

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3206

Appeal PA12-163

Joseph Brant Memorial Hospital

May 29, 2013

Summary: The appellant sought access to records relating to expense claims paid by Joseph Brant Memorial Hospital. The hospital located responsive records and issued a fee estimate of \$1,568 to process the access request. The appellant appealed the fee estimate decision and asked the hospital to waive the fee. The hospital reduced its fee estimate to \$1,149.87 and denied the request for a fee waiver. This order upholds \$428 of the fee estimate and the hospital's denial of a fee waiver.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 57(1) and 57(4)(c); section 6 of Regulation 460.

Orders Considered: P-1393, PO-1943, PO-1962, MO-1977, PO-2278, PO-2333, PO-2566 and PO-3035.

BACKGROUND:

[1] Joseph Brant Memorial Hospital (the hospital) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to "all expense claims made by Board of Director members, the hospital CEO, executives and any others reporting directly to the CEO from January 1, 2007 to the present."

[2] The hospital issued a fee estimate of \$1,568 based on a representative sample of records responsive to the request. The hospital asked the requester for a deposit of 50% of the fee before it would take further steps to process the request. The hospital

also indicated that although it had made no decision regarding access, it anticipated granting access to most of the responsive records, except for a small proportion which might qualify for exemption under the mandatory personal privacy exemption in section 21 of the *Act*.

[3] The requester, now the appellant, appealed the fee estimate to this office.

[4] During mediation, the hospital offered the appellant the following reduced fees and applicable time periods for the requested expense data:

- \$313.60 for 1 year (April 2011 to March 2012)
- \$627.20 for 2 years (April 2010 to March 2012)
- \$940.80 for 3 years (April 2009 to March 2012)

[5] The appellant, a member of the media, subsequently asked the hospital to waive the fee on the basis that it was excessive, and that dissemination of the information would benefit public health and safety. The appellant also narrowed the time period of her request to include only the period of April 1, 2007, to November 30, 2011, in order to align with the hospital's fiscal year.

[6] The hospital responded to the appellant's request by partially waiving the fee to reflect the introduction of the *Broader Public Sector Accountability Act (BPSAA)* and the requirement to post the expense claims of its Board of Directors and executives on its web site as of April 1, 2011. The hospital's revised fee estimate was \$1,149.87. The appellant remained unsatisfied and elected to pursue her appeal of the hospital's decision.

[7] As further mediation of the remaining issues was not possible, the appeal was moved to the adjudication stage of the appeals process.

[8] During my inquiry into this appeal, I sought and received representations from the parties which were shared in accordance with section 7 of this office's *Code of Procedure and Practice Direction 7*.

[9] In this order, I uphold the hospital's denial of a fee waiver, and I uphold only ten hours of search time at a cost of \$300, four hours of preparation time at a cost of \$120, and \$8 for photocopies.

ISSUES:

Issue A: Should the fee estimate be upheld?

Issue B: Should the fee be waived?

DISCUSSION:

Issue A: Should the fee estimate be upheld?

[10] Where the fee to process an access request exceeds \$25, an institution must provide the requester with a fee estimate.¹ Where the fee is \$100 or more, the fee estimate may be based on either

- the actual work done by the institution to respond to the request, or
- a review of a representative sample of the records and/or the advice of an individual who is familiar with the type and content of the records.²

[11] The purpose of a fee estimate is to give the requester sufficient information to make an informed decision on whether or not to pay the fee and pursue access.³ The fee estimate also assists requesters to decide whether to narrow the scope of a request in order to reduce the fees.⁴

[12] In all cases, the institution must include a detailed breakdown of the fee, and a detailed statement as to how the fee was calculated.⁵

[13] 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. In determining whether to uphold a fee estimate, my responsibility under section 57(5) is to ensure that the estimated fee is reasonable. The burden of establishing the reasonableness of the fee estimate rests with SJHH. To discharge this burden, SJHH must provide me with detailed information on how the fee estimate was calculated in accordance with the applicable provisions of the *Act*, and it must produce sufficient evidence to support its claim.

[14] Section 57(1) requires an institution to charge fees for requests under the *Act*. That section reads:

A head shall require the person who makes a request for access to a record to pay fees in the amounts prescribed by the regulations for,

- (a) the costs of every hour of manual search required to locate a record;

¹ Section 57(3).

² Order MO-1699.

³ Orders P-81, MO-1367, MO-1479, MO-1614 and MO-1699.

⁴ Order MO-1520-I.

⁵ Orders P-81 and MO-1614.

- (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.

[15] More specific provisions regarding fees are found in section 6 of Regulation 460, which reads, in part:

6. The following are the fees that shall be charged for the purposes of subsection 57(1) of the *Act* for access to a record:

- 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.
- ...

The Hospital's Representations

[16] The hospital submits that its fee estimate is reasonable and has been calculated in accordance with section 57(1) of the *Act* and Regulation 460. It states that its fee estimate is largely based on the time associated with actual activities it has to conduct to look into the individual expenses of its CEOs, executives and Board of Directors members over a five year period. The hospital adds that its fee estimate is also based on advice from its Controller, Capital and Payables in the Financial Services Department, who has extensive knowledge and experience working with the records in question, and who oversees the processing of all expense claims.

[17] The hospital explains that its expense claims are individually processed through its Accounts Payable Module in its electronic Meditech system, and then each week, batches of expense claims are transferred to its General Ledger module for inclusion in its chart of departmental accounts.

[18] The hospital further explains that to identify the records responsive to the request, it first needed to identify the individuals who fall within the scope of the request. It then had to print a Meditech General Ledger report for each individual, which provided the detailed activity for expense reimbursements for the requested period, including the pay date, bank account, cheque number, invoice number and date, and general ledger account affected by the expense submissions. The hospital states that this information was subsequently used to locate the files for the individuals, so that its accounts payable staff could then manually review every expense report, reconcile the details with the Meditech reports, and summarize the information in the format required. The hospital explains that this step was necessary because the Meditech General Ledger reports do not provide a detailed unique breakdown of the description of various expenses for each claim; and since invoices are not scanned into the system, the relevant backup records for each expense inquiry cannot be accessed electronically. The hospital states that this is a limitation inherent in the current Meditech system.

[19] The hospital asserts that its system of electronic and hard copy records management is consistent with industry accounting practices and legal requirements, and with the records management practices of many other hospitals and organizations in the province. It states that hard copy files are kept as the main source of backup for information requests, external audits and tax purposes. The hospital also relies on Order P-1393 to argue that its required search of electronic and paper financial records, and the way in which it has organized its records which necessitates a manual cross-referencing of the paper backup and expense records within the claim information, are factors that would reasonably lengthen the search and preparation time and increase the total fee estimate.

[20] Regarding preparation time, the hospital states that it requires 12.5 hours to "manually" go through every expense report pulled for the included individuals, and review each submission and summarize the information in the required format. It adds that an additional hour of preparation time is included in the fee estimate for work done by its human resources department to "identify past Board members and hospital executives who would be included within the parameters of the access request and to identify and prepare records." The hospital further adds that its freedom of information office would also need to review each record and sever information that is exempt under sections 20 or 21 of the *Act*, and it estimates one hour will be required to sever exempt information from approximately 40 pages of responsive documents.

[21] The hospital concludes by asserting that its record management practices are consistent with "accounting best practices, and the practices of a number of peer hospitals." It adds that hospitals have developed systems to address their many reporting requirements for financial and other information. The hospital asserts that it is not reasonable to expect it to have "record management practices in place to address requirements that could not have been anticipated at the time."

The Appellant's Representations

[22] The appellant asserts that the fee estimate is excessive and a barrier to access, given the straightforward nature of her request, and the fact that it is clearly in the public interest that the requested information be brought to light. She states that the Government of Ontario and the Minister of Health and Long-Term Care, Deb Matthews, have identified the release of hospital executive and board expenses to the public as measures "necessary to protect the interests of the taxpayers and to strengthen the government's accountabilities for the organization it funds." The appellant further states that the accountability and transparency demanded by the *BPSAA* is crucial at a time of tight hospital budgets and difficult fiscal decisions hospitals have to make regarding cuts to staffing, programs and/or care. She states that during the time period covered by her request, the hospital closed approximately 20 beds, and had to find savings of roughly \$7 million to balance its budget. In light of this, the appellant submits it is reasonable to expect the hospital closely monitors the expenses of its executives and board members.

[23] In respect of the search fees, the appellant states that the records are relatively recent, dating back to April 2007, and it is therefore reasonable to expect that the hospital's records from this period are kept in a consistent and easily searchable manner. She argues that Order PO-3035 stands for the principle that an appellant should not bear the financial burden of an institution's failure to implement proper record management practices. She adds that Order P-1393, relied on by the hospital, involved a request for 12 years' worth of records, whereas her request only involves the four most recent fiscal years. She further adds that she would hope that the Meditech system used by the hospital would give it enough information to make the manual search easier.

[24] The appellant concludes by stating that the hospital's estimate of 37.5 hours to manually search for the records suggests that the records are not being kept in an easily searchable manner. Taken together with the 14.5 hours the hospital estimates it needs to prepare the records, the appellant asserts that the high fees estimated by the hospital essentially make the requested information inaccessible.

Analysis and Findings

[25] I have carefully reviewed the representations in this appeal, and the fee estimate decision letters provided by the hospital which show how the hospital calculated its fee. Based on all of the evidence before me, and for the reasons set out below, I find that the fee estimate of \$1,568, and the revised fee estimate of \$1,149.87, to locate and prepare less than five years' worth of expense claim records for the individuals included in the request, are excessive.

[26] Beginning with the 37.5 hours of search time calculated under section 57(1)(a), I find this to be an unreasonably long time to search for recent records relating to basic expense related information. I accept that the hospital has to search for the hard copies of records containing the detailed information on the breakdown of various expenses within each claim, because these source records are not stored or searchable electronically within its Meditech system. I also accept that various actions are required to locate the records. However, I do accept that these steps take 37.5 hours to complete, or, if they do, that the appellant should be required to pay for this amount of search time.

[27] While the hospital relies on Order P-1393 to support its contention that 37.5 hours of search time is justified in this appeal, I agree with the appellant that Order P-1393, is distinguishable. The request in Order P-1393 was much larger scope, both in terms of the types of records sought and time period in question, than the appellant's request, which request relates to a defined group of individuals, board members and senior executives, and the expenses they claimed during the course of four and a half fiscal years. The scope of the appellant's request is, therefore, well defined. As well, the request is for recent records, which date back to April 2007.

[28] A more applicable order is Order PO-3035, which was relied upon by both parties in their representations. In Order PO-3035, Assistant Commissioner Brian Beamish stated that when dealing with records of recent origin, it is reasonable to expect that the records "should be kept in a consistent and easily searchable manner." In that order, Assistant Commissioner Beamish considered a fee estimate related to records from January 5, 2005, to December 31, 2010, and found that 32 hours of actual search time to produce the responsive records demonstrated that the university's "records management process [was] unwieldy and not conducive to easily focused searches for a well defined class of records." Assistant Commissioner Beamish further noted that an "appellant should not bear the financial burden of the university's failure to implement proper records management practices."

[29] Applying Assistant Commissioner Beamish's reasoning to this appeal, records from 2007 to 2011 should be maintained consistently and in a manner conducive to an easily performed search for four and a half fiscal years' worth of expenses claimed by hospital executives and board members. While the hospital asserts that its records are well organized and accessible for its purposes, and that it maintains its electronic and hard copy records in a manner consistent with industry accounting practices and legal requirements, these are not the benchmarks for my deliberations under the *Act*. Similarly unhelpful is the hospital's submission that prior to the enactment of the *BPSAA*, there was no necessity for public hospitals to track expense information in the manner requested by the appellant, which seems to imply that the appellant has requested information in a particular way when this is not the case.

[30] The appellant has requested "all expense claims." As a publicly funded institution subject to the *Act*, it is reasonable to expect the hospital to have records for all of the expense claims it has received from its executives and board members in the last four and a half fiscal years, and to expect it to be able to retrieve these records without taking an entire work week to do so. Requiring 37.5 hours of search time to locate the expense related records for the previous four and a half fiscal years demonstrates to me that the records are not maintained in an easily searchable manner, despite the hospital's assertion that they are, and I find that the appellant should not bear the resulting financial burden.

[31] Also, it appears that the hospital has included charges in its fee estimate that do not accord with the *Act* and Regulation 460. For example, in its explanation of its search time activities dated May 3, 2012, the hospital has included "coordinating the timing of the search for the records" as a cost in its fee estimate. This office has previously found that coordinating a search is an administrative function and not an activity that can be considered as part of a "manual search" as contemplated by section 57(1)(a).⁶ I find that the search coordination cost cannot be charged under section 57(1)(a) as it is not a "manual search." Similarly, I find that the hospital's "due diligence...to reconcile details of files to Meditech detailed reports" included as a cost in its May 3, 2012, correspondence, is not a charge that is permitted under section 57(1)(a). The hospital's admission that this step is to be performed "once all files [are] obtained" demonstrates that this reconciliation exercise is not part of the "manual search required to locate a record", but rather, part of the hospital's necessary reconciliation process to ensure that the hard copy records that are supposed to relate to its electronic Meditech records, actually do. While the search time for the hard copy records can be charged, I find that the cost of the reconciliation cannot be charged to the appellant under section 57(1)(a).⁷

[32] Accordingly, taking into account the scope of the request; the fact that the records are of recent origin; the manner in which the hospital's records are maintained and the actions necessary to locate them; the permitted charges under section 57(1)(a); and the principle that the appellant should not bear the financial burden of the hospital's failure to maintain its expense related records in a consistent and easily searchable manner, I find that ten hours is a reasonable amount of time for the hospital's manual search. I therefore reduce the search time in this appeal to ten hours, for a total cost of \$300.

[33] Regarding the 14.5 hours of preparation costs calculated by the hospital under section 57(1)(b) in its fee estimate decision, the hospital attributes one hour to its human resources department; one hour to its freedom of information office; and the remaining 12.5 hours to its financial services department for "[m]anually going through

⁶ Order PO-1943.

⁷ Order MO-1977.

every expense report that was pulled for applicable individuals and going through each submission and summarizing the information in the format presented.”⁸

[34] Although the hospital submits in its representations that 12.5 hours are required to review the expense report details and summarize the information in the “required format”, I note that the appellant has not requested the records in any particular format. In fact, she states in her representations that she agreed to receive the expense claims in the online expense reporting format used by the hospital for corporate accountability purposes, at the request of the hospital, even though this format does not provide the complete listing of executive and board expenses she requested. Considering the appellant has agreed to the information being provided in the format proposed by the hospital, and recognizing that the hospital has to extract the individual expense claim information from its records and put it into the format, some preparation time will undoubtedly be required. Based on the representations of the hospital I am satisfied that four hours of preparation time is reasonable for this purpose.

[35] The one hour of preparation time attributed to its human resources department is for the identification of past board members and executives who fall within the scope of the request, and to identify and prepare records. Section 57(1)(b) prescribes a charge for “the costs of preparing a record for disclosure”, and it does not include time for identifying either responsive records, or individuals for whom responsive records should exist. Also, the hospital has not adequately explained the nature of record preparation to be performed by its human resources department for me to be satisfied that it is properly charged under section 57(1)(b). Accordingly, I do not uphold this portion of the fee.

[36] Regarding the one hour of preparation time attributed to the work of the hospital’s freedom of information office, the hospital claims this is required for severing information that is exempt from disclosure under the *Act*. This activity is one that the hospital may properly charge for under section 57(1)(b). However, the hospital has not explained why it needs to sever information when it is extracting the responsive claims information from the expense reports and records, and “summarizing the information in the required format.” Accordingly, I do not uphold this portion of the fee either.

[37] I uphold the cost of \$8.00 for 40 pages of photocopies included in the fee estimate by the hospital, as this portion of the fee has been calculated in accordance with section 6 of Regulation 460.

[38] In summary, I uphold ten hours of search time at a cost of \$300, four hours of preparation time at a cost of \$120, and \$8.00 for photocopies.

⁸ This description appears in the May 3, 2012, summary of activities provided by the hospital’s finance department.

Issue B: Should the fee be waived?

[39] Section 57(4)(c) of the *Act* requires an institution to waive fees in circumstances where payment of the fee would cause financial hardship. It states:

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,

...

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

...

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

[41] 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

[42] The institution or this office may decide that only a portion of the fee should be waived.¹¹

Representations

[43] The hospital asserts that the appellant has not established a basis for a fee waiver under section 57(4)(c) of the *Act*. It argues that the appellant has failed to demonstrate that the records at issue relate directly to a public health and safety issue such that their dissemination would benefit public health or safety. The hospital states that the records are financial in nature and address authorized expenses paid to executives, and to volunteer hospital board members who receive no remuneration for the extensive work that they perform. The hospital adds that the records do not relate to decisions regarding the provision of health services or health care cuts. In addition,

⁹ Order PO-2726.

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

¹¹ Order MO-1243.

the hospital notes that as of April 2011, it has been posting information relating to executive benefits on its web site.

[44] The hospital concludes by asserting that the appellant has not established that it would be fair and equitable in the circumstances to waive the fee. It states that it responded to the request in a timely and cooperative manner and it offered a partial waiver of its fees. It adds that considering the size of the request and the extent of the effort required to process it, a fee waiver would unreasonably drain the hospital of its limited resources, which resources would otherwise be diverted for patient care purposes.

[45] In her representations, the appellant asserts that the fee should be waived because the information is a matter of public health or safety. The appellant argues that cuts to care, staffing and programs made by the hospital, impact public health and safety. She further argues that the public needs to be satisfied that money is being spent properly and that cuts are being made in the right areas to protect public health and safety. The appellant states that during the time period covered by her request, the hospital closed roughly 20 beds and had to find savings of about \$7 million to balance its budget.

[46] The appellant also points out that she has twice agreed to narrow her request. First, she agreed to receive the expense claims in the online expense reporting format used by the hospital for corporate accountability purposes; she notes that this format does not provide a complete listing of executive and board expenses. She also agreed to narrow the request so that it corresponds with the hospital's fiscal year; this compromise resulted in expense claims from January 1, 2007, to March 31, 2007, being excluded from the scope of the request.

[47] The appellant continues that the public should have affordable access to as many years as the *Act* allows. She states that hospitals changed the rules for executive and board expenses in anticipation of these expenses becoming public under the *BPSAA*; for example, executives were previously permitted to submit expense claims for gas, maintenance and insurance costs in addition to their car allowances, however, in August 2011, the rule was changed to include these costs in the car allowance. The appellant argues that in light of these changes, it is important to make expenses in the past years public, as the expenses currently posted on the hospital's web site are not representative of past expenses. She argues that past expenses must be made public to show how taxpayer dollars were previously spent and compare how they are being spent now, to understand the changes, and to properly evaluate whether all the necessary changes were made.

[48] The appellant concludes by arguing that at a time of tight budgets and hospital cutbacks that have the potential to impact public health and safety, it is crucial that the public is aware of how hospitals spend money. She points out that expenses paid to

executives are not insignificant amounts of money; for example, the hospital's CEO receives \$1,100 per month as a car allowance, and this is only one category of expense for one member of the executive. She also notes that it does not matter that board members are not paid for their extensive work; their expenses still cost the hospital money and are deducted from increasingly tight budgets. The appellant argues that any amount of money paid takes money away from frontline health care services provided by the hospital, and therefore, expenses have the potential to impact decision making with respect to the provision of health care services.

Analysis and Findings

[49] The focus of section 57(4)(c) is "public health or safety." Under this section, the appellant bears the onus of demonstrating that a fee waiver is justified. To discharge this onus, the appellant must establish that the records relate directly to a public health or safety issue.¹² Previous orders of this office have established that 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.¹³

[50] The public health concern advanced by the appellant is the way in which taxpayer derived health care dollars are being spent by the hospital. This concern is a valid one in a publicly funded health care system with limited financial resources; however, it cannot be said that the dissemination of expense claims paid in the past five years by the hospital, including those paid before the enactment of the *BPSAA*, will contribute meaningfully to the development or understanding of an important public health issue.

[51] In the health care context, this office has found that dissemination of records relating to the quality of care and service at group homes¹⁴ and long-term care facilities¹⁵ will benefit public health or safety. This office has also found that dissemination of records relating to the amount the province has paid for out of province health care for cancer treatment and the types of treatment involved will benefit public health and safety.¹⁶

[52] While I agree with the appellant that hospital board and executive expenses should be publicly available and are of great public interest, I am not satisfied that the dissemination of the records in this appeal reaches the threshold set out in section 57(4)(c).

¹² Order PO-1962.

¹³ Orders MO-1336, MO-2071, PO-2592 and PO-2726.

¹⁴ Order PO-1962.

¹⁵ Orders PO-2278 and PO-2333.

¹⁶ Order PO-2566.

[53] Moreover, considering my significant reduction of the fee estimate above, I do not believe that it is fair and equitable in the circumstances, to consider a further waiver of the fee.

[54] Accordingly, I uphold the hospital's denial of a fee waiver in this appeal.

ORDER:

1. I reduce the search time claimed by the hospital to ten hours, for a total fee of \$300.
2. I reduce the preparation time claimed by the hospital to four hours, for a total fee of \$120.
3. I uphold \$8 for photocopying costs.
4. I uphold the hospital's decision to deny the request for a fee waiver.

Original signed by: _____
Stella Ball
Adjudicator

_____ May 29, 2013