

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3698

Appeal PA16-163

Toronto East General Hospital

February 21, 2017

Summary: The appellant made a request to Toronto East General Hospital for access to any records from the beginning of 2015, concerning the changing of its name. The hospital provided a fee estimate in the amount of \$326.60. The appellant appealed the fee estimate and requested a fee waiver on the ground set out in section 57(4)(c) (benefit public health or safety). The hospital denied the fee waiver request. The adjudicator does not uphold the hospital's fee estimate with regard to their search time but upholds the remainder of the fee. The adjudicator upholds the hospital's decision to deny 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), 57(4)(c).

BACKGROUND:

[1] The appellant made a request to the Toronto East General Hospital (the hospital) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

[A]ll records that were created by or came to be in the possession of the hospital or its foundation about changing the name of the hospital. This request is specifically for, but not limited to, such records that are within the control of the executive team.

To make your response to this request less onerous, you may limit the scope of your search for records to the beginning of this year [2015].

[2] The hospital issued an interim access decision and fee estimate. In this decision, the hospital indicated that while it had not yet issued a final decision, based on a review of a representative sample of responsive records, it anticipates releasing some records in their entirety, withholding some records in their entirety, and partially releasing about 30% of the records.

[3] The hospital's fee estimate was \$326.60. This estimate was based on a review of a representative sample of records, and comprises fees for 4 hours of manual search time (at \$30 per hour), 4.3 hours of preparation time (at \$30 per hour), and photocopying costs of \$0.20 per page for approximately 379 pages of responsive records. The hospital requested a deposit of 50% of the fee estimate, or \$163.30, before taking further steps to process the request. It also advised the requester that he may request a fee waiver under section 57(4) of the *Act*.

[4] The appellant appealed the hospital's fee estimate decision to this office.

[5] During mediation, the appellant requested a fee waiver on the basis that the hospital's change of name is a matter of public interest and that dissemination of the records would yield a public benefit. The hospital denied the appellant's request for a fee waiver on the grounds that he had not demonstrated that dissemination of the records would benefit public health or safety, or that he met the grounds for a fee waiver based on financial hardship. The hospital also indicated that its decision was based on its interim fee decision and that it expects a significant portion of the records to be released in part or in whole.

[6] The appellant additionally appeals the hospital's denial of his request for a fee waiver.

[7] As no further mediation was possible, this matter was transferred to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*. The parties were invited to submit representations on the issues and once received those representations were shared in accordance with section 7 of the *IPC's Code of Procedure and Practice Direction 7*.

[8] In this order I uphold the fee estimate, in part, and I uphold the hospital's decision to deny the fee waiver.

ISSUES:

- A. Should the fee estimate be upheld?
- B. Should the fee be waived?

DISCUSSION:

A: Should the fee estimate be upheld?

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

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;

[10] More specific provisions regarding fees for access to general records are found in sections 6, 7 and 9 of Regulation 460. Those sections read, 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.
- 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.

[11] Where the fee for access to a record 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

[12] 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

¹ See section 57(3) of the *Act*.

² Order MO-1699.

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

in order to reduce the fees, which the hospital offered in this case.⁴

[13] 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

[14] This office may review an institution's fee and determine whether it complies with the fee provisions in the *Act* and Regulation 460.

Representations

[15] In its representations, the hospital briefly addressed whether the fee should be upheld. It stated that the estimated fee is significantly less than the actual costs that would be incurred in processing the records request and providing copies. It submits that a significant portion of the actual costs involved in processing the request will be absorbed by the hospital. While the hospital did not refer to the charges in their representations, at mediation, the fee was clarified as follows:

- Search time of 4 hours @ \$30/hour = \$120.00
- Preparation time of 4.3 hours @ \$30/hour = \$135.00
- Copying approximately 379 pages @ \$0.20/page = \$75.80
- Total = \$330.80

[16] While the above total is \$330.80, the actual fee estimate provided to the appellant was \$326.60.

[17] In his representations, the appellant makes no submission on the fee estimate.

Analysis and findings

Search Time

[18] The institution provided a fee estimate that included 4 hours of search time. Search time can vary greatly from file to file. A large search time may be in order in situations where there are a large number of records or if the institution's searching technologies are rudimentary. Even in instances where a large volume of records exists, if the institution has a sophisticated system, its search may not take as long as an institution with a less sophisticated system and less records to search. In each case, at appeal, when an institution is explaining the time estimate relating to their search for records, it is important that it identify any issues that would account for its estimated search time.

⁴ Order MO-1520-I.

⁵ Orders P-81 and MO-1614.

[19] In this instance, I have no information from the hospital regarding the steps that have to be taken in order to conduct its search. Even though the hospital has indicated that its search would be only an estimated 4 hours, it has provided no detail to substantiate this amount of time including the record-holdings (electronic or paper) to be searched, the hospital's record storage facilities or the number of individuals who need to be contacted.

[20] The hospital states that the estimated fee is significantly less than the actual cost of processing the records. I do not take this statement to mean that it would be expending more than the 4 estimated hours to conduct its search but simply that the actual cost of the work to be done by the hospital will not be fully recovered in the estimated fee.

[21] Since the appellant appealed the institution's decision, the parties are to provide written representations concerning the issues so that I may have detailed information to decide the issues. In reviewing the hospital's representations on the issue of search time, I find that they have not provided enough information on the issue of search time to substantiate the time claimed. It is possible that the search will take the amount of time indicated by the hospital, but without some substantiation of that time, I cannot uphold the fee for search. In fact, because the hospital did not provide any justification for the actual search time to justify the fee, it has not substantiated any of the 4 hours of search time and I therefore am not prepared to allow for search time in this order.

Preparation

[22] The hospital's representations do not address preparation time specifically. I note that in its interim decision to the appellant where the fee is set out, the preparation time specifically allows for 2 minutes per page for approximately 379 pages. The hospital's interim decision also notes that some records will need to be severed.

[23] Previous orders have confirmed that preparation time in section 57(1)(b) includes time for severing a record.⁶ These cases have established that, on average, it takes two minutes per page to sever a record with multiple severances, and I accept that approach.⁷

[24] Therefore, I am satisfied that indicated fee for preparation is reasonable.

Photocopying

[25] In its interim decision to the appellant, the hospital allows for photocopying at a rate of \$0.20 per page. Allowable photocopy charges are based on the actual number of records copied for disclosure. The per-page charge of \$0.20 is correct, based on the

⁶ Order P-4.

⁷ Orders M-1169, PO-1721, PO-1834 and PO-1990.

abovementioned Regulation 460. I therefore uphold the hospital's estimated photocopy fees. Should the actual number of the photocopies be different than this estimate, the hospital is permitted to recover fees in the amount of \$0.20 per actual page.

Summary

[26] In summary, I find that the fee estimate for search is not substantiated but the estimated fees for preparing and photocopying the responsive records is appropriate. Accordingly, I uphold those portions of the hospital's fee estimate for these charges.

[27] As a result, the total fee estimate that the hospital may rely on in order to proceed with this request is:

Search time	nil
Preparation	\$135.00
Photocopying	\$75.80
Total:	\$210.80

Issue B: Should the fee be waived?

[28] The issue to be determined is whether the appellant should be granted a fee waiver under section 57(4)(c). This provision states:

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,

whether dissemination of the record will benefit public health or safety; and

[29] 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 8 of Regulation 823 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.⁸

[30] 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

⁸ Order PO-2726.

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.⁹ The institution or this office may decide that only a portion of the fee should be waived.¹⁰

[31] The appellant submits that the fee should be waived on the basis of section 57(4)(c) as dissemination of the records would benefit public health or safety.

[32] The following factors may be relevant in determining whether dissemination of a record will benefit public health or safety under section 57(4)(c):

- whether the subject matter of the record is a matter of public rather than private interest
- whether the subject matter of the record relates directly to a public health or safety issue
- whether the dissemination of the record would yield a public benefit by
 - a. disclosing a public health or safety concern, or
 - b. contributing meaningfully to the development of understanding of an important public health or safety issue
- the probability that the requester will disseminate the contents of the record.¹¹

[33] The focus of section 57(4)(c) is "public health or safety". 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.¹²

Representations

[34] In his representations, the appellant states that the dissemination of the information in the records would yield a public benefit by contributing meaningfully to the development of understanding of a public health or safety issue that is important to the east Toronto community and to the patients of the hospital.

[35] The appellant states that despite the hospital's announcements and news coverage, in his review of eight news reports, he did not come across any critical questions about the donation, such as: "Are there strings attached to this money?" The

⁹ Orders M-914, P-474, P-1393 and PO-1953-F.

¹⁰ Order MO-1243.

¹¹ Orders P-2, P-474, PO-1953-F and PO-1962.

¹² Orders MO-1336, MO-2071, PO-2592 and PO-2726.

appellant argues that release of the records would contribute to a better understanding of the commitments made by both parties to the transaction including whether any decision regarding the hospital's core functions will be guided or influenced by the involvement of the private money.

[36] The appellant states that there has been "well-founded scepticism about the value of private donations to which naming rights are attached at other large public institutions in Ontario." He states that it is "well known that universities have been asked to give 'influence' and even 'veto' power to private donors who have pledged only 60 per cent of the amount that the hospital has announced." He refers to a private donation by a specified company to the Centre of International Governance Innovation where the contributor's company secured a voice to influence and veto staffing and curriculum at the school. The appellant queries if the donation to the hospital, which was larger than the donation to the Centre, created obligations for the hospital to the donor.

[37] The appellant states that there are outstanding questions of importance, including: how much of the funds have the hospital already received; if all of the funds have not yet been received, when is the rest of the money due to be transferred to the hospital; are there any limits on the length of the time the family has purchased the naming rights.

[38] The appellant asserts that the answers to these questions are relevant to understanding if an important public health or safety issue may develop as a result of the financial pledge. For example, he refers to the purchase of expensive equipment that may be made as a result of an expected instalment of the funds which, if they do not materialize, will have to be financed from other parts of the hospital's capital or operating budget with possible cascading effect of public-facing staff cuts and/or the reduction of acute care services.

[39] In its representations, the hospital states that there is no public health or safety issue that would justify a need to disseminate the records and assumes the appellant's interest in the records is personal rather than public. In its reply representations, the hospital further submitted that the records have no relationship to section 57(4)(c) and cannot reasonably be considered to benefit public health or safety as contemplated by the Legislation.

[40] The hospital notes that there were a number of known community representatives involved and aware of the donation prior to the official announcement and local and national newspapers were also informed. Also, the hospital states that more recently, additional information regarding the process followed by the Board of Directors was posted on the hospital's website and therefore made available to all members of the public.

Analysis and findings

[41] Based on my review of the parties' representations and the specific wording of the appellant's request, I find that the appellant has not established the grounds for fee waiver in section 57(4)(c). While I accept that there is a potential public interest in the records relating to the hospital's name change, I am unable to find that the records relate directly to a public health or safety issue or that the dissemination of this information will contribute meaningfully to the development of understanding about a public safety issue. Further, I find that much of the public interest is addressed by the various news reports and the information the hospital posted on its website concerning the name change.

[42] In his representations, the appellant refers to a number of possible scenarios that might occur as a result of the donation. For example, he states that the hospital may enter into financial agreements while counting on receiving the funds, which if not received would affect the hospital's operating budget. However, it is not clear how the actual records responsive to this request would address these concerns. For example, records relating to a purchase of new equipment would not be captured by the appellant's request for records relating to "changing the name of the Hospital."

[43] Further, while these records may be of public interest, and while it is likely that the appellant would disseminate these records, he has not demonstrated that the subject matter of the records relates directly to a public health or safety issue, and that the dissemination of the records would yield a public benefit by disclosing a public health or safety concern.

Whether it would be fair and equitable to waive the fee?

[44] While I have found that dissemination of the requested records would not benefit public health or safety, I have gone on to consider whether it would be fair and equitable to waive the fee in the circumstances.

[45] For a fee waiver to be granted under section 57(4), it must be "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.¹³

Representations

[46] The appellant argues that a fee waiver is fair and equitable. He states that the hospital has not provided any records free of charge and that he limited his request to make the hospital's search less onerous. The appellant also argues that with an annual operating budget of \$250 million, it would be reasonable for the hospital to absorb the fee, "in the name of achieving the highest standard of accountability to the public that it serves."

[47] The hospital submits that a fee waiver in this circumstance is not fair and equitable. It refers to the actual fee as being "significantly less than the actual costs that would be incurred in processing the records." The hospital also submits that on several occasions the appellant was provided the opportunity to limit the scope of the request which may have led to his receiving some documents free of charge but according to the hospital this was declined by the appellant. The hospital also noted that recently information, regarding the process that resulted in the name change, was posted on the hospital website to be made available to all members of the public.

Analysis and findings

[48] I find that the appellant has failed to show that it would be fair and equitable to grant a fee waiver. While the appellant noted that he limited the scope of his request to make the hospital's response less onerous, the hospital has indicated several times that it is not seeking to recover the full cost of its search. As indicated by the hospital, information regarding its name change has been made available on its website subsequent to the appellant's access request. I do not accept the appellant's argument that it would be reasonable for the hospital to waive the fee given its operating budget especially given my finding that there is no public health or safety issue. Moreover, I have reduced the overall fee estimate by removing the search time. Therefore, I find that it would not be equitable to grant a fee waiver, especially considering the user-pay principle of the *Act*.

[49] In conclusion, I have not been provided with sufficient evidence in support of the appellant's request for a fee waiver that would justify deviating from the user-pay principle set out in the *Act*. I find that the appellant has not established the basis for a

¹³ Orders M-166, M-408 and PO-1953-F.

fee waiver under section 57(4)(c) of the *Act*, and I uphold the hospital's decision to deny the fee waiver in this circumstance.

ORDER:

1. I uphold the hospital's fee estimate, except for its search time, in the amount of \$210.80.
2. I uphold the hospital's decision to deny the fee waiver.

Original Signed by: _____
Alec Fadel
Adjudicator

February 21, 2017 _____