

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3914

Appeal PA16-460

Wilfrid Laurier University

December 20, 2018

Summary: The appellant is a charitable organization that contracted with Wilfrid Laurier University (the university) on a now-cancelled project. The appellant made a request to the university under the *Freedom of Information and Protection of Privacy Act* for access to all records related to the project and the agreement. After locating a representative sample of records responsive to the request, the university issued a fee estimate of over \$10,000. The appellant asked the university for a full waiver of the fee estimate on financial hardship and other grounds, which the university denied. The appellant appealed the denial of its fee waiver request to this office. In this order, the adjudicator finds that a small fee waiver is fair and equitable in the circumstances. She orders the university to waive 20% of the fee estimate.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 57(4); R.R.O. 1990, Regulation 460 (under the *Freedom of Information and Protection of Privacy Act*), section 8.

Case Considered: *Mann v. Ontario (Ministry of the Environment)*, 2017 ONSC 1056.

OVERVIEW:

[1] The requester is the president of a registered charitable organization. He made a request to Wilfrid Laurier University (the university) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

All records related to [a named project] and an agreement with [the charity for which the requester is president] in any form and using any technology, including emails, BBM, PIN, Facebook postings, etc., with

respect to its approval, review and decision to cancel whether created by or sent by or to any person affiliated with [the university], including administrative staff, legal staff, the President, professors, students, members of Senate, members of the Board of Governors, including through the use of any email or other electronic form that may be non-[university] accounts but was sent or received using [the university]'s servers or other facilities or while on [university] property.

[2] In response, the university conducted searches of four offices that it believed would hold the greatest number of records responsive to the request, in order to obtain a representative sample of responsive records. Through these searches, the university located approximately 8,500 pages of records.

[3] The university then issued a fee estimate and interim access decision (as well as a time extension notice, which was not contested by the requester). In this decision, the university provided a fee estimate of \$10,388.80, along with a detailed statement of how the fee estimate was calculated. It also indicated that the final fee would likely be higher, as the estimate was based only on a preliminary survey and the university expected that searches of the additional areas specified by the requester would yield at least 10-15% more records.

[4] With respect to access, the university indicated that it would likely grant partial access to responsive records, with some records or parts of records likely withheld based on a number of exemptions.

[5] The university also advised the requester of its willingness to work with him if he wished to modify his request in light of the estimated fee, time for completion or the university's interim position on access.

[6] The requester responded by advising the university that he had made his request on behalf of the charity as its president. He explained that the charity's assets are held in trust, and that its income is mainly composed of donations whose use is restricted by law where the use is not directly related to a charitable activity. He maintained that payment of the fee would be impossible based on trust law, and that imposition of the fee would effectively deny the charity any access to the requested records. The requester also maintained that there is a strong public interest in disclosure of the records, because of the governance issues arising from the university's decision to cancel the agreement (which is the subject of the request) and the resulting media coverage. On these bases, the requester asked the university to exercise its discretion to waive the fee.

[7] The university denied the fee waiver request. In doing so, it acknowledged that the estimated fee is high and that the requester has trust obligations to use the charity's donor funds for charitable purposes. It noted, however, that the university is itself a government-funded charitable institution with comparable obligations, and that it is not in a position to shift the burden of the fee from the requester to the university.

[8] In this fee waiver denial decision, the university again invited the requester to explore options to reduce the fee—for example, by narrowing the request to exclude from its scope publicly available records and records that the requester should already have in his possession, which would limit the search time and the number of responsive records. The university also suggested that the requester consider a “phased approach” to the access request, by first addressing records relating to a small number of key areas of interest to the requester, and then deciding, based on the results of that initial search, whether to proceed with further searches. This approach could eliminate unnecessary searches and result in a lower fee.

[9] The requester was dissatisfied with the university’s decisions on his access request, and filed an appeal with this office in the name of the charity. For ease of reference, I will refer to the requester and to the charity interchangeably as the “appellant” in this matter. During the mediation stage of the appeal process, the appellant confirmed that the sole issue in the appeal is the university’s denial of the fee waiver request. As this issue could not be resolved through mediation, the appeal was moved to the adjudication stage for a written inquiry under the *Act*. At this stage, the university and the appellant exchanged representations in accordance with this office’s *Code of Procedure* and *Practice Direction 7*.

[10] The appeal was transferred to me during the inquiry stage. In this order, I find that it is fair and equitable in the circumstances to grant the appellant a small fee waiver. I order the university to reduce its fee estimate by 20%.

DISCUSSION:

Should the fee estimate be waived?

[11] The sole issue in this appeal is whether the fee estimate should be waived, in whole or in part. While the appellant described a fee waiver as a discretionary decision on the part of the university, the *Act* makes it mandatory for the university to waive all or part of the fee in some cases. Specifically, section 57(4) of the *Act* requires an institution to waive fees, in whole or in part, in certain circumstances, and 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) [which sets out specific costs that must be included in the fee] 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.

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 pay the prescribed fees associated with 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.¹

[13] 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 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.²

[14] The institution or this office may decide that only a portion of the fee should be waived.³

Parties' representations

Appellant's representations

[15] In its fee waiver request to the university, the appellant referred both to its inability to pay the fee, and to a public interest in disclosure of the records that are the subject of the request. The appellant elaborates on both topics in its representations.

[16] The appellant first provides some background on the impact of its status as a registered charity on its ability to pay the fee. The appellant is a volunteer organization

¹ Order PO-2726.

² Orders M-914, P-474, P-1393 and PO-1953-F.

³ Order MO-1243.

that fulfils its objects relating to the promotion of arts and culture and the creative sector in the Waterloo Region through particular projects, each with its own budget. Fundraising for projects is done through grants or donations. The appellant states that funds raised in this manner are subject to trust law and contract law. For example, under the contractual arrangements between the appellant and a granting body, any funds obtained through a grant may only be used for the purposes set out in the grant application. As a result, the appellant submits, no funds from such grants may be used for litigation costs or to pay for other, non-charitable expenses, such as a fee imposed for access to records under the *Act*.

[17] Donations from individuals and corporations are subject to similar restrictions, based on trust law, which limit administrative expenses. Moreover, when the appellant accepts donations for specific purposes, such as for a particular project, those funds are held in trust for that project and cannot be used for any other purpose, activity or project. In addition, the Canada Revenue Agency places a limit on administrative expenses, which are not considered to be "charitable activities" for tax law purposes.

[18] Based on all this, the appellant submits, it is impecunious for the purposes of this appeal. It is limited to using its resources, including financial resources, for carrying out its charitable activities and has no assets that are not held in trust that could be used to pay the university's fee estimate. The appellant also provided a copy of its most recent financial statements to contrast its financial position with that of the university. The appellant submits that while both the appellant and the university are charities, the university's financial statements reveal a material and substantially different context, with the university's revenues and expenses in the hundreds of millions of dollars. It also contrasts the university's financial position with that of the institution in Order PO-3493. In that case, the institution had provided evidence of significant debt obligations in support of its claim that granting a fee waiver would not be fair and equitable. In that order, based on a number of considerations, I upheld the institution's denial of a fee waiver request.

[19] For these reasons, the appellant asks for a fee waiver on the basis of financial hardship, as contemplated by section 57(4)(b) of the *Act*.

[20] The appellant also asserts that there is a public interest argument for granting a fee waiver in this case. The appellant provides some background on the project that is the subject of the request.

[21] The project was proposed as a celebration of the 150th anniversary of Confederation. The appellant adopted the project as a charitable activity within its objects, and in this role accepted and agreed to accept gifts and donations to support the project. In June 2015, the appellant entered into an agreement with the university in relation to the project. The appellant states that it applied for a substantial grant based on its agreement with the university and the anticipated success of the project.

[22] The appellant later became aware of internal conflict within the university regarding the project. While the university's Board of Governors had approved the

project, the university Senate later approved a motion opposing the project and recommending that the Board cancel the university's involvement. In response, the university's then-President struck a special advisory committee to review the project and to make recommendations. The committee's February 2016 report recommended that the project not proceed. Later that month, the university's Board of Governors voted to withdraw from the agreement.

[23] The appellant states that the process used by the university and its then-President affected not only its private interests, but also resulted in substantial public debate about what happened, and why. In support, the appellant encloses with its representations a number of newspaper articles and editorials about the university's decision to cancel the project, and about other university incidents raising questions about freedom of expression and artistic expression at the university. The appellant submits that these are evidence of a significant public interest in issues relating to university governance. While the appellant acknowledges that the public interest override at section 23 of the *Act* is not at issue in this appeal—as the university has not yet issued a final access decision that can be challenged by the appellant on the basis of section 23—the appellant submits that the principles animating the public interest override are applicable here.

[24] The appellant suggests that its private interests in disclosure are related to this larger public interest. The appellant reports that it has suffered financial and reputational harms as a result of the university's decision to cancel the project, and that access to the records is necessary to assess its litigation options and to provide information to its donors, granting bodies and others whose trust in the charity may have been damaged as a result of the project's cancellation. In the absence of a fee waiver, the appellant will be unable to take these steps to mitigate these harms.

[25] In summary, the appellant describes three reasons for seeking access to the requested records: to make a decision on litigation against the university or others for losses incurred; to inform funders and donors about what happened; and to inform public debate on issues concerning university governance, freedom of expression, artistic expression and university processes.

University's representations

[26] In initial and reply representations, the university addresses each of the factors that must be considered in deciding whether to waive the fee, and concludes that a full fee waiver is not fair and equitable in these circumstances.

[27] On the actual cost of processing, collecting and copying the records in comparison to the fee [section 57(4)(a)], the university submits that its fee estimate accurately reflects its actual costs, and that no fees were charged other than those prescribed by the *Act*. The university describes in some detail the processes undertaken to search for a representative sample of records, the results of that search, and the basis for its fee estimate.

[28] With respect to the appellant's financial hardship argument [section 57(4)(b)], the university observes that this office recognized, in Order PO-3027, that the *Act* does not provide an automatic exemption from fees or an automatic fee waiver to requesters that are charitable organizations. This office also recognized that a large fee does not necessarily lead to the conclusion that payment of the fee will cause a requester financial hardship (Order P-1402). In the university's submission, the appellant's evidence of financial hardship, in the form of recent financial statements, does not support its request for a full fee waiver. In particular, the appellant's argument that it does not have a specific administration budget is not an adequate reason, on its own, for the university to assume the full cost of the appellant's request. The university observes that the appellant's statement of revenue and expenses shows a budget for expenses specifically related to this particular project and net assets of nearly \$60,000; these suggest an availability of funds to cover reasonable administrative expenses related to the project, like the fees associated with its access request.

[29] Moreover, this office has upheld an institution's decision to deny a fee waiver even where it accepted that a requester had little to no funds to cover the costs associated with an access request, where the denial was based on fair and equitable grounds (Order P-463). The university notes that the Divisional Court explicitly recognized that the sole test for fee waiver is whether granting the waiver would be fair and equitable.⁴ Thus, even if the appellant were to establish financial hardship grounds for a fee waiver (which the university denies), it would still be necessary to show that a waiver is fair and equitable in the circumstances. The university argues that it would not be fair and equitable in this case to transfer the costs of the appellant's broad and detailed access request to the university. Like the appellant, the university is a charity, and has the same financial and legal obligations to account for its use of funds to its donors, as well as to tuition-fee-paying students and Ontario taxpayers more generally.

[30] On the question of whether dissemination of the records will benefit public health or safety [section 57(4)(c)], this office has identified that the following factors may be relevant in making this determination:

- 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;

⁴ *Mann v. Ontario (Ministry of the Environment)*, 2017 ONSC 1056.

- the probability that the requester will disseminate the contents of the record.⁵

[31] The university states that the records relate to a private contractual relationship between the university and the appellant. While there may be a public interest in the broader issue of the university's handling of the project, this has been addressed through other means, including through the university's establishment of a special advisory committee, which conducted wide public consultations on the matter, and through the publication of the committee's report, which is available on the university's website. The university has also made available a number of other documents addressing the project and its outcome, including the minutes of open meetings of the university's Board of Governors and Senate where the project was discussed.

[32] By contrast, the university submits, the records sought by the appellant mainly address general issues relating to the agreement between the university and the appellant in relation to the project, including communications about the project and records generated by the committee struck to review the project. These records do not relate directly to any identified public health or safety issue. For the same reasons, the university denies that dissemination of the records would yield a public benefit by disclosing a public health or safety concern, or by contributing meaningfully to the development of understanding on such matters.

[33] The university also addresses the three reasons given by the appellant for making its access request—namely, to make a decision on whether to pursue litigation; to inform its funders and donors about what happened; and to inform public debate on issues concerning university governance, freedom of expression, artistic expression and university processes.

[34] The university submits that the first two reasons reflect a private, rather than public, interest in disclosure of the records. There is no public interest served by the appellant's commencing litigation in order to seek damages, and no public health or safety component to the appellant's intention to provide its funders and donors with more information about the project's cancellation. The university acknowledges that the third reason given by the appellant (to inform public debate on university governance issues) could arguably be said to address a matter of public interest; however, the appellant has not established any connection between the public interest and a public health or safety issue, which is the focus of section 57(4)(c).

[35] Furthermore, even if dissemination of the records would benefit public health or safety (which the university denies), the university maintains that a fee waiver would not be fair and equitable in the circumstances, for the reasons given above.

[36] The university also considered the matters prescribed by regulation [section 57(4)(d)], and concluded that neither weighs in favour of a fee waiver. Specifically, the appellant will receive partial access to the requested records, and the estimated fee is significantly greater than the \$5 threshold at which the amount of the fee may be too

⁵ Orders P-2, P-474, PO-1953-F and PO-1962.

small to justify requiring payment.

[37] Finally, the university considered whether any other relevant factors apply, including:

- 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.⁶

[38] The university asserts that these factors are relevant in these circumstances, and weigh against granting a fee waiver. The university reports that it attempted to work cooperatively with the appellant in addressing the request, including by providing a detailed description of the responsive records and basis for its fee estimate, and by suggesting ways in which the fee could be reduced. The appellant accepted the university's suggestions that he obtain some publicly available records through those other sources, and that he eliminate from his request email records already in his possession. However, the appellant did not agree to narrow his request in any other way, or to the university's suggestion of taking a phased approach to the searches; neither has he proposed any other compromise solution to reduce the fee. Instead, the appellant continues to take the position that no fee should be charged.

[39] The university acknowledges that the fee estimate is high, and may reflect a significant expense for a charity. However, given the breadth of the request, there are a large number of responsive records (based on its representative sample, there are likely to be over 8,500 pages of records), and extensive search and preparation time will be necessary to fulfil the request. The university submits that it is reasonable for the appellant to bear the cost of completing the request, and that a full fee waiver would unreasonably shift the burden of the cost to the university, itself a registered charity with obligations to account to the public for its use of resources.

⁶ Orders M-166, M-408 and PO-1953-F.

Analysis and findings

[40] For a fee waiver to be granted under section 57(4), the test is whether any waiver would be “fair and equitable” in the circumstances.⁷ The factors set out at paragraphs (a) to (d) of section 57(4) and any other relevant factors must be considered in deciding whether it would be fair and equitable to waive the fee. After consideration of all relevant factors, I conclude that a small fee waiver is fair and equitable in the circumstances.

[41] The appellant’s fee waiver request raises the potential application of the factors at sections 57(4)(b) and (c). The appellant has not claimed that the factors at sections 57(4)(a) and (d) apply in these circumstances, and I accept the university’s arguments that they do not.

[42] For the financial hardship ground at section 57(4)(b) to apply, the appellant must provide some evidence regarding its financial situation, including information about its income, expenses, assets and liabilities.⁸ The appellant provided detailed evidence about its operations as a charitable organization, and recent financial statements to show that it operated at a loss in the one-year period reflected in those statements, and in that period allocated only \$5 for administrative expenses. These statements also show net assets of nearly \$60,000, which the appellant maintains can only be used for charitable purposes. I accept the appellant’s evidence that it is bound by law to use funds received from granting bodies solely for the purposes set out in particular grant applications. I also accept that funds from donations received for specific projects are held in trust for those projects, and cannot be used for any other purpose, activity or project. However, I do not accept that the appellant is for these reasons impecunious for the purposes of this appeal.

[43] The financial statements cover a recent one-year period after the date of the university’s withdrawal from the project. The appellant reports revenue of a little over \$169,000 for this period, with donations accounting for the vast majority (over 79 percent) of this revenue; by contrast, grants account for just over one-half of one percent of this revenue. Assuming that some of its donation revenue is available for project-related uses (for the reasons described next), the appellant has not explained to my satisfaction why these funds could not be used to pay the fee estimate as a project-related expense.

[44] The appellant has not specified what proportion of its grant and donation revenue is received specifically for the purposes of the project (or received without directions about its use), and so is available for project-related uses. However, its recent financial statements show that the appellant spent nearly 80% of its charitable program expense budget that year on the project (over \$257,000 of its total program expenses of over \$322,000), with the remaining budget allocated between six other projects. This indicates that a significant proportion of the appellant’s grant and

⁷ See *Mann v. Ontario (Ministry of the Environment)*, cited above.

⁸ Orders M-914, P-591, P-700, P-1142, P-1365 and P-1393.

donation revenue was available that year for the purposes of the project. I also find it reasonable to expect that the appellant will continue to receive grant and donation revenue for this purpose. The appellant has not suggested that its recent financial statements reflect an atypical pattern of income or spending. Publicly available information indicates that the appellant is continuing with the project without the university's involvement, and is currently soliciting donations for that purpose.⁹

[45] Although the appellant has asserted that it has no funds with which to pay the fee estimate, it is unclear to me why grant and donation revenue available for project-related expenses could not be used for this purpose. The appellant has taken the position that without a fee waiver, it will be unable to mitigate its losses arising from the university's cancellation of the project. This is because, in the appellant's submission, access to the requested project-related records (which is contingent on a fee waiver or payment of the fee estimate) is necessary in order to make a decision on whether to pursue litigation or take other mitigating action. The appellant has also explained that charities are not prohibited from pursuing litigation, but that decisions on litigation are particularly constrained for charities because they must be able to connect any litigation to their charitable activities. This indicates to me that any litigation contemplated by the appellant must be connected to its charitable activities.

[46] If the appellant decides to pursue litigation in connection with the project, and if payment or waiver of the fee estimate is a necessary condition for the appellant to pursue this litigation (as the appellant has claimed), it does not seem unreasonable to characterize the fee estimate as an expense related to the appellant's charitable activities. The appellant has asserted that funds received from grant applications cannot be used to pay any litigation costs or other "non-charitable expenses" like the fee estimate, but I am not persuaded that this means funds received from donations cannot be used for those purposes. The appellant has not specifically made this claim for donation funds, instead stating more generally that donation funds are subject to restrictions based in trust law and that administrative expenses are limited. It may be that the fee estimate exceeds the amount that the appellant could reasonably claim as administrative expenses, but the appellant has not explicitly made this claim or provided me with evidence to lead me to this conclusion.

[47] Based on all this, I am not persuaded that the appellant lacks any funds from which to pay any part of the fee estimate. I recognize, however, that the fee estimate is high, and would represent a fair expense for the appellant. For example, the fee estimate of \$10,388.80 compares to net assets of slightly under \$60,000 and total project expenses of \$257,720 for the recent year reflected in its financial statements. In the circumstances, I conclude that payment of the fee estimate would cause some financial hardship for the appellant. I will take this factor into account when deciding whether a fee waiver is fair and equitable in this case.

[48] I do not find applicable the factor at section 57(4)(c). I recognize that there has been a fair amount of media reporting about the university's cancellation of the project,

⁹ This information appears on the appellant's profile on an online fundraising website.

and I accept the general premise that there is a public interest in matters of university governance and freedom of expression on campus. The appellant's representations on this topic have mainly to do with its dissatisfaction with the university's decision-making process leading to the cancellation of the project, and a claim that there is a public interest in disclosure of information about this process. Even if I were to accept that there is a public interest in the particular records sought by the appellant, the focus of section 57(4)(c) is "public health or safety." In order to establish a basis for a fee waiver on this ground, there must be some connection between the public interest and a public health and safety issue.¹⁰ The appellant has not explained any such connection, or even identified any public health or safety issue, and none is apparent to me. As a result, this factor cannot apply.

[49] Any other relevant factors must also be considered when deciding whether a fee waiver is fair and equitable. I agree with the university that relevant factors in this case include the large number of responsive records and the university's efforts to respond to the appellant's broad request in a manner that would address the appellant's concerns about the large fee estimate. I also accept the university's submission that a full fee waiver would shift an unreasonable burden of the cost from the appellant to the university. The appellant argues that the university is better placed financially to assume the costs of its broad request, but it does not follow from this that it would be fair and equitable for the university to do so. The fee provisions in the *Act* establish a user-pay principle, and the appellant has not explained to my satisfaction why the university ought to bear the full costs of processing his request while he should bear none. These considerations weigh against finding that a full fee waiver would be fair and equitable in these circumstances.

[50] Taking into consideration all applicable factors, including financial hardship to the appellant, the evidence of some public interest in this matter, the breadth of the request, and the manner in which the university responded to the request, I conclude that it is fair and equitable in the circumstances to grant the appellant a small fee waiver. In my view, a 20% fee waiver represents a reasonable allocation of the burden of the cost of the request between the appellant and the institution. This results in a revised fee estimate of \$8,311.04.

ORDER:

I order the university to waive 20% of its fee estimate. The revised fee estimate is \$8,311.04.

Original Signed by: _____
Jenny Ryu
Adjudicator

December 20, 2018 _____

¹⁰ Orders MO-1336, MO-2071, PO-2592 and PO-2726.