

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3099

Appeal PA11-17

North East Local Health Integration Network

July 20, 2012

Summary: The appellant sought access from the institution to all documents within a specified 18 month time frame that contained his name. The institution issued a fee estimate and the appellant requested a fee waiver on the basis of section 57(4)(b) (financial hardship). The appellant also claimed that the request was for his personal information. The documents sought are not limited to personal information, and the institution's fee estimate and decision to not waive its fee are upheld.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 2(1) and (3), 57(1) and (4)(b).

Orders and Investigation Reports Considered: R-980015.

OVERVIEW:

[1] The appellant submitted the following request to the North East Local Health Integration Network (the LHIN) pursuant to the *Freedom of Information and Protection of Privacy Act* (the *Act*):

I [named requester], the former director of [identified entity] am requesting all documents that refer to me directly or indirectly dating from April 1, 2009 to the present, November 19, 2010. I request all board

minutes, records, memos, emails, complaints, recorded conversations, records, files and any other form of correspondence and communication that refer to me or names me directly. I ask that you search all files from all staffers and board members, including the secretaries and assistants.

I am aware of [identified entity] member complaints, of several investigations, of meetings and discussions with former board members and staff and volunteers at [identified entity], meetings with CMHA, telephone calls, meetings at the LHIN itself, communication with the Ministry of Health and Long Term Care, the police, the Ombudsman, members of the public and local politicians, among others.

I am also requesting the third party investigative report issued under your [LHIN]. This report is of particular interest since it was prompted by complaints, I [named requester] directed to the attention of the [LHIN], and in particular to [three named individuals]. That report was prompted because of my complaints.

[2] The LHIN issued a fee estimate indicating that an "initial review of the records indicates that it will cost an estimated total of \$650 to process your request. The fee estimates are based on an expectation of requiring approximately a total of 200 photocopies, approximately 20 hours of search and preparation time and courier costs to your address." No decision regarding access was made at that time.

[3] Pursuant to section 45 of the *Act*, the appellant submitted a fee waiver request to the LHIN on the basis that payment of the fee would cause him undue financial hardship. In response, the LHIN granted a partial fee waiver reducing the fee estimate by half to \$325, and it advised that no decision regarding access had yet been made.

[4] The appellant appealed the decision on the fee and the fee waiver to this office.

[5] During the mediation stage of the appeal process, the appellant contested the reasonableness of the fee, as in his view, the request was for his personal information and not for general records. He also took issue with the denial by the LHIN to waive the full fee. The appellant took the position that payment of the fee would cause him financial hardship pursuant to section 57(4)(b) of the *Act*. The appellant advised that he was agreeable to receiving the records electronically.

[6] Prior to the issuance of the mediator's report, the LHIN issued a revised fee estimate and interim access decision letter. The letter explained that, although no final decision had been made regarding access, some information contained in the responsive records might be subject to certain exemptions, such as sections 13(1), 18(1)(c) and (d), 21(1) and 21(2)(e) of the *Act*. The letter also reiterated the fee decision of the LHIN, which remained unchanged.

[7] Mediation did not resolve this appeal, and the appeal was transferred to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry under the *Act*.

[8] The issues to be determined in this appeal are whether the fee estimate is reasonable and whether the LHIN should have waived the fees in full on the basis of financial hardship. Before determining these issues, however, it is necessary to determine whether the request is for personal information or general records; accordingly, this has been included as an issue in the appeal.

[9] During the inquiry into this appeal, this office sought and received representations from the LHIN and the appellant. These representations were shared in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction 7*. This office also sought and received reply representations from the LHIN. This file was subsequently transferred to me to complete the adjudication process.

[10] In this decision, I find that the request does not consist solely of the appellant's personal information, and I uphold the LHIN's fee estimate and its decision to not waive its fee.

ISSUES:

- A. Was the appellant's request for his own personal information?
- B. Should the fee estimate be upheld?
- C. Should the fee be waived?

DISCUSSION:

A. Was the appellant's request for his own personal information?

[11] In order to determine how the fee estimate is to be determined, it is necessary to decide whether the request was for the appellant's own "personal information." That term is defined in section 2(1) as follows:

"personal information" means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,

- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except if they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or opinions of another individual about the individual, and
- (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[12] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information.¹

[13] Section 2(3) also relates to the definition of personal information. This section states:

Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

[14] In its representations, the LHIN states that the appellant's request is not restricted to his personal information despite the appellant's position that his request was not for general records. The LHIN states that it conducted a search for "all

¹ Order 11.

documents that refer directly or indirectly to [the appellant]" in accordance with the request, and the responsive records located can be divided into three categories:

1. records that do not contain personal information;
2. records that contain the personal information of the appellant and of other individuals; and
3. records that contain only the appellant's personal information.

[15] In respect of category 1 above, the LHIN states that the appellant was the Executive Director of a health service provider funded by the LHIN in accordance with the *Local Health System Integration Act, 2006* (LHSIA) and had regular dealings with the LHIN in this capacity. The LHIN states that there are responsive records in the general files of both the health service provider and the LHIN such as email correspondence communicating important information from the LHIN to all of the executive directors of the health service providers in the LHIN's geographic region; however, these records refer to the appellant in a professional context, and do not contain his personal information.

[16] The LHIN also states that the investigative report referenced in the appellant's request does not fall into the category of personal information of the appellant as it was an operational review of the health service provider commissioned in accordance with the provisions of the LHSIA and the service accountability agreement that the health service provider was required to have with the LHIN in order to obtain funding from the LHIN. The LHIN states that while the investigative report may contain the name of the appellant, who, as the credit card account cardholder of the health service provider approved some transactions in his role as the Executive Director, these direct or implicit references to appellant are not "about" the appellant.

[17] In his representations, the appellant states that he prefers to "keep it simple and receive [his] personal information." The appellant states that the records comprised of "numerous emails, complaints, internal memos, board meetings, police reports, third party investigative reports, KPMG report, and any other documents that name [him] personally" contain his personal information as his name is on those documents.

[18] In its reply representations, the LHIN states that the appellant's submissions have not narrowed the scope of his initial request to solely his personal information. The LHIN states that the request still comprises both general records and records containing the appellant's personal information. The LHIN reiterates that mentioning an individual by "name" does not mean that the information is personal in nature. The LHIN also advises that it conducted another review of the records at issue and determined that approximately 35% of the responsive records contain the personal information of the appellant. The LHIN included with its reply representations a revised fee estimate divided into two parts; general records and personal information.

Analysis and Findings

[19] To qualify as personal information, the information must be about the individual in a personal capacity. This office has clearly stated that as a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be “about” the individual.²

[20] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.³

[21] Beyond the assertion that any document bearing his name contains his personal information, the appellant has not provided any representations to establish that all of the requested documents contain his personal information.

[22] As stated by Adjudicator Donald Hale in Order R-980015:

The Commissioner’s orders have established that, as a general rule, a record containing information generated by or otherwise associated with an individual in the normal course of performing his or her professional or employment responsibilities, whether in a public or a private sector setting, is not the individual’s personal information simply because his or her name appears on the document.

[23] I adopt Adjudicator Hale’s summary of the established findings of this office on this issue in rejecting the appellant’s submission that any document relating to his request that bears his name contains his personal information by virtue of that fact alone.

[24] I am persuaded by the representations of the LHIN that many of the responsive records are general records in which the appellant is referenced in his capacity as the Executive Director of the health service provider for which the LHIN had responsibility. For example, general email correspondence from the LHIN to all of its health service providers would not qualify as personal information of the appellant simply because the appellant was one of the email recipients. Another example is the operational report of the health service provider commissioned in accordance with provisions of the LHSIA and the service accountability and funding agreement between the health service provider and the LHIN; this report does not qualify as personal information of the appellant absent the inclusion of something of a personal nature about the appellant therein. The appellant provides no submissions to support his assertion that the operational report includes his personal information.

² Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

³ Orders P-1409, R-980015, PO-2225 and MO-2344.

[25] I am satisfied based on the representations of the LHIN that not all of the responsive records in this matter contain the personal information of the appellant, and therefore, I find that the request is not solely for the appellant's own "personal information."

[26] A portion of the requested documents contains the appellant's personal information, as acknowledged by the LHIN. I address these documents below.

B. Should the fee estimate be upheld?

[27] 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.⁴ The fee estimate also assists requesters to decide whether to narrow the scope of a request in order to reduce the fees.⁵

[28] 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.⁶

[29] The LHIN submits that it is required by section 57(1) of the *Act* to charge fees for freedom of information requests. The LHIN also submits that its fee estimate of \$650 is based on approximately 200 photocopies, 20 hours of search and preparation, and courier costs. The LHIN further submits that due to the breadth of the request, it is required to search through all of its general records in order to locate all documents containing the appellant's name. The LHIN states that the majority of the records fall within the scope of section 6 of Regulation 460 of the *Act* as they consist of general records. The LHIN also advises that records in a single file organized by the appellant's name that contain the appellant's personal information alone, were calculated in accordance with the provisions of section 6.1 of Regulation 460 so as not to include in its fee estimate, the time spent on searching for and severing these documents.

[30] The appellant submits that the fee estimate is unreasonable as he is requesting his personal information. He makes no other representations about the calculation of the fee estimate.

[31] In the revised fee estimate submitted by the LHIN, the LHIN indicates that the responsive records (comprising approximately 900 pages) have been divided into two categories; general records (540 pages or 60%) and personal records (360 pages or

⁴ Orders P-81, MO-1367, MO-1479, MO-1614 and MO-1699.

⁵ Order MO-1520-I.

⁶ Order MO-1699.

40%). The LHIN estimates the total cost of the general records to be \$243, which includes: \$108 for 540 photocopies at a cost of 20 cents each; \$45 for 1.5 hours of search time; and \$90 for three hours to sever and prepare the records for disclosure.

[32] The LHIN estimates the cost for providing the personal records to be \$72 for approximately 360 photocopies at a cost of 20 cents each. The LHIN also notes that the total cost of fulfilling the request, which remains unchanged from the reduced fee of \$325, does not accurately reflect the amount of search and severance time associated with the general records; however, the LHIN previously indicated that the fee associated with the entire request would not exceed \$325.

Analysis and Findings

[33] This office may review an institution's fee and determine whether it complies with the fee provisions in the *Act* and Regulation 460.

[34] 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.

[35] Sections 6 and 6.1 of Regulation 460 list the fees to be charged by an institution in respect of general records and records containing personal information respectively, and include the following relevant provisions:

- 6. The following are the fees that shall be charged for the purposes of section 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.

...

6.1 The following are the fees that shall be charged for the purposes of section 57(1) of the Act for access to personal information about the individual making the request for access:

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

...

[36] Although the LHIN's initial categorization of records into three groups was not consistent with the two distinct categories contemplated by the *Act* for the purposes of fees to be charged, the revised fee estimate from the LHIN appropriately contains a breakdown of the fees for general records and for personal information.

[37] The fees for the general records have been calculated in accordance with section 6 of Regulation 460 in that they include a fee of 20 cents per photocopy (for a total of \$108 for 540 photocopies), and fees for 1.5 hours of search time and for three hours to sever and prepare records for disclosure (for a total of \$135 based on 18 fifteen-minute units of search time at \$7.50 per unit). The only fee listed in the revised fee estimate for the records that contain the appellant's personal information is a fee for photocopies at 20 cents per page based on the estimated number of photocopies to be provided; this calculation too consistent with section 6.1 of Regulation 460.

[38] I note that the revised fee estimate contains a significant reduction in the estimated amount of search and preparation time, which was initially estimated by the LHIN to be 20 hours. I also note that the LHIN advises in its reply representations that it has already surpassed the estimated 20 hours of search and preparation of the records for disclosure, and that the actual cost for processing the request has already exceeded the amount initially estimated. While I accept the LHIN's submissions in this regard, I note that the LHIN does not specify in its representations what actions it has had to take to locate the requested records beyond searching through its general records. Nor does it provide a list of the records in question and details about which records require severing or other actions to prepare them for disclosure.

[39] Despite the absence of such details, I am satisfied that the breadth of the appellant's request of the LHIN would result in more than a mere 1.5 hours of search

time, particularly considering the volume of general records indicated by the LHIN in its revised fee estimate which represents 60% of the total documents the LHIN anticipates disclosing. As I note above, the LHIN indicates that it has already surpassed the 20 hours of search time initially estimated for records. Taking a proportional approach to the 20 hours already devoted to searching for records, 60% amounts to 12 hours, which have presumably been spent searching for general records; this far exceeds the 1.5 hours estimated by the LHIN. For these reasons, I find that the estimated fee for search time is reasonable in the circumstances.

[40] In regards to the estimated time and corresponding fee for the preparation of records for disclosure, I note that this office has accepted that it takes two minutes to sever a page that requires multiple severances.⁷ Absent details from the LHIN to establish whether the three hour estimate is reasonable, I order the LHIN to restrict its fees in this category to the number of records that actually require severing or other preparation for disclosure at a rate of two minutes per page in accordance with the general principle above and to a maximum of \$90. In the event that fewer than three hours are required to prepare the records for disclosure such that the \$90 maximum is not reached, this amount should be reduced accordingly.

[41] With respect to the remaining fee of \$10 for courier costs, I find that it is reasonable considering the approximately 900 pages of responsive records the LHIN has identified for disclosure. However, I also note that the appellant is agreeable to receiving the records electronically, which may obviate the need for courier costs. The LHIN submits that it was not advised that the appellant was willing to receive all documents electronically. In the event that the LHIN and the appellant agree to electronic transmission of the documents and the actual cost of such transmission is less than the \$10 estimated for courier costs by the LHIN, this part of the fee should be reduced accordingly.

[42] In conclusion, I find that the LHIN is entitled to charge a fee for searching for general records, for severing and preparing general records, for photocopying general records, and for its courier costs. I am satisfied that with the exception of the photocopying charge of \$72, these fees do not pertain to the records containing the appellant's personal information.

C. Should the fee be waived?

[43] Section 57(4) of the *Act* requires an institution to waive fees, in whole or in part, in certain circumstances. Section 8 of Regulation 460 sets out additional matters for a head to consider in deciding whether to waive a fee. These provisions state:

⁷ Orders MO-1169, PO-1721, PO-1834, PO-1990.

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 by 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.

[44] For a fee waiver to be granted under section 57(4), it must be "fair and equitable" in the circumstances. Relevant factors in deciding whether or not a fee waiver is "fair and equitable" 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 institution provided any records to the requester free of charge;
- 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 advanced a compromise solution which would reduce costs; and

- whether the waiver of the fee would shift an unreasonable burden of the cost from the appellant to the institution.⁸

[45] The LHIN submits that although the appellant requested a waiver of the full fee on the basis of financial hardship, he did not provide sufficient evidence of financial hardship so as to engage section 57(4)(b) of the *Act*. The LHIN states that the only proof the appellant provided to the LHIN was a statement that he was receiving employment insurance at the time of the request and that prior to that, he received Ontario Disability Support Program assistance for 15 years. The LHIN states that it reduced its original estimated fee by half, despite having no concrete knowledge of the appellant's financial circumstances, because it wanted to respond to the appellant's concerns about cost in a positive manner. The LHIN further submits that its actual work has already exceeded the estimated amount. The LHIN submits the request is for personal reasons and would not benefit public health and safety as contemplated by the *Act*, and none of the additional matters set out in section 8 of Regulation 460 apply in this appeal.

[46] The appellant reiterates the reasons he provided to the LHIN noted above. He states that he has paid enough already with the loss of his Executive Director position; he adds that if he still had his job he would gladly pay the fee. The appellant submits that a waiver of the full fee is "fair and judicious and within the scope and meaning of the *Act*."

[47] In its reply representations, the LHIN states that the fees are mandatory unless the appellant can present a persuasive argument that a fee waiver is justified on the basis that it is fair and equitable to grant it, or that the *Act* requires it to waive the fee. The LHIN refers to Order PO-2726 in support of this submission. The LHIN also points out that based on the appellant's submission that he had a government pension for 15 years prior to receiving employment insurance, and that he had an annual salary while he was employed by the health service provider, it can be deduced that the appellant simultaneously collected a government pension in addition to earning a reasonable salary; the LHIN contends that these circumstances do not support the appellant's claim of financial hardship. The LHIN reiterates its submission that the appellant has provided insufficient evidence of undue financial hardship.

Analysis and Findings

[48] The fee provisions in the *Act* establish a user-pay principle which is founded on the premise that requesters should be expected to carry at least a portion of the cost of processing a request unless it is fair and equitable that they not do so. The fees referred to in section 57(1) and outlined in section 6 of Regulation 460 are mandatory unless the requester can present a persuasive argument that a fee waiver is justified on

⁸ Orders M-166, M-408 and PO-1953-F.

the basis that it is fair and equitable to grant it or the *Act* requires the institution to waive the fees.⁹

[49] 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.¹⁰

[50] For section 57(4)(b) to apply, the requester must provide some evidence regarding his or her financial situation, including information about income, expenses, assets and liabilities.¹¹

[51] Having reviewed the appellant's representations on this issue, I see no evidence of the appellant's financial situation such as details of his income, expenses, assets and liabilities, that would establish financial hardship under section 57(4)(b) of the *Act*. The appellant was advised in the Notice of Inquiry that such evidence was required in order for section 57(4)(b) to apply, however, he did not provide any documentation to support his assertion of financial hardship. I further note, as did the LHIN, that the appellant's representations seem to indicate that prior to receiving employment insurance he was collecting a government pension concurrently with his salary from the health service provider, which, if true, would not support the appellant's claim of financial hardship.

[52] As the appellant has not established a basis for a fee waiver under section 57(4) of the *Act*, I need not consider whether it would be fair and equitable for the fee or part of it to be waived.

[53] I accept the LHIN's submissions and I uphold its decision to not waive its fee.

ORDER:

1. I find that the request is not for the appellant's personal information alone.
2. I uphold the LHIN's revised fee estimate of \$325 and order that if the actual costs of severing and preparing the general records for disclosure, and providing the requested documents are less than the corresponding amounts provided in the fee estimate, \$90 and \$10 respectively, these fees be reduced accordingly.

⁹ Order PO-2726.

¹⁰ Orders M-914, P-474, P-1393, PO-1953-F.

¹¹ Orders M-914, P-591, P-700, P-1142, P-1365 and P-1393.

3. I uphold the LHIN's decision not to waive the fee in its entirety.

Original signed by: _____

Stella Ball
Adjudicator

_____ July 20, 2012