Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4170

Appeal PA19-00356

Ministry of the Solicitor General

July 27, 2021

Summary: The Ministry of the Solicitor General (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to email correspondence from the manager of its Information Management Unit about the ministry's responses to 62 recommendations that came out of a joint inquest into eight deaths at the Hamilton-Wentworth Detention Centre in 2018. In response, the ministry issued a fee estimate in the amount of $1350 for searching for and preparing responsive records. The requester appealed the fee estimate as excessive. In this order, the adjudicator partly upholds the ministry's fee estimate. After reducing the search portion of the fee by $675 and the preparation portion by $225, the adjudicator reduces the fee estimate to $450.

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); section 6 of Regulation 460.

Orders Considered: Orders MO-3014, MO-3404 and MO-3446.

OVERVIEW:

[1] This order reviews the reasonableness of a fee estimate issued by the Ministry of the Solicitor General (the ministry) in response to an access request under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The request was for access to records about the ministry's response to the 62 recommendations that came out of a joint inquest into eight overdose deaths in 2018 at the Hamilton-Wentworth Detention Centre.

[2] By way of background, the requester, a member of the media, initially sought access to:

> ...correspondence, or memos, including drafts, from [the ministry] or the Hamilton-Wentworth Detention Centre about responses to the 62

> recommendations that came out of a joint inquest into eight deaths at the Hamilton-Wentworth Detention Centre in 2018.[1]

[3] The ministry issued an interim decision stating that the total estimated fee to process the request would be $2910.00, based on 67 hours of search time and 30 hours of preparation time. The ministry also wrote that, based on a preliminary review, access to some of the information in the responsive records would be denied under sections 12(1) (cabinet records), 13(1) (advice or recommendations), 14(2)(d) (correctional record), and section 21 (personal privacy) of the *Act*.

[4] The requester, now the appellant, appealed the ministry's decision to the Office of the Information and Privacy Commissioner (IPC). The parties participated in mediation to explore the possibility of resolution.

[5] During mediation, the appellant narrowed her request to records from the ministry's Information Management Unit (IMU) only, and removed drafts from the scope of the request. The request was revised to be seeking access to:

> …correspondence, reports or memos, omitting drafts, from the Information Management Unit of the [ministry] or the Hamilton-Wentworth Detention Centre about responses to the 62 recommendations that came out of a joint inquest into eight deaths at the Hamilton-Wentworth Detention Centre in 2018 ([eight individuals are named]).

[6] The ministry issued a revised interim decision with a new fee estimate of $2340.00, based on 48 hours of search time and 30 hours of preparation time. The ministry again wrote that some of the information would be exempt under the same exemptions noted in the initial fee estimate.

[7] Because the ministry advised that the majority of search time is for email correspondence at the IMU, the appellant further narrowed her request to only emails of the IMU manager. In response, the ministry provided a further revised fee estimate of $1350, based on 30 hours of search time for the emails and 15 hours of preparation time for them.

[8] The appellant maintained that the estimated fees are excessive and unreasonable. As no further mediation was possible, the appeal was transferred to the adjudication stage of the appeal process, where an adjudicator may conduct a written inquiry. I decided to conduct an inquiry, during which I received representations from the ministry and the appellant that were shared between them in accordance with the IPC's *Practice Direction 7* on the sharing of representations.

[9] In this order, I uphold the ministry's fee estimate in part. I find that the ministry's estimate for search time is not reasonable and reduce it by $675. I also find that the ministry has not provided me with a basis on which to conclude that its estimate of $450 for preparation time is reasonable, and I reduce it by $225. In the result, I uphold a fee estimate of $450.

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[1] The names of the eight individuals were included in the request, but are not set out here.

DISCUSSION:

[10] The only issue before me is whether to uphold the ministry's fee estimate as reasonable.

[11] Section 57(1) requires institutions to charge fees for providing access to records requested under the *Act*. An institution must advise the requester of the fee where the fee is $25 or less to process a request. Where the fee exceeds $25, the institution must provide the requester with a fee estimate.[2]

[12] 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] The purpose of a fee estimate is to give the requester sufficient information to make an informed decision whether or not to pay the fee and pursue access.[4] The fee estimate also helps requesters decide whether to narrow the scope of a request in order to reduce the fees.[5]

[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.[6] The IPC 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.

[14] Section 57(1) states that:

> 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.

[15] More specific provisions regarding fees are found in sections 6, 7 and 9 of Regulation 460. Those sections state:

> 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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[2] Section 57(3) of the *Act*.
[3] Order MO-1699.
[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.

1. For photocopies and computer printouts, 20 cents per page.

2. For records provided on CD-ROMs, $10 for each CD- ROM.

3. For manually searching a record, $7.50 for each 15 minutes spent by any person.

4. For preparing a record for disclosure, including severing a part of the record, $7.50 for each 15 minutes spent by any person.

5. For developing a computer program or other method of producing a record from machine readable record, $15 for each 15 minutes spent by any person.

6. The costs, including computer costs, that the institution incurs in locating, retrieving, processing and copying the record if those costs are specified in an invoice that the institution has received.

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.

(2) A head shall refund any amount paid under subsection (1) that is subsequently waived.

9. If a person is required to pay a fee for access to a record, the head may require the person to do so before giving the person access to the record.

Representations

The ministry's representations

[16] The ministry submits that its fee estimate is fair, reasonable, and authorized by paragraphs 3 and 4 of section 6 of Regulation 460.

[17] The ministry says that the $1350 estimate is based on 30 hours of search time for 900 emails and 15 hours of time to prepare responsive records for disclosure. The ministry estimates that there are "approximately 900 emails" that are potentially responsive to the request, and that "it will take approximately 30 hours to search through each of the email records to determine if they are in fact responsive. $900 of the fee estimate is therefore attributable to the amount of time it will take to search for the records."

[18] The ministry says that its fee estimate is based first on the responsive emails all likely being contained in a master file folder created by the IMU manager for the inquest. The ministry says that the existing IMU manager was the manager at the time the records were created, and so has "direct knowledge" of the records, which the ministry submits supports its position that the fee is reasonable.

[19] The master folder is divided into eight subfolders, one for each inmate whose death was the subject of the inquest. The ministry submits that it arrived at the figure of 900 by

the IMU manager counting the emails in the master file and each subfolder. The ministry also says that, "As it is likely that the records are organized in file folders, we believe that this makes them easily searchable." The ministry says it took the organization of the records in separate and distinct data folders into account in preparing the fee estimate.

[20] The ministry says it also considered the following "into the time it will take to conduct the search":

- some of the emails are lengthy (more than one page)
- some of the emails contain attachments, which also may be responsive
- some of the emails are part of lengthy email chains, and these may contain duplicative information which will need to be severed.

[21] The ministry argues that the search through the 900 emails will require the IMU manager to carefully consider whether an email is in fact responsive. It says this will take "longer than it would for a more technical search," as the IMU manager will need to consider whether an email contains a "response" to the inquest recommendations. The ministry says that this is not as straightforward a search as it would be where the records could be searched using specific search terms, and that there are no search terms that can be used to easily search for and identify responsive records.

[22] The ministry says that most, if not all, of the responsive emails will be subject to severances, because they will likely contain advice and recommendations, and therefore may be subject to the exemption in section 13(1). The ministry says that the records may also be subject to exemption under sections 12, 14(1), 19 and 21 and that it will take 15 hours to sever the records in preparation for disclosure.

[23] Finally, citing paragraph 10 or Order MO-3404, the ministry submits that it has provided the appellant with "'sufficient information to make an informed decision on whether or not the pay the fee and pursue access,' which is the recognized purpose of a fee estimate."

The appellant's representations

[24] The appellant maintains that the fee estimate of $1350, based on 30 hours of search time and 15 hours of preparation time, is excessive and unreasonable.

[25] The appellant says that the issue of drugs in Ontario correctional facilities, including Hamilton-Wentworth Detention Centre, is a major societal problem and that there have been more than a dozen deaths at the Hamilton jail in the last decade. According to the appellant's representations, the issue has been the focus of significant media attention, especially locally, the drug-associated deaths are a matter of public safety, and there is a significant public interest in better understanding the issue and the ministry's response to recommendations.[7]

[26] The appellant says that, while the ministry's official responses to the 62

[7] I note that there is no claim before me that the appellant requested a waiver of the fee, pursuant to section 57(4) of the *Act*, and a fee waiver is not at issue in this appeal.

recommendations were made public, many of the responses were not clear and it is paramount to better understand, with a focus on preventing future similar deaths, why the ministry responded as it did. The appellant argues that the fee estimate of $1350 is an excessive barrier to this public interest.

[27] The appellant says that she has narrowed her request to one person's emails[8] - those of the IMU manager – and the time-frame of the search is only one year. She notes that the ministry's own representations reveal that the approximately 900 emails are already organized into folders by the eight inmates who died, allowing for quick access. The appellant argues that if an email is from the time period after the 62 recommendations were made, it relates to the inquest and is therefore responsive.

[28] Finally, the appellant submits that section 57(1)(b) of the *Act* does not include time for deciding whether or not to claim an exemption.

The ministry's reply representations

[29] The ministry says that there is a distinction between knowing which folders contain responsive records and where they are located on a computer and then being able to identify which records are actually responsive. While the records in the folders are generally about the inmates' deaths, the ministry says that not all are responsive because only some will contain a response to the recommendations.

Analysis and findings

[30] The fee provisions of the *Act* establish a user-pay principle, which is founded on the premise that requesters pay the prescribed fees associated with processing a request. In determining whether to uphold a fee, my responsibility under section 57 of the *Act* is to ensure that the amount charged is reasonable. The burden of establishing the reasonableness of the fee rests with the ministry. To discharge this burden, the ministry must provide me with detailed information as to how the fee was calculated in accordance with the provisions of the *Act* and produce sufficient evidence to support its claim.

[31] The fee in this appeal is broken down into two main parts: costs for the search for responsive records (section 57(1)(a)), and costs of preparing the records for disclosure (section 57(1)(b)).

Section 57(1)(a) – searching for responsive records

[32] With respect to the search portion of the fee under section 57(1)(a), the ministry has attributed $900 of the $1350 fee estimate to search through 900 emails[9] for ones that are responsive. The ministry's representations do not explain how it arrived at this amount. It appears that the ministry may have applied a rate of 2 minutes per email for search.[10] More specifically, it appears that the ministry calculated the search fee in this manner:

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[8] The appellant writes in her representations that she has "narrowed the scope of my request to only email correspondence from the manager of the Information Management Unit."

[9] As noted above, the ministry submits that it arrived at the 900 email figure based on the IMU manager's count.

[10] The IPC has accepted 2 minutes per email to be the rate of *severing* information from responsive records as part of preparing them for disclosure, which I discuss later in this order.

> 900 emails × 2 minutes each / 15 minute intervals × $7.50 per 15 minute interval = $900

[33] Regarding the search fee under section 57(1)(a), the IPC has previously found that to review or search for responsive emails, the appropriate rate is 1 minute per email. In Order MO-3014, the adjudicator considered the cost of searching through 2500 emails and found that 1 minute to view an email and determine its responsiveness was reasonable.

[34] Similarly, in Order MO-3404, the order cited by the ministry, the adjudicator calculated the allowable estimated search fee for emails to be 1 minute per record. In that case, the institution estimated that it would require 1 minute per record to search 12,494 emails in 35 email addresses. Accepting the institution's estimate of 1 minute per record, the adjudicator nevertheless reduced the allowable search fee by half. She found that:

> …it is reasonable to estimate that only half of the 12,494 records (6,247 records) would require the level of review requiring the board's estimate of 1 minute per record.

[35] The ministry also argues that its estimate for searching considers that some of the emails are part of lengthy chains that "may contain duplicative information which will need to be severed."

[36] Previous IPC orders have reduced the search fee to account for duplicated emails.[11] In Order MO-3446, the adjudicator stated:

> After all, the duplicative nature of email records exchanged between numerous individuals is, in my view, well-known. Further, the fee provisions of the *Act* allow institutions to charge a fee to conduct a record-by-record review to identify responsive information and duplication would be obvious at that point…There is precedent for reducing the allowable search fee to account for duplicated emails[6] and I will do so in this appeal by deducting 10% of the newly calculated search time.

[37] Similarly, in Order MO-3404, the adjudicator also considered duplicate emails and wrote:

> For the purposes of the fee estimate, I find that it is reasonable to estimate that only half of the 12,494 records (6,247 records) would require the level of review requiring the board's estimate of 1 minute per record. In my view, the board should be able to quickly determine which record is a duplicate of another. In addition, a full minute would not be required for the board to review the beginning of an email chain to determine which portion of the record contains duplicate information. Finally, I find that the reduction in search time is reasonable taking into consideration that the board's estimated search time included an unspecified block of time "to review the record for applicable exemptions."

[38] The adjudicator noted that "institutions cannot charge a fee [under section

[11] Orders MO-2446, PO-2514 and PO-3480.

57(1)(a)] for deciding whether to claim an exemption or identifying which records require severing," because this is a fee charged under section 57(1)(b) for preparing records for disclosure.

[39] I accept and adopt the approach set out in Orders MO-3014, MO-3404 and MO-3446. Based on the material before me, I find that 1 minute per email to search through emails is reasonable. In making my finding, I have considered that the emails are already organized in a master folder and further into subfolders by inmate name, making them "easily searchable," according to the ministry. I am mindful of the ministry's position that its search may not be as straightforward as a search by inmate name because the ministry is searching for responses to recommendations, and that an email can contain a response to a recommendation without mentioning an inmate's name.

[40] I also note that the ministry's representations appear to include time for severing emails in the search portion of the fee estimate. As prescribed in section 6.4 of Regulation 460, which relates to section 57(1)(b) of the *Act*, the ministry may charge $7.50 per quarter of an hour for severing the records in accordance with the *Act* to prepare them for disclosure. Because the ministry has also charged $450 for preparing the records for disclosure, I find that including costs associated with preparation (such as applying severances) in the search portion of the fee estimate, represents a duplicate charge. I therefore find it reasonable to reduce the ministry's search fee because the allowable costs associated with the search do not include severing the records in preparation for disclosure.

[41] I am also not persuaded that all 900 emails will require the same level of review, when the ministry itself submits that some will be longer or duplicative. In the circumstances, I am not persuaded that the search for responsive emails requires more than 1 minute per email, or that additional time is required to identify and review duplicate emails or attachments. In this regard, again applying the reasoning in Order MO-3404, I find it reasonable to estimate that only half of the 900 emails would require a level of review necessitating 1 minute per email, based on the ministry's representations that many emails will be duplicates, and based on the fact that, while the folders contain emails relating to the entire inquest, access is only sought to emails after a certain date.

[42] For these reasons, I find it reasonable to reduce the ministry's estimate of $900 for searching for responsive records by $675. This represents a reduction of $450 for reducing the search time from 2 minutes per email to 1 minute, and a further reduction of this amount by $225 based on the ministry's representations that there will be duplication (and my finding that duplicates will not require the same level of review), that likely no more than half of the emails will be responsive and that, of the emails in the master file and subfolders, only those after the inquest made its recommendations will be the subject of the ministry's search.

Section 57(1)(b) – preparing the records for disclosure

[43] The ministry's fee estimate for preparing the records for disclosure is $450. This, according to the ministry, includes reviewing each email to determine whether portions are exempt under the various exemptions the ministry has said may apply, and severing them prior to disclosure.

[44] The ministry submits that this amount is based on its "belief" that it will take 15 hours to prepare the records for disclosure.[12] The ministry has not provided any support for the belief that it will take 15 hours to sever responsive records. As a result, I have no basis on which to conclude that this estimate is reasonable in the circumstances.

[45] Paragraph 4 of section 6 of Regulation 460 allows the ministry to charge $7.50 for each 15 minutes spent preparing a record for disclosure, "including severing a part of the record." As I stated above, based on the ministry's representations that the folders containing responsive emails were created for the inquest, I find it reasonable to conclude that not all of the 900 emails will contain responses to the inquest's recommendations and therefore be responsive. As the appellant points out, emails containing responses likely follow the conclusion of the inquest in 2018, when recommendations would have been made, thus removing emails before then from those to be prepared for disclosure.

[46] Without any representations from the ministry to the contrary, I therefore find it reasonable to estimate that only a portion of the 900 emails will indeed be responsive and will therefore need to be prepared for disclosure. In the absence of specific evidence from the ministry, and applying the reasoning in Order MO-3404, I find it reasonable to conclude that no more than half of the emails will require severances, and that it will take less time to sever emails where there is duplication.

[47] Accordingly, I find it reasonable to reduce the ministry's estimate for preparing the records for disclosure by 7.5 hours. I reduce the allowable hours to 7.5, multiplied by $30 per hour, for a total of $225.00.

Conclusion

[48] After reviewing the parties' representations, I find that the ministry has not provided me with sufficient evidence to support its position that the fee was calculated in accordance with the provisions of the *Act* and is reasonable. I therefore partially uphold the ministry's fee. I reduce the ministry's allowable search fee from $900 to $225. I reduce the ministry's allowable preparation fee from $450 to $225. I find that a reasonable fee in the circumstances is $450.

[49] Nothing in this order precludes the ministry from charging a lower final fee, if the processing of the request allows for such further reduction.

ORDER:

I uphold the ministry's fee estimate in part, and allow it to charge a total fee of $450 for processing the request, representing $225 for search time and $225 for preparation time.

Original Signed by: July 27, 2021
Jessica Kowalski
Adjudicator

[12] According to the ministry's representations, "We believe it will take 15 hours to prepare each record that needs to be severed."