

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3379

Appeal PA12-350

Ministry of Training, Colleges and Universities

August 18, 2014

Summary: The sole issue in this appeal is the appropriateness of the fee estimate charged by the ministry for access to records relating to the development of satellite campus policies. In this order, the ministry's fee estimate is upheld and the appeal is dismissed.

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

Orders and Investigation Reports Considered: PO-3035

OVERVIEW:

[1] The Ministry of Training, Colleges and Universities (the ministry) received five requests for information 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 the development of satellite campus policies, including all records pertaining to the existence or development of a satellite campus in Simcoe County. This is meant to include but is not limited to, notes to files, letters, emails, memos, policies, draft policies, etc. We are requesting all documents from 2009-present.

[2] The ministry issued an interim decision with a fee estimate in the amount of \$5730.00, advising that a deposit of \$2865.00 was required before it would process the request. The ministry's fee estimate was calculated based on 186 hours of search time (at \$30.00/hour) and 5 hours of record preparation (at \$30.00/hour).

[3] The ministry also advised the requester that it expects that the mandatory exemption at section 17(1) (third party 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 the estimated fee is excessive and should be reduced.

[5] During mediation, the parties participated in a teleconference with the mediator to discuss the ways in which 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.

[6] To assist the appellant with narrowing her request, the ministry issued a detailed version of its fee estimate, describing the search time and providing some explanatory notes on the preparation of the records. 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.

[7] The appellant then revised the time period of her request for emails to include only those created from 2012 to present, thereby eliminating any archived emails, and eliminated hard copy records from the ministry's 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 \$2040.00, reducing the search time to 63 hours. In the letter, the ministry stated that the preparation fee remains unchanged.

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

Records pertaining to the development of satellite campus policies, including records pertaining to the existence or development of a satellite campus in Simcoe County. This is meant to include letters, emails (for the last year only), memos, and only the recent version of a draft policy. We are requesting documents from 2011-present.

[10] In response to the narrowed request, the ministry issued a second revised fee estimate of \$1590.00, reducing the search time to 48 hours. The ministry reiterated its previous preparation fee, 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 - \$1590.00 from \$2040.00

63 hours of search time reduced to 48 hours

Who is searching from Strategic Policy and Programs Division:

- The Research and Planning Branch: 16 staff (48 hours)

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 should be upheld. The ministry submitted representations. I then invited the appellant to make representations in response to 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 which were, in turn, shared with the ministry, which submitted further representations by way of reply.

[12] In the discussion that follows, I uphold the ministry's fee estimate and dismiss the appeal.

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

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

² Order MO-1520-I.

- 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;
- (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.

³ Order MO-1699.

⁴ Orders P-81 and MO-1614.

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 that the appellant 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 pertains to other institutions under the *Act*, it might be preferable for the appellant to make her request directly to those institutions. The appellant confirmed that she wished to proceed with her request to the ministry.

[20] The ministry states that the main issue regarding the appellant's original request is that it was for "all records" pertaining to the development of satellite campus policies. The ministry states that the Strategic Policy and Programs Division has custody and control of these records. While the responsive records are within a single division, the ministry states that since the appellant requested "all records", this would include the satellite campus policies for potentially every university and college in Ontario, making the search extensive.

[21] The ministry submits that, during mediation, its FOI Unit staff and senior managers with expertise in the records took part in a teleconference with the appellant and explained to her that the subject matter of her request would have to be narrowed to reduce the number of staff searching for records. In order to assist the appellant in understanding the workings of each applicable program area, the ministry sent the appellant a detailed fee calculation of her request, organization charts and program descriptions for the Strategic Policy and Programs Division.

[22] However, even with this additional information and mediation, the ministry states that the appellant decided to narrow her request only by time period, by limiting an email search and requesting only more recent versions of policies. Further, the ministry submits that despite the fact that it seems the appellant is most interested in the satellite campus policies for Simcoe County, she did not narrow her request by subject matter. With regard to the second amended request, the ministry states that the appellant could have narrowed her request by selecting the postsecondary institutions she was most interested in (in case she wants to compare policies in Simcoe County with other regions and/or institutions), but chose to keep the request very broad.

[23] With regard to its final fee estimate of \$1590.00, the ministry states that it sought the advice of senior managers in the Strategic Policy and Programs Division with custody and control of the records. The ministry takes the position that the appellant's request continues to be very broad. The ministry notes that this office 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 a large division where at the most recent estimate, sixteen staff within the division would need to undertake a search for responsive records. The ministry states that only a narrowing of the subject matter of the request will reduce the search fees. The ministry also submits that the appellant bears the onus to identify the records she is most interested in.

[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 term of search requirements. However, the appellant submits that the subsequent reductions in the fee estimate are not commensurate with the type and extent of information that was removed from the scope of her 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 the search for all records relating to the development of satellite campus policies since 2011 for all postsecondary institutions in Ontario will engage multiple staff records (i.e., past and present) in the Research and Planning Branch of the Strategic Policy and Programs Division. The ministry states that it made its senior managers from the Strategic Policy and Programs Division 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 lengthy 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 amended 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, I am prepared to uphold the ministry's fee estimate.

[30] With respect to the search time under section 57(1)(a), I agree with the ministry that the appellant's request is very broad and that the range of the search is at the root 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 a requester generally should not bear the financial burden of the university's failure to implement proper 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 appellant sought access to 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 the development of any satellite campus policies since 2011 for all postsecondary institutions in Ontario.

[31] Although the appellant limited the scope of her request for certain categories of records (i.e. by limiting the time period for emails), I find that her request is still extremely broad and is not limited to a particular subject matter, as was the case in the request that gave rise to Order PO-3035. Further, I agree with the ministry that while it appears that the appellant is more focussed on Simcoe County, the appellant did not limit her request to include records relating only to Simcoe County. Unlike the request in Order PO-3035, the appellant seeks records from the ministry that relate to the development of satellite campus policies generally throughout the province.

[32] Based on my 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 Research and Planning Branch would be required to take to locate the responsive records. For these reasons, I uphold the estimated 48 hours of search time under section 57(1)(a) at \$30 per hour, for a total cost of \$1440.00. 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.

[33] 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 required for preparing the records for disclosure. The ministry indicates that this time is required to sever exempt information, such as information exempt under section 17(1) (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

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

also uphold this part of the fee estimate. However, I note that if the actual preparation of records takes less time, the ministry should reduce the fee balance, as appropriate.

[34] In conclusion, I uphold the ministry's fee and dismiss the appeal.

ORDER:

I uphold the ministry's fee estimate and dismiss the appeal.

Original signed by: _____
Justine Wai
Adjudicator

_____ August 18, 2014