Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3716

Appeal PA15-558

Hamilton Health Sciences

March 31, 2017

Summary: The sole issue in this appeal is the appropriateness of the fee estimate provided by the hospital for access to records pertaining to a specific matter. In this order the hospital'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); sections 6 and 7 of regulation 460.

Orders Considered: PO-3205, PO-3206, PO-3215, PO-3035 and PO-3515.

OVERVIEW

[1] Hamilton Health Sciences (the hospital) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act* or *FIPPA*) for access to the following information:

> … all records regarding two aboriginal children refusing chemotherapy at McMaster Children's Hospital and the resulting Ontario court family division case between Hamilton Health Sciences and Brant Child and Family Services including but not limited to records regarding the Nov. 14, 2014 decision and April 24, 2015 clarification.
>
> If this information is available in electronic format, [the requester asked] that it be released in that format to reduce any potential costs.

[2] The requester also asked that the hospital consider a fee waiver for the request, on the basis that any information released "is intended to be used to serve the public's interest".

[3] After extending the time for processing the request under section 27(1) of the *Act*, and the requester clarifying that she was not seeking clinical records or records subject to solicitor-client privilege, the hospital issued its preliminary decision letter setting out its fee estimate for processing the request. The hospital provided a fee estimate for processing the request in the sum of $4,800.00, which reflected a waiver of 80% of the estimated fee for search time. The letter further advised the requester that, based on its review of a representative sample of the records, the hospital would be withholding personal health information (PHI)[1] and personal information, and may claim that other information is subject to exemption under sections 13 (advice or recommendations) and/or 18(1) (economic and other interests) of the *Act*.

[4] The requester (now the appellant) appealed the hospital's fee estimate.

[5] Mediation did not resolve the appeal and it was moved to the adjudication stage of the appeals process where an adjudicator conducts an inquiry under the *Act*.

[6] During the inquiry into the appeal, I sought and received representations from the hospital and the appellant. Representations were shared in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction 7*.

[7] The sole issue in this appeal is whether the fee estimate should be upheld. In this order I uphold the hospital's fee estimate and dismiss the appeal.

DISCUSSION:

[8] An institution must advise the requester of the applicable fee where the fee is $25 or less. Where the fee exceeds $25, an institution must provide the requester with a fee estimate.[2] 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]

[9] The purpose of a fee estimate is to give the requester sufficient information to

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[1] PHI is defined at section 4 of the *Personal Health Information Protection Act, 2004*, S.O. 2004, c. 3, Sched. A.
[2] Section 57(3).
[3] Order MO-1699.

make an informed decision on whether or not to pay the fee and pursue access.[4] The fee estimate also assists requesters to decide whether to narrow the scope of a request in order to reduce the fees.[5]

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

[11] 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.

[12] More specific provisions regarding fees are found in section 6 and 7 of Regulation 460, which reads, 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:
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> > 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.

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[4] Orders P-81, MO-1367, MO-1479, MO-1614 and MO-1699.

[5] Order MO-1520-I.

[6] 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.

> 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.

The hospital's representations

[13] The hospital states that the request was very broad in scope, "not being limited by time period, by type of record, or by communications of any particular persons".

[14] It submits that:

> The [appellant] was consulted by the hospital's legal counsel [named law firm] about the option of narrowing the scope of the request, but the [appellant] did not narrow the scope of the request to any significant extent. The [appellant] simply clarified that the request was not for clinical records for either patient or for records subject to solicitor-client privilege …. For the most part, [*FIPPA*] does not apply to clinical records and there is an exemption under *FIPPA* for records subject to solicitor-client privilege. Due to the significance of both of these cases and the complicated, intensive Court proceeding, the hospital has extensive records as to the patients beyond their clinical records.
>
> …
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> As the request did not state a time period, the hospital had to determine a relevant time period for the search for responsive records. For each patient, the start of this period was determined to be the initial date of becoming a patient of the hospital. The earlier of these two dates was in [specified date]. The date of issuance by the Judge of the clarification of his initial decision ([specified date]) was determined to be the end date for the search for responsive records.

[15] The hospital submits that after receiving the request it worked with staff who were most knowledgeable regarding the subject matter of the request and the hospital's record holdings to identify individuals who may have responsive records.

[16] It states:

> … These individuals included members of senior management, external and internal legal counsel, medical affairs, interprofessional practice, clinical and organizational ethics and hospital administration. The search extended to communications of former staff members and included a

> search of archived records, with the involvement of ICT (information and communication technology) staff. Due to the clarification by the [appellant] and the exclusion of [PHI] from [the access to information] requests, the search did not extend to clinical records.

[17] The hospital explains that its search included "electronic" and "non-electronic" records.

[18] With respect to its search for "electronic records", the hospital submits that most of this type of record were emails and that because the hospital is one of the largest in Canada the "hospital's volume of email is significant". It explains:

> The hospital followed a process of conducting keyword searches for responsive emails sent or received during the relevant time period by persons who the hospital determined to have had involvement as to the two patients or the Court proceeding. As the patients were generally not referred to by name or otherwise consistently in emails, it was very difficult to formulate keywords which would reveal responsive records without identifying many records which would on review be determined to not be responsive to this request.
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> Keywords were developed with the assistance of some hospital individuals familiar with the patients or the Court proceeding. An iterative process was followed. This involved running searches using various keywords, manually reviewing the emails brought up through the keyword(s) to determine which of the emails were responsive to the Request, refining the keywords and running further searches, and then again manually reviewing the emails brought up to determine if they were responsive.

[19] The hospital submits that the process it followed was similar to that discussed and upheld in Order PO-3515[7].

[20] With respect to its search for non-electronic records, the hospital explains that:

> The non-electronic or "hard copy" responsive records found through the searches done by individuals who had been identified as having some non-clinical involvement as to the two patients or the Court proceeding were, with few exceptions, found to be duplicative of the responsive electronic records found.

[21] The hospital states that by virtue of the wording of the request, any responsive record would be at least partially comprised of PHI of the children.

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[7] A fee appeal that involved different parties.

[22] The hospital submits that:

> Accordingly, all hospital records responsive to the request are either excluded from disclosure under *FIPPA* or must be redacted to sever all PHI (which includes "information that identifies an individual or for which it is reasonably foreseeable in the circumstances that it could be utilized, either alone or with other information, to identify an individual"). There was wide publicity as to both of these children and their conditions/treatment and as to the Court proceeding, which would make it easier to identify the children with just a little bit of information about them.
>
> Additionally, there are other exclusions and exemptions which apply to various records, which would also involve the severing of content through redaction. These exclusions and exemptions include privileged content (*FIPPA* s. 19), advice or recommendations (*FIPPA* s. 13), personal information (*FIPPA*, s. 21); and third party information (*FIPPA*, s. 17).

[23] The hospital states that its fee estimate set out in its interim decision letter was based on its review of a representative sample of responsive records. In addition, the appellant was advised in the letter that:

- Due to the broad scope of the request, the hospital had to do an extensive search for responsive records;
- The request was in essence a request for personal health information and/or personal information;
- The hospital believes that none of the records will be able to be released without redaction.

[24] The hospital states that its fee estimate is comprised of three components:

- searching for responsive records (20 hours @ $30.00 = $600.00);
- printing/copying records (3,500 pages @ $0.20 = $700.00);
- severing of information in order to prepare records, at the rate of 30 pages per hour (117 hours @ $30.00 = $3,500.00[8]).

[25] The hospital states that its fee estimate includes only 20 hours of manual search time:

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[8] The actual amount based on 117 hours of time would be $3,510.00. For the purposes of the analysis, however, I will use the amount of $3,500.00 as set out in the hospital's decision letter.

> … which is a significant reduction from the actual search time required, as the hospital elected to not charge the [appellant] for all of the search time required. This decision was based on the fact that preparing the records in this matter would entail significant expense because of their nature and volume. Manual search time included:
>
> - one person/day for searching by individuals for non-email documents;
> - two person/days for the review of the initial set of emails brought up through the initial filtering by means of time period, identity of sender/recipient and initial basic keywords and exclusion of non-responsive records;
> - 15 person/days of iterative review of sets of emails brought up through additional keyword searches and exclusion of non-responsive records.

[26] With respect to its estimated preparation time, as discussed above, the hospital submits that PHI as well as other exempt or excluded information would have to be severed prior to disclosure.

[27] The hospital states that as set out in its decision letter, its representative sampling of records indicates that an estimated 3,500 pages of records will be disclosed, all of which will require some redaction. It adds:

> The estimates for severing and printing/copying are simply dependent on the estimated number of pages to be disclosed and requiring redaction. Ultimately those fees could be determined to be higher or lower.

The appellant's representations

[28] The appellant's representations focus on the case which gave rise to the request, which she submits is of great public importance. They also focus on how, in her opinion, the fee is excessive and how the fee is so high as to amount to a barrier to access.

[29] She submits:

> … This case was the first time in Canada that a hospital took a children's aid society to court for failing to intervene.

[30] With respect to the scope of the request and the allegation that she refused to narrow the request, she submits:

> [The hospital] claims the request is not limited by a time period. Respectfully, I would disagree. The first child started treatment at [the hospital] in [specified date] so it's not possible for there to be records before that time. I made the request in [specified date]. That leaves a time period of one year and four months. I would not consider that to be a broad or undefined period of time.
>
> [The hospital] also claims that I refused to narrow the request. Again, I would respectfully disagree. I clarified that I was not looking for clinical records for either patient or records subject to solicitor-client privilege. More importantly, I offered in mediation to narrow the request to emails and their attachments. Considering my request started at all records, I believe changing my request to emails and their attachments is a major concession on my part. I do not have the benefit of knowing what documents I am excluding by narrowing my request in this way. During mediation, [the hospital] made zero concessions.
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> I would also like to point out that [the hospital] handled this request from the beginning in a very unusual manner. It was not handled by the [Freedom of Information] office at [the hospital] as normal. Instead it was immediately handled by a lawyer hired by [the hospital]. The phone calls and emails I received regarding this request right from when I first made it - long before this appeal - was with the lawyer.

[31] She submits that the request is for recent records so all the searches "should be entirely electronic".

[32] She also submits that:

> … The records are regarding two very specific cases so should be easily searchable. There is no way for me to know what records exist to specifically ask for these records. I was given little information during mediation or before to help me determine what records exist. This case is of great public importance making accountability and transparency paramount.

[33] The appellant then submits that the amount of the fee estimate in this appeal amounts to a barrier to access. She submits:

> I was given a fee estimate of $4,800. That fee is a barrier to the public having access to this information making accountability and transparency impossible. I also believe the fee is excessive for documents that should be easily searchable electronically. The hospital is claiming it will take them the equivalent of three-and-a-half work weeks to search and

> prepare the records. I also feel that is excessive for a request for easily electronically searchable emails and attachments.

[34] The appellant also refers to Order PO-3035 which she submits stands for the principle that an "appellant should not bear the financial burden of an institution's failure to implement proper record management practices."

[35] The appellant also relies on Orders PO-3205, PO-3206 and PO-3215 arguing that, "[i]n these three cases - also involving records of public interest - combined fees of $8,018 were brought down to a reasonable $1,228 which allowed the public access to the records.

[36] She further submits:

> In these cases, the request was for four-and-a-half years compared to 16 months in this case. The records also went back to 2007 while in this case the request only goes back to [specified date].
>
> If four-and-a-half years of records going back to 2007 are expected to be easily searched than surely just over one-year worth of records going back to [specified date] should also be expected to be easily searched.

The hospital's reply representations

[37] The hospital asserts that the notoriety of the matter supports the hospital's position that a great deal of information qualifies as PHI because it is "reasonably foreseeable in the circumstances that it could be utilized, either alone or with other information, to identify an individual" thereby falling within the scope of the definition of PHI in of *PHIPA*. In addition, the hospital submits that the fact that the patients were minors means that information that might ordinarily be personal information, about the patients' substitute decision makers, is also PHI. Relying on PHIPA Decision 17, the hospital submits that PHI in records that are not clinical records is still subject to *PHIPA*.

[38] The hospital submits:

> In short, given the nature of the request "(records regarding two aboriginal children refusing chemotherapy"), almost all of the responsive records contains information that is PHI by virtue of the definition in sections 4(1) and (2) of *PHIPA*. The appellant's argument in the last paragraph on page 1 and first paragraph of page 2 of her representations confirms the ease with which information in the requested records could be linked with publically available information to identify the patients.

[39] With respect to the appellant's comments regarding the scope of the request, the hospital submits that:

> [The hospital] was merely saying that the request covers the entire period, from admission of the patients to the hospital, through to the disposition of legal proceedings.
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> … , restricting the request to emails and their attachments does not reduce the degree of redaction that will need to be carried out to comply with section 8 of *PHIPA*, among other sections. This is so because information that might in other cases not constitute PHI, because it does not contain direct identifiers and could not reasonably be linked with other information to identify the patient, is PHI in this case because of the media coverage it received.
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> Most of [the hospital's] records (outside of clinical records) that needed to be searched because it was reasonable to anticipate that they could be responsive to the request were emails and involved communications among many individuals, some of whom are no longer at [the hospital] so that IT needed to be involved to search and make available archived records. …

[40] With respect to consulting outside counsel, the hospital submits:

> For clarity, the FOI office at [the hospital] has processed the appellant's request. Given that the request included information about a legal proceeding that was managed by external counsel and the complexity regarding the PHI in the responsive records, external counsel has been consulted and otherwise engaged throughout the process (including corresponding with the appellant where it was more efficient for external counsel to write) to ensure that [the hospital] does not violate any judicial or other requirements in processing the request. In this regard, [the hospital] notes that the proceeding was itself subject to Court directed confidentiality restrictions.

[41] With respect to the appellant's comments regarding the amount of the fee, the hospital submits:

> The appellant believes that the fee estimate of $4,800 "is excessive for documents that should be searchable electronically". Only $600.00 of the estimated fee is for searching for responsive records (based on 20 hours at the prescribed hourly rate of $30.00). The balance of the fee is for preparation of records for disclosure. The appellant has not directly addressed the fee estimate for preparing the responsive records for disclosure, so her position is not known.
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> The requester appears to believe that electronic searching is an automatic process not involving significant manual search time. The most common

means of electronic searching involves determination of persons likely to have responsive electronic documents and then developing keywords, which are used in an iterative searching process involving manual review. This was the process used by [the hospital] … . A description of keyword searching can be found in the Sedona Canada Principles Addressing Electronic Discovery (Second Edition). In relation to keyword searching, the Principles provide (at page 50):

> Keyword searching involves searching the documents for words or phrases that are common and distinct to a claim or defence, such as product names and components in a product liability case. Note that, due to the casual nature of many e-mails, potentially relevant e-mails may not contain the words or phrases selected, as the correspondents are familiar with the context and the exchange is part of a larger conversation. Care should be taken when selecting keywords, and the results of keyword searches should always be validated through sampling both the responsive and nonresponsive populations.

In this case, … , the search process involved identifying persons who were reasonably likely to have responsive records and identifying the various ways in which the patients were reasonably likely to have been referred to, since the hospital avoids using patient names in email. These factors added to the difficulty of formulating keywords which would pull up responsive records without pulling up a large volume of records, which on manual review, would be found not responsive to the request.

[42] With respect to the orders cited by the appellant, the hospital submits:

In her representations, the [appellant] refers to Orders PO-3215, PO-3205, PO-3206, and PO-3035. Each of these Orders relates to a request for expense claims of Board members or others rather than for records about patients. For the reasons set out above, this request is far more complex. In PO-3035, the institution had failed to provide sufficient evidence regarding its fee estimate. The fee for the limited redaction that was required was upheld.

[The hospital] submits that it has provided a detailed explanation of how it arrived at its fee estimate and that the decision in Order PO-3515 (referred to in the [hospital's] submission) is more applicable than the Orders cited by the appellant to the search for responsive emails.

The appellant's sur-reply representations

[43] In sur-reply the appellant submits that the identity of one child is covered under

a publication ban and that her newspaper "has followed this ban to the letter".

[44] The appellant argues that while she worked hard to limit this request by changing it from all documents to emails and their attachments, the hospital made no concessions. She further maintains that a time frame of one year and four months is reasonably short.

[45] With respect to the search time claimed by the hospital, the appellant reiterates her reliance on the orders she previously cited and submits:

> I do expect the records to be easily searchable. However, that is also the expectation of the office of the Information and privacy Commissioner.
>
> …
>
> I am being charged for 20 hours of search time for just over one-year worth of records.

[46] Referring specifically to the orders she cited, the appellant submits:

> The request for executive expenses involved approximately 30 board and executive members over a four-and-a-half-year period. Some of the records were in an off-site storage area. At the time, [the hospital] argued it was complex.
>
> My current request involves records for two individuals over one year and four months. I do not agree that this search is more complicated.

[47] The appellant concludes her representations by stating that she has no issue with legitimate exemptions being redacted:

> My issue is with what I feel is an unreasonable fee estimate that will prohibit information becoming public in a matter of great importance. This case has left many unanswered questions and concerns.

Analysis and finding

[48] It is important to first note that I am not dealing with a fee waiver request in this appeal, as although the appellant requested a fee waiver, and apparently received a reduction, she did not pursue it any further. Hence matters pertaining to "public interest" are not relevant to my consideration of the fee estimate.

[49] With respect to the search time under section 57(1)(a), I agree with the hospital that the appellant's request is broad and that the range and volume of the possible responsive records is the basis for the large search fee. In her representations, the appellant refers to Order PO-3035, in which Commissioner Brian Beamish stated that

records of recent origin should be kept in a consistent and easily searchable manner and that the requester in that case should not bear the financial burden of the university's failure to implement proper record management practices. Orders PO-3205, PO-3206 and PO-3215 are based on this premise. While I agree with Commissioner Beamish's findings, I find that they are not applicable to the facts of this appeal. In Order PO-3035, the requester sought access to copies of all expense receipts submitted to a university for all domestic and international flights taken by a named individual for a five-year period. Similarly, the determinations in Orders PO-3205, PO-3206 and PO-3215 were based on the nature of the requests at issue in these appeals. In this appeal, the appellant seeks all records under the hospital's custody or control relating to the case that is referenced in the request and that gave rise to the appeal.

[50] At the request stage, the appellant clarified that she was not seeking clinical records or records subject to solicitor-client privilege and at mediation offered to limit the scope of the search to only be for responsive emails and attachments. However, despite this narrowing of scope, I find that the appellant's request is still extremely broad.

[51] Based on my review of its representations, I find that the hospital provided me with sufficient evidence to substantiate the estimated time required to locate responsive records. In arriving at its search fee estimate under section 57(1)(a), I find that the hospital properly sought the advice of individuals who were familiar with the type and contents of the requested records and properly considered a representative sample of records. For these reasons, I uphold the estimated fee for search time under section 57(1)(a) of $600.00.

[52] With respect to the record preparation component of the fee which is governed by section 57(1)(b) of the *Act*, the hospital allocated 117 hours at a cost of $30 per hour, with a total of $3,500.00 set out in its fee estimate, as the time required for preparing the records for disclosure. The hospital indicates that, based on a representative sample, this time is required to sever exempt information, such as information that qualifies as PHI under *PHIPA* or qualifies for exemption under sections 13, 17, 19 and 21 of the *Act*. Generally, this office has accepted that it takes two minutes to sever a page that requires multiple severances.[9] Using this formula, I find that the hospital's estimate of $3,500.00 would cover the preparation of approximately 3,500 pages of responsive records. In light of the appellant's broad request, I find that it is not unreasonable for the hospital to estimate that it will be required to prepare approximately 3,500 pages of records for disclosure. Accordingly, I also uphold this part of the fee estimate. However, I note that, as acknowledged by the hospital if the actual preparation of records takes less time, the hospital should reduce the fee, as appropriate.

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[9] Orders MO-1169, PO-1721, PO-1834 and PO-1990.

[53] Similarly, I also uphold the hospital's estimate of photocopying fees of $700.00 based on the estimated 3,500 pages of responsive records.

[54] Where a request is broad and involves records that are likely to be dispersed through an institution, high search and preparation fees may apply.[10] In that regard, it is the breadth of the appellant's request that resulted in the estimated fee. It is therefore the scope of the request and not the method of calculating the estimated fee that results in the amount to be charged for processing the request.

[55] Finally, as it was the hospital that made the decision, I am satisfied with the manner in which the hospital initially processed the appellant's request.

[56] Accordingly, in all the circumstances I uphold the hospital's fee estimate and dismiss the appeal.

ORDER:

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

Original Signed by:	March 31, 2017
Steven Faughnan Adjudicator	

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[10] See Orders PO-3375 and PO-3379.