reflection of the number of locations in which the responsive records were located. The OSAA has clearly explained why and how records are maintained in its various branches, and I find that it has established that it maintains a regularized system of information management for active files. As I indicated above, it is clear from the OSAA's representations, that they are organized in a way that makes them most accessible to the area holding them. As I noted above, the OSAA is not obliged to maintain its records in such a way as to accommodate the appellant's request.

I find that the OSAA has provided a sufficiently detailed description of the steps taken to locate responsive records, including the staff members involved, the locations they searched, the time each one took to conduct the search and the results of each search, to enable me to determine that the steps undertaken to search for responsive records was reasonable in the circumstances and supports the fees that have been estimated to date. Accordingly, I uphold the OSAA's fee estimate for the costs of searching for responsive records.

Preparation

The OSAA indicates that only the cost of removing exempt information from the records has been included in its estimate for preparing the records for disclosure, and has broken down the steps taken in arriving at its estimate as follows:

PA06-220

The number of pages provided to the FOI Co-ordinator is 492. After a review of approximately 10% of these records by the FOI Office, the number was reduced to 360 pages because some pages will be denied in their entirety due to exemptions.

…

Of the pages review…approximately 90 pages require redaction in accordance with the section 13(1), 15(1) and 19.

The IPC has established in numerous orders that an institution may include 2 minutes per page to redact the records in an estimate…90 pages x 2=180 minutes or 3 hours at $30.00 per hour for a total of $90.00.

PA06-224

The number of pages provided to the FOI Co-ordinator is approximately 1,525. After a review of approximately 10% of these records, 30% cannot be released due to exemptions and duplications. The number of pages to be released is 1,047.

…

…approximately 50% of the records would require redaction in accordance with the sections 13(1), 15(1) and 19 of the *Act*.

…preparation time would be 523 pages (1047x50%) x 2 minutes per page = 17.43. This was lowered to 17 hours at $30.00 per hour, for a total of $510.00.

PA06-226

The number of pages…is approximately…7,200 pages of responsive records to the re-scoped request. After a 10% review of these records…the number of pages to be released was reduced to 6,050 based on duplicates and exemptions.

…

…approximately 1,000 pages would require redaction in accordance with the sections 12(1), 13(1), 15, 18(1) and 19…

…preparation time…would be 1,000 pages x 2 minutes = 2,000 minutes or 33.3 hours at $30.00 per hour - $999.00

The appellant notes that the amounts claimed for preparation in the OSAA's representations differ from those cited in its revised decision letters. In particular, in PA06-220, the OSAA has estimated that it will take 5 hours at $150.00 to sever the records, and in PA06-226, the OSAA has estimated that preparation will take 101 hours at a cost of $3,030.

In responding to the appellant's submissions, the OSAA notes that this is only an estimate, and should the final number of pages that require severance be different, it will change its fee accordingly based on the maximum of two minutes per page.

Findings

Previous orders have confirmed that preparation time in section 57(1)(b) includes time for severing a record (Order P-4). They have also established that, on average, it takes two minutes per page to sever a record (Orders M-1169, PO-1721, PO-1834 and PO-1990), and I accept that approach. I note that there are two significant differences in the number of pages that the OSAA has identified as requiring redaction in the estimates it provided to the appellant and in those estimated in its representations. As noted by the appellant, the OSAA has decreased the estimated preparation costs in PA06-220 from $150.00 to $90.00. In Appeal PA06-226, the OSAA revised the estimated preparation costs from 101 hours at $3,030.00 to 18 hours at $540. In its representations, the OSAA explained that the estimated preparation cost would more likely be closer to 33.3 hours at $999.00, which significantly increases the amount estimated in its revised decision. However, on my review of the OSAA's representations regarding its revised fee estimates, I am satisfied that the estimated number of pages of records to be severed for the appeals addressed in this order is reasonable.

Accordingly, I uphold the OSAA's estimated fees, as amended in its representations, for the preparation times based on the estimated time to sever the records.

Photocopying

The OSAA's estimates of $72.00 for photocopying 360 pages in Appeal PA06-220, $209.40 for photocopying 1,047 pages in Appeal PA06-224, and $1,210.00 for photocopying 6,050 pages in Appeal PA06-226 are calculated in accordance with item 1 of section 6 of Regulation 460 made under the *Act*. Allowable photocopy charges are based on the actual number of records copied for disclosure. The per-page charge of $0.20 is correct, based on the estimate of the number of pages of records ultimately determined to be responsive. I, therefore, uphold the OSAA's estimated photocopy fees. Should the actual number of the photocopies be different than this estimate, the OSAA is permitted to recover fees in the amount of $0.20 per actual page.

Summary

In summary, I find that fee estimates for searching for and photocopying the responsive records are appropriate. Accordingly, I uphold the OSAA's fee estimates for these charges in Appeals PA06-220, PA06-224 and PA06-226.

With respect to the OSAA's fee estimate for preparing the records for disclosure, I uphold its estimate for the time required to sever the records as outlined in its representations. As a result of the above, the revised fee estimates initially provided to the appellant will be revised again to reflect the changes in estimated preparation costs associated with Appeals PA06-220 and PA06-226. Further, I uphold the OSAA's fee estimate for preparing the records in Appeal PA06-224.

As a result, the total fee estimate that the OSAA may rely on in order to proceed with these requests is:

PA06-220 - $ 402.00
PA06-224 - $1,109.40
PA06-226 - $2,117.00

The OSAA notes that since these are fee estimates, the final amounts for the number of responsive records and the preparation time may differ. It confirms that any changes would be outlined for the appellant at the time of the final decision and actual fee, but will follow the $0.20 per page for photocopies and preparation time based on $30.00 per hour and a maximum of 2 minutes per page that requires redacting.

I now turn to whether a fee waiver is warranted in the circumstances of these appeals.

FEE WAIVER

Section 57(4) of the *Act* requires an institution to waive fees, in whole or in part, in certain circumstances. That section 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,
>
> (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 by the regulations.

Section 8 of Regulation 460 sets out additional matters for a head to consider in deciding whether to waive a fee:

> 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.

A requester must first ask the institution for a fee waiver, and provide detailed information to support the request, before this office will consider whether a fee waiver should be granted. This office may review the institution's decision to deny a request for a fee waiver, in whole or in part, and may uphold or modify the institution's decision [Orders M-914, P-474, P-1393, PO-1953-F]. The standard of review applicable to an institution's decision under this section is "correctness" [Order P-474].

As I noted above, the appellant did not specifically request a fee waiver at the request stage and appears to have confirmed that she is not pursuing a fee waiver during mediation, at least on the basis of financial hardship or public health and safety. Yet, she uses language throughout her discussions with this office which leads me to conclude that she is seeking a waiver of the fees that the OSAA has charged. In the Notice of Inquiry, I asked the parties whether there are any circumstances, other than pursuant to sections 57(4)(b) and (c) under which a fee can be waived, and if so, what factors should be considered in making this determination.

The appellant provided brief submissions on this issue. The Ministry addressed the issue of fee waiver generally, but declined to answer the questions I posed in the Notice of Inquiry. Although it would have been helpful for the OSAA to address the issue, given my findings below, it is not necessary to go beyond the submissions made by the appellant.

Section 57(4) requires that I must first determine whether the appellant has established the basis for a fee waiver under the criteria listed in section 57(4) and then, if that basis has been established, determine whether it would be fair and equitable for the fee to be waived. The institution or this office may decide that only a portion of the fee should be waived [Order MO-1243].

Part 1: Basis for Fee Waiver

In her representations, the appellant indicates that she works for a public media outlet and believes that publication of the requested records is in the public interest. She notes that her paper has published more than 700 articles on the dispute. She acknowledges, however, that her paper cannot claim financial hardship and the information requested will not benefit public health or safety.

The appellant states that she has already received some information free of charge and indicates that the OSAA must have determined that some of the fee can be waived. She indicates that she is unclear what criteria were used to make this determination.

She states that she did not apply for a fee waiver because the *Act's* provisions for granting a waiver are "incredibly limited". She believes that the Commissioner's Office must address this issue, noting that "public interest" is used under the federal legislation as a reason to grant a fee waiver.

Findings

In Order MO-1336, I addressed arguments that a fee waiver should be granted in circumstances that did not meet the criteria set out in section 45(4) (the municipal *Act* equivalent to section 57(4)) as follows:

> The appellant submits that he is entitled to a fee waiver on the basis of financial hardship and "public interest". He also states a number of other reasons why the fee should be waived in the circumstances of this appeal. In this regard, he refers to other Board expenditures and states "[i]t is clear that the [Board] is not concerned about the amount of money involved in the search for the material I am seeking". He also notes that the Board has always made exceptions or modifications concerning fees that families might be asked to pay out of area students wishing to attend schools within the Board's jurisdiction. Further, he appears to suggest that because the Board has not been inundated with access requests and that his is the first request for a fee waiver, this case should be treated as an exception to the general rule that fees should be charged.
>
> Section 45(1) of the Act is very clear and straightforward, stating "[a] head **shall require** the person who makes a request for access to a record to pay fees in the amounts prescribed". The circumstances under which a head shall waive payment of the fee in section 45(4) are specific and limited to those matters cited above. On this basis, I find that the activities of the Board with respect to other financial matters within its jurisdiction and authority have no relation to its obligation to charge a fee for responding to an access request or to consider waiver of the fee. Nor does the fact that the Board may not deal with a high volume of access requests.
>
> …
>
> The focus of section 45(4)(c) is "public health or safety". It is not sufficient that there be only a "public interest" in the records or that the public has a "right to know". There must be some connection between the public interest and a public health and safety issue.

This interpretation of the breadth of the fee waiver provisions is consistent with other orders of this office (see: Order MO-2071, for example). Although "public interest" may be considered under other legislation, or in a different context under the *Act*, the appellant has not persuaded me that a fee waiver should be considered in circumstances other than prescribed in section 57(4), which does not consider "public interest" in isolation to constitute a basis for granting a fee waiver.

On the basis of the representations submitted by the appellant, I find that she has not established that the fees which I have allowed the OSAA to charge for responding to these requests should be waived.

ORDER:

1. I uphold in principal the fees estimated by the OSAA. The OSAA may charge the appellant an estimated fee of $402.00 for Appeal PA06-220, $1,109.40 for Appeal PA06-224, and $2,117.00 for Appeal PA06-226.

2. I dismiss the appellant's request for a fee waiver.

Original signed by: June 28, 2007
Laurel Cropley
Adjudicator