

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3375

Appeal PA12-348

Ministry of Training, Colleges and Universities

August 8, 2014

Summary: The sole issue in this appeal is the fee estimate charged by the ministry for access to records relating to Georgian College. The ministry's fee is upheld, in part. The fee for search time and preparation of records is upheld. The fee for computer program development is not upheld.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 57

Orders and Investigation Reports Considered: PO-3035

OVERVIEW:

[1] The Ministry of Training, Colleges and Universities (the ministry) received five requests under the *Freedom of Information and Protection of Privacy Act* (the *Act*), from a single requester. The request that is the subject of this appeal reads as follows:

All records pertaining to Georgian College (from 2009-present). This is meant to include but is not limited to emails, letters, memos, notes to file, etc.

Without foregoing the generality of the request, with regards to documents pertaining to BIU [Basic Income Unit] and WFU [Weight Funding Unit] only, we are prepared to limit BIU and WFU documents to BIU and WFU documents for students who are registered through the partnership agreement.

[2] The ministry issued an interim decision with a fee estimate in the amount of \$4,620.00, advising that a deposit of \$2,310.00 was required before it would process the request. The ministry's fee estimate charged for 143 hours of search time (at \$30.00/hour), 3 hours for computer program development (at \$60.00/hour) and 5 hours for record preparation time (at \$30.00/hour).

[3] The ministry also stated that it expects that the mandatory exemption in section 17 (third party commercial information) of the *Act* may apply to some of the responsive records.

[4] The requester, now the appellant, appealed the ministry's fee estimate, claiming that it is excessive and should be reduced.

[5] During mediation, the parties participated in a teleconference to discuss the possible ways the fee estimate could be reduced. The ministry provided the appellant with additional information on the nature of the search and the number of staff that would be involved. The ministry took the position that the appellant's request is very broad and recommended that she reduce the scope of the request. To assist the appellant with narrowing her request, the ministry agreed to provide her with a description of the program units involved with the search and a detailed fee breakdown. The appellant advised the mediator and the ministry that she is not interested in any records from Georgian College's Alumni file.

[6] The ministry then issued a detailed version of its fee estimate, describing the search time for each branch/unit of the ministry and providing some explanatory notes on the preparation and computer program development activities. The ministry also provided the appellant with information describing its records retention schedules, relevant organizational charts, the program descriptions of the divisions involved in the search and other documentation, to assist the appellant with narrowing her request.

[7] The appellant then revised the time period of her request from 2011 to 2012, thereby eliminating any archived emails and hard copy records from the off-site Records Centre from the scope of her request.

[8] Upon receipt of the appellant's narrowed request, the ministry issued a revised fee estimate of \$3,060.00, reducing the search time to 91 hours. The ministry advised that the preparation and computer program development fees remained unchanged and that it did not include photocopy charges in the fee estimate.

[9] After further discussions, the appellant narrowed her request to the following:

Records held by the ministry pertaining to Georgian College (from 2011 – present). This is meant to include emails (for the last year only), letters and memos.

Without forgoing the generality of the request, with regards to documents pertaining to BIU and WFU only, we are prepared to limit BIU and WFU documents to BIU and WFU documents to students who are registered through the partnership agreement.

[10] In response to the narrowed request, the ministry issued a second revised fee estimate of \$2,520.00, reducing the search time to 73 hours. The ministry reiterated its previous preparation and computer program development fees, as it maintains that the request is still broadly worded. The ministry's final fee estimate, which is at issue in this appeal, reads as follows:

REVISED FEE ESTIMATE – \$2520.00 from \$3060.00

91 hours of search time reduced to 73 hours:

Who is searching from Strategic Policy and Programs Division:

- Research and Planning Branch – 16 staff (57 hours)
- Programs Branch – 1 staff (6 hours)

Who is searching from the Postsecondary Education Division:

- Postsecondary Finance and Information Management Branch, Colleges Finance and Universities Finance Unit – 3 staff (10 hours)

Photocopying charges not included in fee estimate

3 hours of computer program development – it may be necessary to develop a computer program or some other method of producing a record from a machine readable record. The charge is restricted to a personnel charge and does not include computer processing time. The charge is \$60.00 per hour (\$15.00 for 15 minutes)

5 hours of record preparation time – severing exempt information such as s. 17 (third party information) or non-responsive information

[11] As mediation did not resolve the appeal, the file was moved to the adjudication stage of the appeals process where an adjudicator conducts an inquiry under the *Act*. I began my inquiry by sending a Notice of Inquiry to the ministry, seeking its representations on whether the fee estimate should be upheld. The ministry submitted representations. I then invited the appellant to make representations in response to

the issues raised in the Notice of Inquiry and the ministry's arguments, which were shared in accordance with section 7 of this office's *Code of Procedure and Practice Direction 7*. The appellant also submitted representations. I then sought representations from the ministry in response to those submitted by the appellant. The ministry submitted representations.

[12] In the discussion that follows, I uphold the ministry's fee estimate in part.

DISCUSSION:

Should the fee estimate be upheld?

[13] 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 to the responsive records.¹ The fee estimate also assists requesters to decide whether to narrow the scope of a request in order to reduce the fees.²

[14] 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.³

[15] In all cases, the institution must include a detailed breakdown of the fee, and a detailed statement as to how the fee was calculated.⁴

[16] 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.

[17] 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;

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

² Order MO-1520-I.

³ Order MO-1699.

⁴ Orders P-81 and MO-1614.

- (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.

[18] More specific provisions regarding fees are found in sections 6, 7 and 9 of Regulation 460. Those sections read:

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

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

Representations

[19] In its representations, the ministry states that the request that is the subject of this appeal is one of five made to the ministry at the same time. The ministry states that it made a strong effort to assist the appellant in clarifying or narrowing all of her requests. The ministry states that, when it received this request, the FOI Coordinator advised the appellant that her request was very broad and would likely garner a large fee estimate. The FOI Coordinator also noted that, since the request pertained to Georgian College, it might be preferable for the appellant to make the request directly to the college. The appellant confirmed that she wished to keep her request with the ministry.

[20] The ministry states that the appellant's original request was worded very broadly, as it contains the words "all records" and "without foregoing the generality of the request". The ministry states that two large divisions of the ministry have custody or control of responsive records: the Postsecondary Education Division and the Strategic Policy and Programs Division. The ministry states that each division has multiple branches and units that would have responsive records, because various program areas deal with Georgian College in different capacities. For example, the ministry states that the Postsecondary Finance and Information Management Branch (in the Postsecondary Education Division) deals with Georgian College in its role in establishing and administering the operation and capital funding framework for colleges and universities; administering transfer payments to postsecondary institutions; and administering and reporting on finances related to student assistance programs.

[21] The ministry states that, during mediation, several senior managers from the ministry with expertise in the records took part in a teleconference and explained to the appellant how various program areas would have records relating to Georgian College, and many staff in multiple program areas would need to undertake a search for records. In order to assist the appellant in understanding the work of each applicable program area, the ministry sent the appellant a detailed fee calculation, organization charts and program descriptions for the Postsecondary Education Division and the Strategic Policy and Programs Division. As discussed in the background, the appellant amended her request twice and the ministry's final fee estimate is for \$2520.00.

[22] With regard to its final fee estimate, the ministry states that it sought the advice of senior managers in each of the program areas that would have custody or control over records responsive to the appellant's request. The ministry submits that compiling a representative sample of records would have been unhelpful because the search

would be undertaken in numerous program areas, each with different relationships with Georgian College.

[23] The ministry takes the position that the appellant's request is too broad and notes that the IPC has found that a request for "all" information relating to a particular subject is an example where there is a potential to frustrate the right to access provided for in the *Act* because a request for "all" information may not be sufficiently descriptive. The ministry states that the search for records would be undertaken by two large Divisions, the Postsecondary Education Division and the Strategic Policy and Programs Division, as well as their various branches, which also have unique relationships to Georgian College. At the most recent estimate, the ministry states that 20 staff within these two divisions would need to undertake the searches for records. The ministry states that only a narrowing of the subject matter will reduce the search fees.

[24] In her representations, the appellant takes the position that the fee estimate is far too high. The appellant states that she worked very closely with the mediator to narrow her request. The appellant submits that, not only did she narrow her request significantly, but she removed areas that were claimed by the ministry to be the most costly in terms of search requirements. However, the appellant submits that the subsequent reductions in the fee estimates are not commensurate with the type and extent of information that was removed for the request.

[25] The appellant submits that the ministry's representations do not demonstrate how it developed its fee formula or how it is able to claim five minutes of reading time for each email. The appellant also submits that the large fee may be caused by a varied and dispersed filing system. In support of her representations, the appellant refers to Order PO-3035, in which Assistant Commissioner Brian Beamish found as follows:

In my view, it is reasonable to expect that university records from this time period should be kept in a consistent and easily searchable manner. If they are not, which I believe is the case in this appeal, I am of the view that the appellant should not bear the financial burden of the university's failure to implement proper record management practices. Consequently, I find that the search time is excessive and that the university has not provided adequate evidence to satisfy me that the search time was reasonable.

[26] The appellant submits that the records requested ought to be easily accessible and that she should not bear the burden of cost if the ministry has filed the documents in such a way that a number of staff members are required to locate them. The appellant concludes that the search time is unreasonable and should be significantly reduced, and that the record preparation time has been overly inflated.

[27] In reply, the ministry re-iterates that the request was not significantly narrowed by subject matter. The ministry states that, unless the request is narrowed by subject matter, a large number of staff will be required to search for the records, even though the time period or email search has been narrowed. The ministry states that, as the appellant has requested all "records held by the ministry pertaining to Georgian College", a comprehensive search will need to be undertaken in all relevant program areas. The ministry states that it has made the managers from the two divisions available to the appellant to explain the organization of the ministry and the effect such a broad request will have on the time it will take to complete the search for responsive records. The ministry states that the time required to complete the search is not a result of inadequate records management practices. Rather, the ministry submits that the long search time is caused by the breadth and generality of the requests.

[28] The ministry states that it did not include five minutes of reading time per email in the fee estimate at issue in this appeal. The ministry states it has, in good faith, kept the figures for record preparation time low and excluded photocopying and CD costs from the fee estimate. The ministry also notes that the search time for the request is only an estimate. Accordingly, if the actual searches take less time, the ministry states that the fee balance would be reduced or waived as appropriate.

Findings

[29] On my review of the evidence and the arguments of the parties regarding the fee estimate, I am prepared to uphold the ministry's fee estimate in part.

[30] With respect to search time under section 57(1)(a), I agree with the ministry that the appellant's request is very broad and it is the range of the search that is the cause of the large search fee. In her representations, the appellant refers to Order PO-3035, in which Assistant Commissioner Beamish stated that records of recent origin should be kept in a consistent and easily searchable manner and that the appellant in that case should not bear the financial burden of the university's failure to implement proper record management practices. While I agree with Assistant Commissioner Beamish's findings, I find that they are not applicable to the facts of this appeal. In Order PO-3035, the request was for copies of all expense receipts submitted to the university for all domestic and international flights taken by a named individual for a five year period. In this appeal, the appellant is seeking all records under the ministry's custody or control relating to Georgian College. While the appellant has limited the scope of her request for certain records, such as emails, the request is still extremely broad and is not limited to particular areas for search as the request in Order PO-3035. The appellant continues to seek records from all of the branches and divisions of the ministry that relate to Georgian College.

[31] Upon review of its representations, I find that the ministry has provided me with sufficient evidence to demonstrate the amount of time that staff from the different branches and divisions will take to locate the responsive records. For these reasons, I uphold the 73 hours of search time under section 57(1)(a) at \$30 per hour, for a total cost of \$2190.00. I note that the ministry has stated that the search time is only an estimate and if the actual search takes less time, the ministry will reduce the fee balance as appropriate.

[32] With respect to section 57(1)(b), the ministry allocated five hours at a cost of \$30 per hour, with a total of \$150.00 in its fee estimate, as the time for preparing the records for disclosure. The ministry indicates that the time is required to sever exempt information, such as information exempt under section 17 (third party information) of the *Act*, or non-responsive information. Generally, this office has accepted that it takes two minutes to sever a page that requires multiple severances.⁵ Using this formula, I find that the ministry's estimate of \$150.00 would cover the preparation of 150 pages of responsive records. In light of the appellant's broad request, I find that it is not unreasonable for the ministry to estimate that it will be required to prepare approximately 150 pages of records for disclosure. Accordingly, I uphold this part of the fee estimate.

[33] With respect to section 57(1)(c), the ministry allocated three hours at a cost of \$60.00 per hour as the time for computer program development. In its fee estimate, the ministry states that it may be necessary to develop a computer program or some other method of producing a record from a machine readable record. The ministry states that the charge is restricted to a personnel charge and does not include computer processing time. In the Notice of Inquiry sent to the ministry, I asked the ministry to describe, in detail, the type of program that will be developed to complete the search and the actions required and the time involved. The ministry did not respond to these questions in its representations nor did it offer any further explanation regarding the computer program development. As I have not been provided with information to justify this part of the fee estimate, I do not uphold it.

[34] In conclusion, I uphold the ministry's fee estimate in part. In particular, I uphold the ministry's estimate for search costs and preparation of records. However, I do not uphold the ministry's fee for computer program development.

ORDER:

1. I uphold the ministry's estimated fee of \$2190.00 for 73 hours of search time.
2. I do not uphold the ministry's estimate for computer program development.

⁵ Orders MO-1169, PO-1721, PO-1834 and PO-1990.

3. I uphold the ministry's estimated fee of \$150.00 for five hours of record preparation time.

Original signed by: _____
Justine Wai
Adjudicator

_____ August 8, 2014