

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3537

Appeal PA13-332-3

Algoma University

October 5, 2015

Summary: The sole issue in this appeal is whether to uphold the fee estimate issued by Algoma University (the university) in response to a request it received under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The request was for access to all electronic and hard copy documents, communications, email, correspondence, notes and minutes of all meetings pertaining to the requester during a two-year period. In this order, the adjudicator upholds the fee estimate, in part. The university is ordered to reduce the fee estimate with respect to manual search time and the fee estimate for the time required to prepare records is disallowed.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 57(1); sections 6 and 6.1 of Regulation 460.

Orders and Investigation Reports Considered: Order PO-2464.

OVERVIEW:

[1] This order disposes of an appeal of a decision of Algoma University (the university) in response to a request it received under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to all electronic and hard copy documents, communications, email, correspondence, notes and minutes of all meetings pertaining to the requester, a former employee, during a four and a half year time period.

[2] The university issued a fee estimate to the requester of approximately

\$32,650.00. The requester (now the appellant) appealed the university's fee estimate to this office.

[3] During the mediation of the appeal, the appellant amended the time frame of the request to a two-year period in an effort to reduce the fee estimate. In response to the appellant's narrowed request, the university issued a revised fee estimate of \$14,724.50. The university also advised the appellant that it anticipates that the exemptions in sections 17(1) (third party commercial information) and 18(1) (economic interests of the institution) may apply to withhold some of the information responsive to the appellant's request. After reviewing the university's revised decision, the appellant confirmed that he continued to take issue with the amount of its fee estimate.

[4] The file was then moved to the adjudication stage of the appeals process where an adjudicator conducts an inquiry under the *Act*. The adjudicator assigned to the appeal sought and received representations from the university and the appellant, which were shared in accordance with this office's *Practice Direction 7*. The file was then transferred to me for final disposition. For the reasons that follow, I uphold the university's fee estimate, in part. I order the university to reduce its fee estimate to \$1,260.00.¹

DISCUSSION:

[5] The sole issue in this appeal is whether the university's fee estimate should be upheld. 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.² The fee estimate also assists requesters to decide whether to narrow the scope of a request in order to reduce the fees.³ 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

[6] 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.

[7] 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,

¹ The university may also charge the rate for photocopying as set out in sections 6 and 6.1 of Regulation 460.

² Orders P-81, MO-1367, MO-1479, MO-1614 and MO-1699.

³ Order MO-1520-I.

⁴ Orders P-81 and MO-1614.

- (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.

[8] More specific provisions regarding fees are found in sections 6 and 6.1 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.

6.1 The following are the fees that shall be charged for the purposes of subsection 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.
- 2. For records provided on CD-ROMs, \$10 for each CD-ROM.

3. 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.

3. 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.

The university's representations

[9] The university states that its initial analysis revealed that 10,549 email communications exist in which the appellant is either the sender, recipient, subject or is mentioned in the body of the emails. These emails, the university advises, will have to be reviewed and severed as necessary. In addition, the university states that it would also have to review its written documentation, which would involve searching the manual files in the current file system in each of the 14 offices that had interactions with the appellant, as well as the files that have been moved into storage. Moreover, the university states that it would need to review all of the records containing the appellant's name to determine what it can (or cannot) disclose. It further confirms that there would likely be third party information contained in the records that may be subject to an exemption in the *Act*.

[10] The university provided its breakdown of the fee estimate as follows:

- Manual search of 14 offices – each office's search time is 21 hours, for a total of 294 hours. The fee for this is 294 hours times \$30.00 per hour, which totals \$8,820.00 The university states that the \$30.00 per hour rate is based on the "average staff rate," but that this amount will be higher if an "Administrative position" is conducting the search of their office records;
- IT time to extract the emails – according to the university, this task can only be completed by IT staff and will take 21 hours. The search will involve searching the system of 14 current and previous employees who were involved with or worked directly with the appellant. The fee for this is 21 hours times \$30.00 per hour, which totals \$630.00; and
- Computer and other costs incurred in locating, retrieving, processing and copying records – the university advises that each of the 10,549 emails would have to be reviewed to determine what can and cannot be disclosed and then severed, if necessary. Each email would be reviewed for one minute, which totals 175 hours. The fee for this is 175 hours times \$30.00, which totals \$5,274.50.

[11] The university then goes on to state:

In addition to the above noted fees, there will also be a charge for any and all photo-copying required at \$0.20/page. Without having knowledge of the number of copies and time required, it is difficult to include this as part of the fee estimate. We also anticipate the possibility of withholding of some of the information due to one or more of the exemptions addressed in Section 17.1 and 18.1 of the *Freedom of Information and Protection of Privacy Act*. Due to the overly broad range of this request, it would be difficult at this time to know what specifically may be exempted under these provisions.

The appellant's representations

[12] In his representations, the appellant submits that the university confirmed during the mediation of the appeal that it does not have a protocol dealing with requests made under the *Act*, a records management system or a document retention schedule. Consequently, he argues, he is concerned about not only the quantity, but the quality of the responsive records. The appellant further states:

Given the fact that the records are of recent origin and that the search times are excessive, and since the evidence shows that there is a deficient records management system in place, I will not subsidize the development of a proper records management system at this institution.⁵

Analysis and findings

Hourly rate

[13] The university has estimated a charge of \$30.00 per hour for searching and preparing records, respectively. I find that this is the correct hourly rate, based on section 6 of Regulation 460. I remind the university that because the hourly rate for these activities is set in Regulation 460, it is not entitled to charge based on who is conducting the activity. As previously stated, the university advised the appellant that the \$30.00 hourly rate is based on the average staff rate, but that the amount will be higher if an employee in an administrative position conducts a search. This is incorrect. The rate is \$30.00 per hour regardless of who is conducting a search or preparing a record.

Cost of preparing the records

[14] The university's initial analysis states that all of the 10,549 emails responsive to the request will have to be reviewed and severed, if necessary. The university has included the time taken to review the emails for exemptions and/or severances as part of its fee for preparing the records for disclosure. I again remind the university that

⁵ The appellant cites Order PO-3035 in support of his position.

section 57(1)(b) includes the time for severing a record,⁶ but does not include the time for deciding whether or not to claim an exemption,⁷ or to identify records requiring severing.⁸

[15] In Order PO-2464, Adjudicator Catherine Corban addressed this issue and found that the time to prepare records does not include reviewing the records to determine which exemptions apply. She stated:

In outlining the actions required to prepare the records for disclosure, the Ministry submits that all of the records must be reviewed and information that is subject to one of the exemptions outlined in the *Act* must be severed. It should be noted that I cannot permit the Ministry to charge preparation time for it to review the records to determine which exemptions might apply. In Order MO-1380, Senior Adjudicator David Goodis examined section 45(1)(b), the municipal equivalent of section 57(1)(b), and summarized the approach this office has taken to this issue as follows:

“Preparing the record for disclosure” under subsection 45(1)(b) has been construed by this office as including (although not necessarily limited to) severing exempt information from records (see, for example, Order M-203). On the other hand, previous orders have found that certain other activities, such as the time spent reviewing records for release, cannot be charged for under the *Act* (Orders 4, M-376 and P-1536). In my view, charges for identifying and preparing records requiring third party notice, as well as identifying records requiring severing, are also not allowable under the *Act*. These activities are part of an institution’s general responsibilities under the *Act*, and are not specifically contemplated by the words “preparing a record for disclosure” under section 45(1)(b) (see Order P-1536).

I agree with the approach taken by this office on this issue, as articulated by Senior Adjudicator Goodis, and I apply it here. Accordingly, I will not allow the Ministry to charge for the time required to review the records and to determine what information, if any, qualifies for exemption, and which exemption applies. These activities do not, in my view, fall within the ambit of actions contemplated by the words “prepare a record for disclosure.

[16] Adjudicator Corban found that the fee estimate with respect to the preparation

⁶ Order P-4.

⁷ Orders P-4, M-376 and P-1536.

⁸ Order MO-1380.

of records was not calculated in accordance with the *Act* and previous orders of this office, and she disallowed it. I agree with and adopt the approach taken by Adjudicator Corban.

[17] Consequently, I find that the university has over-estimated the fee associated with preparing the records, given that the time required to review a record for exemptions and to review a record for severing cannot be included in the fee. With respect to the time spent to sever records, I am of the view that some of the emails would require severing, but not all of them. I find that the university's representations are speculative on this issue. Had the university conducted a search for a representative sample of responsive records, it may have been able to provide more specific and accurate evidence as to the percentage of emails that would require severing. In the absence of that evidence, and because I have no basis to substitute a different fee estimate for the time required to make severances to the responsive records, I must disallow the estimate with respect to the university's cost for preparing records.⁹

Search time

[18] The university states that the emails can only be extracted by staff from its IT department and that it will take 21 hours to complete this task. The university also states that 14 offices would be required to conduct manual searches for "manual" records, and that each of these offices will be required to take 21 hours to conduct the searches. As previously stated, in each instance the university is charging a rate of \$30.00 per hour to search.

[19] The appellant's request involves a two-year time period that is within the past five years.

[20] I accept the university's estimate with respect to the search time and hourly rate for its IT staff to extract over ten thousand emails in which the appellant is the sender, recipient, or subject of the email, as well as those where he is included in the body of the email. Given that there are 14 current and previous employees whose email accounts will have to be searched, the university is estimating that each account will require 1.5 hours to search for responsive emails. I accept the university's estimate with respect to this task.

[21] Conversely, I do not accept the university's estimate for the manual searches that will have to be conducted. The university states that manual searches of 14 offices for the purpose of locating "manual" records will take each of the 14 offices 21 hours to complete. As previously stated, the request covers a two-year period that was within the past five years. According to the university, the email search and extraction is to be

⁹ I also note that the university estimated this portion of the fee on the basis of 175 hours of preparation time at the rate of \$30.00 per hour for a total of \$5,274.50, which is incorrect. 175 times 30 equals 5,250.00.

conducted by IT staff. Therefore, the remaining records at issue are classified by the university as "manual" records. I do not find it credible that it would take 14 employees 21 hours each to conduct manual searches for "manual" records covering a two-year period. In the absence of further evidence from the university describing its records management system, or an explanation of why and how there would be such a vast number of "manual" records relating to the appellant that would require 294 hours of search time, I find this estimate to be grossly over-estimated. I am, therefore reducing the manual search time to 1.5 hours per employee for a total of 21 hours of search time.

Summary of findings

- I uphold the portion of the university's fee estimate with respect to the IT time to search for and extract the emails – 21 hours at \$30.00 per hour, totaling \$630.00;
- I am reducing the university's fee estimate for the manual search time for other records to 21 hours at \$30.00 per hour, totaling \$630.00; and
- I am disallowing the university's fee estimate for the time to prepare the records for disclosure.

[22] Consequently, I order the university to reduce its fee estimate to \$1,260.00. The university may also charge for any photocopying in accordance with sections 6 and 6.1 of Regulation 460.

ORDER:

I uphold the university's fee estimate, in part. The fee estimate is to be reduced to \$1,260.00, excluding photocopying costs.

Original Signed by: _____
Cathy Hamilton
Adjudicator

_____ October 5, 2015