

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3769

Appeal PA17-246

University Health Network

September 12, 2017

Summary: A request was submitted to the University Health Network (UHN) on September 22, 2016. The UHN issued an interim decision with a fee estimate of \$4400 on November 16, 2016. The requester then narrowed the scope of his request resulting in a revised fee estimate that was issued by the UHN on December 20, 2016. On January 26, 2017, the requester paid a 50% deposit of the \$2,430 estimated fee. Since that date, a final decision regarding access to the requested records has not been issued by UHN.

On May 11, 2017, the requester submitted an appeal to the Office of the Information and Privacy Commissioner/Ontario (IPC) indicating that the UHN was in a "deemed refusal" situation. This order finds the UHN to be in a deemed refusal situation pursuant to section 29(4) of the *Act*, and is ordered to provide an access decision without recourse to a time extension.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 10, 24, 26, 27, 28 and 29. Regulation 460/823 s, 7.

Orders and Investigation Reports Considered: Order MO-2275.

BACKGROUND:

[1] On September 22, 2016, a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) was made to the University Health Network (UHN) for access to the following records:

1. Copies of all records, documents, notes, information, communications (paper or electronic), including deleted electronic correspondence, relating to [a named individual and/or [a named individual], from September 1, 2001 until the present, involving any of the following individuals [13 named individuals]”.

2. Copies of all records, documents, notes, information, communications (paper or electronic), including deleted electronic correspondence, relating to [a named individual] and/or [a named individual] from September 1, 2012 until present between any employees, staff, agents or representatives of the University Health Network and any employees, staff, agents or representatives of the following entities [12 named entities].

3. A copy of the 2016 External Departmental Review Report of the University Health Network Lab Medicine Program, including any drafts or correspondence relating to drafts, amendment or changes to the 2016 External Departmental Review Report of the University Health Network Lab Medicine Program.

[2] On October 21, 2016, the UHN sent a letter to the requester to acknowledge that during a conversation on October 19, 2016, the requester confirmed he wished to proceed with the access request.

[3] On November 16, 2016, the UHN issued an interim decision to the requester advising that after an initial review of the records the estimated cost of processing the request was \$4,400 based on an estimated 146 hours of search time. The UHN also advised that sections 19, 21, 65(6) and 65(8.1) of the *Act* would likely apply to many of the responsive records.

[4] On December 20, 2016, the UHN issued a revised interim decision, following a narrowing of the request. The fee estimate was revised to \$2,430. The UHN maintained that the following exemptions and exclusions would likely be applied: section 21 (personal privacy); section 19 (solicitor-client privilege); section 65(6) (employer and employee relations); and section 65(8.1) of the *Act*.

[5] On May 11, 2017, the requester (now the appellant) filed an appeal with the IPC, indicating that despite paying the requested fee estimate, he had not received a final decision and stated that: “The institution should provide immediate, unredacted access to the responsive records”.

[6] This appeal was originally assigned to former analyst Rita Najm to address the deemed refusal issue.

[7] On June 5, 2017, the Manager, Privacy Operations/FIPPA Coordinator (FOIC) at the UHN informed Ms. Najm that the UHN was struggling to answer the request due to

its complexity. The FOIC indicated that he would need until August, 2017 to respond. The appellant did not agree with the August timeframe to issue a final access decision. In a later conversation with Ms. Najm on July 6, 2017, the FOIC indicated that the UHN was on target to issue a decision before August.

[8] The appeal was transferred to me for follow-up on July 13, 2017. On July 31, 2017, I spoke with the FOIC who reported that the UHN had not yet completed the request. The FOIC reported that the appellant may no longer be interested in pursuing his request, as the records requested, appeared to have been solicited for a legal matter that was not successful. The FOIC indicated that he would call the appellant and report back by August 2, 2017. The FOIC did not call by the end of the day on August 2, 2017. On August 4, 2017, I attempted to obtain an update from the FOIC without success.

[9] I then directed the UHN to provide a decision on or before August 11, 2017. On August 11, 2017, the FOIC e-mailed me indicating that he was waiting for the appellant to return his call to discuss the request. I indicated to the FOIC that the appellant remained interested in the request and that a decision should be issued immediately.

[10] On August 14, 2017, this office sent a Notice of Inquiry to the UHN stating that the UHN was in a deemed refusal situation for failing to issue an access decision within the 30 days mandated by section 26 of the *Act*. The Notice advised the UHN that if a final decision was not issued by August 28, 2017, I would be in a position to issue an order requiring the UHN to provide a decision regarding access to the requested records to the appellant.

[11] Despite following up with the UHN on September 6, 2017, and the FOIC's promise that a decision would be issued on Friday, September 8, 2017, as of September 11, 2017, a decision regarding access has not been issued.

DISCUSSION:

[12] The issues raised by this appeal relate to sections 10, 24, 26, 27, 28, and 29 of the *Act*.

[13] I find that the UNH is in a deemed refusal situation pursuant to section 29(4) of the *Act* as it has failed to issue an access decision pursuant to the statutory timelines set out in section 26 of the *Act*.

[14] Section 10 (1) of the *Act* states that:

Subject to subsection 69(2), every person has a right of access to a record or part of a record in the custody or control of an institution unless,

(a) The record or part of the record falls within one of the exemptions under sections 12 to 22; or

(b) The head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

[15] When an institution makes a decision to disclose records, or parts of records, in response to a request under the *Act*, section 26 sets out the time frames within which this disclosure is to take place. This section reads:

Where a person requests access to a record, the head of the institution to which the request is made or if a request is forwarded or transferred under section 25, the head of the institution to which it is forwarded or transferred, shall, subject to sections 27, 28, and 57, within thirty days after the request is received,

(a) give written notice to the person who made the request as to whether or not access to the record or a part of it will be given; and

(b) if access is to be given, give the person who made the request access to the record or part, and if necessary for the purpose cause the record to be produced.

[16] In order MO-2275, former Registrar, Robert Binstock stated:

"In my view, section 19 [equivalent to section 26 in the *Freedom of Information and Protection of Privacy Act*] of the *Act* requires the ministry to issue a decision and to disclose those records for which access is to be given within 30 days of receipt of the request."

[17] I agree with the former Registrar's approach and adopt his reasoning for the purposes of this appeal.

[18] In this appeal, a request was made to the UHN for documents on September 22, 2016 as per section 24(1) of the *Act*. The request was further narrowed on December 20, 2016. The revised fee estimate was paid by the appellant on January 26, 2017.

[19] The UHN has committed to issuing a decision on four separate occasions (early August, August 11, August 28 and finally September 8, 2017). The UHN has continuously failed to adhere to its oral commitments to provide a decision.

[20] The appellant has expressed concern that UHN's refusal to issue a decision letter seven months after it paid the requested fee deposit is an act of flagrant non-compliance which renders the *Act* meaningless. I concur that the UHN's behaviour in failing to communicate with the IPC and the appellant in a diligent manner regarding

the status of the appeal; its disregard for his own deadlines; and its failure to adhere to its commitment to issue a decision by September 8, 2017, undermines the spirit and intent of FIPPA outlined in section 1 of the *Act*.

[21] Based on the foregoing, I find the UHN to be in a deemed refusal situation pursuant to section 29(4) of the *Act*.

ORDER:

1. I order the University Health Network to issue a final decision to the appellant regarding access to the records in accordance with the *Act* without recourse to a time extension, no later than **September 22, 2017**.
2. In order to verify compliance with provision 1 of the Order, I order the University Health Network to provide me with a copy of the decision letter referred to in Provision 1 no later than **September 22, 2017**.

Original Signed by: _____
Daniel McSweeney
Analyst

_____ September 12, 2017