

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3493

Appeal PA14-70

Brock University

May 22, 2015

Summary: The appellant made a request to Brock University (the university) for marketing, consulting and other expenses relating to its "Both Sides of the Brain" campaign for specified academic years. After being denied a waiver of the university's fee estimate for processing his request, the appellant appealed both the fee estimate and the denial of fee waiver to this office. By the close of the inquiry process, the sole issue to be determined was the appropriateness of the university's denial of a waiver of its last revised fee estimate. In this order, the adjudicator upholds the university's denial of a further fee waiver and dismisses the appeal.

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

OVERVIEW:

[1] The appellant made a request to Brock University (the university) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

The annual budgets for the "Both Sides of the Brian" campaign, from 2009/2010 to 2013/2014. The budgets should include, but not be limited to[,] salaries and benefits of employees working on the campaign, marketing and consulting costs, and all other expenses.

[2] The university issued an interim access and fee estimate decision, advising that a budget specific to the campaign had not been developed, and that no employees had been hired specifically to implement the campaign. As a result, there were no budgets, employee salaries or benefits dedicated to the campaign. The university proposed instead to conduct a search of its record-holdings for marketing, consulting and other expenses relating to the campaign. The university indicated it interpreted the request to include the costs for "consultants, development and creative service contracts, collateral/material purchases, advertising buys, and all other expenses."

[3] The university provided a fee estimate of \$3,000 to process the appellant's request, based on an estimated 100 hours of search time at a cost of \$30.00 per hour. The university noted that while it expected to be able to release the requested information, once located, to the appellant in full, it could not make a final decision on access until the information is compiled. The university requested a deposit of 50% of the estimated fee before taking further steps to process the request. The university also sought an extension of time to process the request, in light of the potentially large number of records involved.

[4] In response, the appellant wrote to the university to request a waiver of the fee on the basis of financial hardship. In his fee waiver request, the appellant also alluded to a public interest in transparency of the university's operations.

[5] The university and the appellant attempted to reach a compromise solution to reduce costs. After some discussion, the appellant agreed to narrow the scope of his request by eliminating records from the 2010/2011 academic year from the request. The university issued a revised fee estimate, in light of the narrowed request, of \$2,280. In separate correspondence, the university denied the appellant's request for a fee waiver. It requested a deposit of \$1,140, representing 50% of the revised fee estimate, in order to proceed with the appellant's request.

[6] The appellant appealed the university's decision to this office.

[7] During the mediation stage of the appeal process, the university provided a detailed explanation of the basis for its fee estimate, which was shared with the appellant. The appellant provided the university with documentation to support a second fee waiver request. Based on the information provided by the appellant, and in recognition of the appellant's cooperation with the university to reduce costs, the university agreed to waive half the fee. It provided a new fee estimate of \$1,140, and requested a fee deposit of \$570 in order to proceed with the request.

[8] The appellant wished to appeal the new fee estimate and the university's denial of his fee waiver request. Before the close of mediation, the appellant confirmed he takes no issue with the university's proposed search for responsive information, or with its request for a time extension. In addition, during the inquiry stage of the appeal

process, the appellant withdrew his objection to the university's revised fee estimate. As a result, the sole issue in this appeal is whether the university's denial of a fee waiver was appropriate and in keeping with the requirements of the *Act*.

[9] The adjudicator previously assigned to this appeal sought and received representations from the university and the appellant, which were shared in accordance with this office's *Practice Direction Number 7* and section 7 of its *Code of Procedure*. That adjudicator also sought reply representations from the university on the issue of the fee waiver. The appeal was then transferred to me to complete the inquiry. For the reasons that follow, I uphold the university's denial of a fee waiver.

DISCUSSION:

[10] Section 57(1) requires an institution to charge fees for requests under the *Act*.¹ Where the fee exceeds \$25, section 57(3) requires an institution to provide the requester with a fee estimate.

[11] As the appellant has withdrawn his objection to the fee estimate produced by the university, the sole issue in this appeal is whether the fee estimate should be waived. 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. Those provisions state:

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.

¹ In addition, more specific provisions regarding fees are found in sections 6, 6.1, 7 and 9 of Regulation 460.

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.

[12] 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.²

[13] The requester is therefore required to meet a two-part test in order to establish that a fee waiver ought to be granted: first the requester must establish that one of the bases for a fee waiver under section 57(4) has been met; second, the requester must establish that a fee waiver is "fair and equitable" in the circumstances.

[14] During the mediation and inquiry stages of this appeal, the appellant provided the university and this office with copies of recent pay stubs, details of some of his expenses and a personal bank assessment in support of a financial hardship claim under section 57(4)(b) of the *Act*. In his representations, the appellant also refers to the importance of transparency, accountability and openness in university operations, and particularly in the decision-making processes around its "Both Sides of the Brain" campaign during a time of rising tuition fees and budget cuts. I will treat his submission as also raising as a basis for a fee waiver section 57(4)(c), which contemplates a fee waiver where dissemination of the records will benefit public health or safety.

[15] The university says it is prepared to assume, based on the evidence provided by the appellant, that payment of the estimated fee may cause some financial hardship to the appellant. As the university is prepared to accept there may be a basis for a fee waiver under section 57(4)(b), I will treat the first part of the test for fee waiver as being met.

² Order PO-2726.

[16] The university also recognizes that the appellant's submissions implicitly make the case for a fee waiver under section 57(4)(c). I agree with the university, however, that the appellant has not established a basis for fee waiver under this head. I accept that the requested information may be a matter of public interest, and not merely a private interest of the appellant. I also recognize that the appellant has indicated he intends to disseminate the information he seeks. However, it is not sufficient that there be only a "public interest" in the records or that the public has a "right to know." In order to establish the basis for a fee waiver under section 57(4)(c), the appellant must demonstrate that dissemination of the requested information will benefit public health or safety. There must be some connection between the public interest and a public health and safety issue.³ I am not satisfied the appellant has established such a connection. As the university notes, the appellant's representations do not address any connection between the public interest he identifies and any public health or safety matter. Given this, he has not made out the case for a fee waiver under section 57(4)(c) of the *Act*.

[17] The appellant's entitlement to a fee waiver therefore depends on whether granting a waiver based on his financial hardship claim under section 57(4)(b) is "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.⁴

³ Orders MO-1336, MO-2071, PO-2592 and PO-2726.

⁴ Orders M-166, M-408 and PO-1953-F.

[18] The university notes that the fee estimate at issue in this appeal already reflects a 50% reduction of its estimated costs to process the appellant's request, in recognition of the fact the appellant provided some documentation to demonstrate financial hardship and that the appellant worked with the university to narrow the scope of his request. Any further reduction of the fee would not be fair and equitable, it submits, considering the university also worked with the appellant in a timely and cooperative manner to narrow and clarify the scope of the request, and that a complete waiver of the fee would shift an unreasonable burden of the cost from the appellant to the university.

[19] In support of the latter consideration, the university states that by waiving half its fee, it is already agreeing to assume significant costs in terms of staff resources necessary to complete the searches, which it estimates will involve two employees searching and reviewing in excess of 890 pages, for a total of 170 hours of staff time. It also sets out a detailed breakdown of the estimated actual costs to process the appellant's request, which – at \$5,100 – is significantly more than the revised fee estimate of \$1,140 at issue in this appeal. The university submits that, considering the size of the request and the extent of the effort required to process it, any further fee waiver would unreasonably drain the university of limited resources that would otherwise be diverted to student purposes.

[20] In his representations, the appellant notes that he and the university have worked cooperatively in addressing his concerns around the fee estimate, and that he is willing to discuss further compromises to reduce costs, such as extending the timelines for processing his request to minimize interference with staff's usual job responsibilities.

[21] On the question of the reasonableness of shifting the burden of the cost from the appellant to the university, the appellant contrasts the fee estimate at issue in this appeal with the university's operating budget of over \$200 million, an annual housing allowance for the president of \$15,000 per year, and the president's annual salary of \$333,576. He describes the \$1,140 at issue in this appeal as "miniscule in comparison," and argues that while the cost would have no bearing on the financial health of the university, it would have a significant impact on his livelihood. Therefore, he suggests, it is fair and equitable that the fee be absorbed by the university, rather than by him.

[22] In its reply representations, the university provides figures to counteract those cited by the appellant. These include the university's \$3.2 million deficit for the 2014-2015 budget year, its \$41 million in accumulated deficits and \$135 million in external debt obligations. It also relies on some past orders of this office where, in other fact situations where a financial hardship basis for fee waiver was established, adjudicators nonetheless upheld decisions not to grant full or partial fee waivers on the basis it would not be fair and equitable in the circumstances.

[23] On the facts of this appeal, I find the appellant has not established that a further fee waiver is fair and equitable in the circumstances.

[24] While I am satisfied that the parties have worked constructively and cooperatively throughout this process, and will accept the figures cited by both parties as providing an accurate picture of the university's financial health, I find these factors alone do not weigh in favour of a fee waiver. Instead, on consideration of the university's evidence of the time and resources necessary to process the appellant's request, provided in support of the university's fee estimate (which is not in dispute in this appeal), I accept that granting a further fee waiver would shift an unreasonable burden of the cost from the appellant to the university and that to do so would not be fair and equitable in the circumstances.

[25] I agree with the university that the appellant's willingness to extend timelines for processing his request would not assist in reducing the actual costs to the university, given the request as formulated would still entail a time-consuming search of a large volume of records in multiple locations by two employees from a limited number of staff. While I accept that payment of the projected fee will cause the appellant financial hardship, I do not accept that the full fee waiver he seeks is fair and equitable in the circumstances.

[26] Additionally, while this office may grant a partial fee waiver where appropriate, I am satisfied the fee estimate of \$1,140 at issue in this appeal already reflects a significant subsidy by the university of its projected actual costs of processing the appellant's request, and that this waiver was granted by the university in consideration of the principles of fairness and equity. To require the university to assume an even greater part of the costs would not be a fair and equitable allocation of the burden between the parties.

[27] Therefore, I find the appellant has not made out the second part of the two-part test for fee waiver and his argument fails on that basis. I uphold the university's decision to deny the appellant's fee waiver request.

ORDER:

I dismiss this appeal.

Original Signed by: _____
Jenny Ryu
Adjudicator

_____ May 22, 2015