Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4171

Appeal PA19-00288

Ornge

July 28, 2021

Summary: Ornge received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to air ambulance response times. In response, Ornge issued an interim decision with a fee estimate. Upon receiving the fee estimate, the requester made a request to Ornge for a fee waiver. Ornge denied the fee waiver. The requester, now the appellant, appealed Ornge's decision to the Information and Privacy Commissioner of Ontario. In this order, the adjudicator upholds Ornge's decision to deny a fee waiver. However, she does not allow Ornge to charge a search fee under section 57(1)(a) of the *Act*, and reduces the total fee estimate from $2,327.50 to $1,487.50.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 57(1), 57(4), Regulation 460.

Orders Considered: Orders M-1083 and PO-1943.

OVERVIEW:

[1] This order addresses the reasonableness of a fee estimate and the denial of a fee waiver for access to records relating to air ambulance response times. Ornge, the province's provider of air ambulance service and medical transport , received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for the following information:

> All databases or reports that track air ambulance response times, from January 1, 2014 to the date the office begins processing this request, in a machine readable format.

[2] After ongoing discussions and email exchanges between the requester and Ornge, the request was revised to seek the following information:

> Response Time for Serviced and Transported Patients for the Period April 1, 2016 to December 31, 2018 for Scene Call Services and Transported Requests (herein after "Scene Call Report"); and
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> Response Time for Serviced and Transported Patients for the Period April 1, 2016 to December 31, 2018 for Interfacility Serviced and Transported Requests (herein after "Interfacility Report").

[3] In response to the modified request, Ornge issued an interim decision with the following fee estimate:

Cost	**Amount**
Developing a computer program or other method of producing a record from machine readable record 22 hours at $60/hour	$1,320.00
Search 28 hours at $30/hour	$840.00
Preparing documents for disclosure 5 hours and 15 minutes at $30/hour	$157.50
CD-ROM	$10.00
Total	$2,327.50

[4] Upon receiving the fee estimate, the requester made a request to Ornge for a fee waiver. In response, Ornge denied the fee waiver.

[5] The requester, now the appellant, appealed Ornge's decision to the Information and Privacy Commissioner of Ontario (IPC) and a mediator was appointed to explore resolution.

[6] As a mediated resolution was not possible, the appeal was transferred to the adjudication stage, where an adjudicator may conduct an inquiry under the *Act*. I decided to commence an inquiry by inviting representations from Ornge, initially. I received representations from Ornge, which were shared with the appellant, except for an affidavit submitted by Ornge with its representations that was withheld as confidential in accordance with the confidentiality criteria in the IPC's *Practice Direction 7: Sharing of Representations*. I then invited and received representations from the appellant, which were shared with Ornge. I invited Ornge to submit reply representations, which I received.

[7] In this order, I uphold Ornge's denial of the fee waiver, and I partly uphold its fee estimate. I do not uphold the search component of Ornge's fee estimate. I reduce the search fee from $840 to $0, because I find that the search activities Ornge has listed are not allowable charges under the *Act*. This results in a reduction of the total fee estimate from $2,327.50 to $1,487.50.

ISSUES:

A. Should the fee estimate be upheld?

B. Should the fee be waived?

DISCUSSION:

A. Should the fee estimate be upheld?

[8] The appellant argues that the fee estimate is excessive, while Ornge argues that the fee estimate is reasonable and should be upheld.

[9] 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,
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> (a) the costs of every hour of manual search required to locate a record;
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> (b) the costs of preparing the record for disclosure;
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> (c) computer and other costs incurred in locating, retrieving, processing and copying a record;
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> (d) shipping costs; and
>
> (e) any other costs incurred in responding to a request for access to a record.

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

> 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.
>
> 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.
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> (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 of Ornge

[11] Ornge argues that its fee estimate should be upheld because it is a reasonable estimate based on the allowable fees under the *Act* and the actual cost of producing the records. Ornge submits that to promote transparency and offer the appellant flexibility, it has broken the fee estimate into multiple parts based on report type (i.e. Interfacility Calls and Scene Calls) and year. Ornge submits that the appellant is free to narrow or broaden the request and only pay for the portion of the fee required for the specific records it decides it wants. Ornge submits that the fee estimate is based on three tasks required to compile the responsive records and the time required to complete each task.

[12] Ornge submits that the creation of a computer program is the first task necessary in order to produce responsive records. Ornge submits that the type of reports responsive to the appellant's request do not currently exist, but the raw data is maintained in Ornge's ambulance dispatch system. Ornge submits that this system is a health records database and its primary purpose is to aid in the provision of healthcare, however, response time information is included in that database.

[13] Ornge submits that the primary users of the database are ambulance dispatchers and physicians, and they access the data by searching for individual patients. Ornge explains that its database is not a spreadsheet, but a sophisticated database that stores data in "strings", which require extensive setup and is accessed using advanced software. Ornge notes that the system is not designed to extract information using response time, or nursing stations as focal points, which is what the appellant seeks. Ornge submits that response time information cannot be extracted from the database using copy and paste or quick export functions as would occur when working with a discrete spreadsheet.

[14] Ornge submits that in order to extract the data for reporting purposes, a trained Information Data Analyst (analyst) must create a computer program that would read the entire database, locate the requested data, collect all of the various data fields that the appellant has requested, and then compile them into an exported record that can be reviewed and manipulated. Ornge submits that this task only needs to be performed once, after which the computer program could be used to extract response time reports with data based on different periods.

[15] Ornge submits that the estimate for the creation of a computer program is 22 hours at $60 per hour. Ornge submits that its Acting Director of Decision Support provided the estimated time, an Ornge employee with 10 years' experience creating similar reports in the past, such as the Reaction/Response Times Report generated for the Ministry of Health (ministry) each month. Ornge submits that the rate of $60 per hour is the rate prescribed under the *Act* for "computer costs". Ornge submits that based on the cost of paying an analyst to perform this task, the actual cost of creating this computer program will be significantly higher than $60 per hour.

[16] Ornge submits that after creating a computer program, the second task is the actual search for the responsive records, which will ensure that it is providing the appellant with accurate information. Ornge submits that the steps involved in the search are validating that the computer program works as intended and is collecting all the requested data; and querying outlier data for accuracy by manually reviewing additional data in the source system to validate outlier data.

[17] Ornge estimates that the search for responsive records will take 28 hours at the rate of $30 per hour. Ornge submits that the majority of the 28 hours will be spent validating data located in "free text fields" within the source system. Ornge explains that these fields allow an ambulance dispatcher to write whatever text they wish. Ornge submits that since the text is not coded or classified, a computer program cannot extract it and an analyst must read the additional data. Ornge submits that to provide the appellant with transparency about this activity, a "manual review" column is included in both reports.

[18] Ornge submits that the 28-hour estimate is based on an assessment that at least 30% of the rows of data in each report will require manual review. Ornge submits that since it conducts 20,000 patient-related transports per year, 30% of the data about patient transports equates to 6,000 rows of data that will need to be manually reviewed for each reporting year. Ornge noted several reasons why a particular row of data may require a manual review, mainly to do with changes to its database, which I will not reiterate here.

[19] Ornge submits that the rate of $30 per hour is based on the rate prescribed by the *Act* for "search time". Ornge further submits that, again, the actual cost to pay an analyst to perform this task is significantly higher than $30 per hour as their salary is higher than that.

[20] Ornge submits that the final task is to review the records exported from the system and apply any applicable severances pursuant to the *Act* and the *Personal Health Information Protection Act, 2004*. Ornge submits that the records will contain identifiable personal health information that will need to be severed. Ornge submits that the appellant has specifically sought location-based data and many of its patient calls are from remote rural communities, in which a helicopter or airplane transport in a specific month, in a specific year, to a specific health care facility, could be identifiable to other members of the community. Ornge submits that it intends to make the review process as efficient as possible by using an algorithm to mask most patient data; however, there will still be some patient transports described in the report that will require severance to protect the patients' information.

[21] Ornge submits that the estimate for severance of the records is 5 hours and 15 minutes at $30 per hour. Ornge submits that it has based the time estimate on the fact

that Ornge performs 20,000 patient-related transports per year and therefore each year's report would have at least 20,000 rows of data to review and sever. Ornge submits that this means that it would review and sever about 191 rows of data per minute. Ornge submits that $30 per hour is the rate prescribed by the *Act* for "record preparation". Ornge submits that it estimates the actual cost of employees' salaries to perform this task will be higher than the estimated cost to the appellant.

[22] Ornge submits that the fee estimate also includes a CD-ROM fee of $10. Ornge submits that a CD-ROM was determined to be necessary because the data is expected to be larger than can be sent via email.

[23] Ornge submits that it has carefully considered the work required to provide the appellant with a reasonable fee estimate. Ornge submits that efforts have been made to make the process as efficient as possible and minimize the cost to the appellant. Ornge further submits that all charges are based on the prescribed fees under the *Act* and the ultimate fee charged to the appellant will be much lower than the actual cost of production. Ornge submits, therefore, that its fee estimate should be upheld.

Representations of the appellant

[24] The appellant argues that a report is not necessary. She submits that she is an experienced data journalist with graduate-level training in econometrics, and she has worked with a wide variety of database formats. The appellant submits that earlier in the process, she substantially narrowed the date range for her request. The appellant submits that staff who process public records often assume, reasonably, that journalists cannot work with raw data, and need processed and polished reports. The appellant submits, however, that is not the case here. The appellant submits that she has been clear throughout this process that she would accept data in any machine-readable format, anything other than a digital photograph of a PDF.

[25] The appellant submits that she views the first version of any request as a starting point for a discussion with staff about what is feasible, especially around dates, and the least burdensome way to sever information that cannot be released. The appellant submits, however, that her general preference is for something close to a full copy of the database in question, in whatever machine-readable format is convenient.

[26] The appellant submits that Ornge never seemed to consider releasing any version of its database to her. She submits that Ornge steered her towards refining the columns in a "report" it had devised, and she followed their lead in order to be flexible. The appellant submits that her call with Ornge's Acting Director of Decision Support was constructive and brief, and they discussed changes to Ornge's reporting systems, and in that context, the appellant agreed to limit the time period to make the request more straightforward. The appellant submits that she was not left with the impression that the request was particularly onerous.

[27] The appellant submits that if the polished "report" that Ornge prefers is more time consuming to prepare than an extract from the raw database, the additional cost should be Ornge's to bear. The appellant submits that Ornge has not explained why it would take 22 hours to extract the relevant data from its system. The appellant submits that, typically, extracting data is much less time-consuming than cleaning and analyzing it. She submits

that from Ornge's representations, she does not understand why this estimate is so large.

[28] The appellant notes that Ornge states its estimate is based on a similar report generated for the ministry in the past. The appellant argues that if a similar report already exists, that should reduce the time required for this extraction. The appellant submits that experienced programmers typically modify existing code to fit new situations.

[29] The appellant submits that Ornge seems to attribute the complexity of its task to an unidentified file format described as "strings". The appellant submits that "string" is technical jargon for any series of letters and numbers, and that all databases store strings. The appellant argues that if the database format is relevant to understanding the time estimate, it should be disclosed to her.

[30] The appellant submits that while Ornge says that its database "requires extensive setup and is accessed using advanced software", it is not clear why "advanced software" would make preparing an extract more difficult, as most organizations purchase software to improve efficiency. The appellant submits that if these assertions are relevant in understanding the time estimate, Ornge should be specific about the setup and software.

[31] The appellant submits that programming and data analysis is sometimes frustrating and time-consuming work, but as more and more public records are stored in large databases, one should be wary of arguments that limit access to records on the basis that programming tasks are difficult and mysterious, without going into any detail about what makes them difficult.

[32] The appellant argues that "data cleaning" should not be charged to requesters. The appellant notes that Ornge estimates that 28 hours of "search" work billed at $840.00 is required to release this data, and that it says this process would include "querying outlier data for accuracy by manually reviewing additional data in the source system to validate outlier data." The appellant submits that, in simpler terms, this means an analyst would identify response times that seem unusual, perhaps unusually long, and correct any errors.

[33] The appellant notes that Ornge goes on to say that "data quality issues may exist because of issues in individual data entry." The appellant submits, in other words, Ornge is concerned that there may be errors in its data. The appellant argues that while this kind of "data proofing" or cleaning is indeed time-consuming, it is not appropriate to charge it to a requester. The appellant submits that in Order M-1083, the IPC found it was not appropriate for the institution to charge for time spent "proofing data". The appellant argues that if "data proofing" was charged, Ornge and other agencies could effectively reduce access to any records they declare to be of poor quality.

[34] The appellant submits that understanding data quality issues is central to the reporting process for data and investigative reporters, and the issues flagged by Ornge would be most appropriately addressed in interviews and written correspondence with the journalists who request this data.

Ornge's reply

[35] Ornge submits that the appellant's argument that "a 'report' is not necessary" is inaccurate and seems to be based on confusion about the nature of the records Ornge

would produce in response to this request. Ornge submits that the original request was for a copy of Ornge's entire database. Ornge submits that this request is not possible for the reasons detailed extensively in its initial representations, as well as the fact that it is a database of personal health information and would not be subject to the *Act* in its current form. Ornge submits that despite this, it worked promptly and extensively to clarify the request to identify a record that can be produced.

[36] Ornge submits that through consensus, it identified a spreadsheet containing the requested data in a legible form as the appropriate record and that is the record at issue. Ornge submits that the record is still raw data and not a "processed and polished" report as indicated by the appellant. Ornge submits that it is a Microsoft Excel spreadsheet file and this should be known to the appellant, because she was provided with a template of the proposed record during the clarification process and she agreed, in writing, to that format. Ornge submits that the appellant acknowledged this in her representations, when she referenced the call between her and Ornge's the Acting Director of Decision Support.

[37] Ornge submits that the fact that the record is data in a spreadsheet does not in any way negate Ornge's legislated duty to charge fees for the request. Ornge submits that the *Act* specifically requires the institution to charge for production from a machine readable record by means of computer software and the exercise of technical expertise. Ornge submits that the Regulation specifically includes "developing a computer program or other method of producing a record from machine readable record" as one of the activities for which fees must be charged.

[38] Ornge submits that while the appellant takes issue with the time for extraction, it notes that it has provided detailed evidence from the individual who is actually in charge of Ornge's data to support each aspect of that estimate. Ornge further submits that its estimate is not purely theoretical, but based on prior experience producing similar types of records for the ministry. Ornge submits that it knows exactly what is involved in the creation of the requested records, because it has produced similar records in the past and it used that experience to generate the current fee estimate.

[39] Ornge notes that the appellant argues this prior experience should lower the fee estimate, but Ornge submits that any timesaving will automatically be taken into account. Ornge submits that the final fee will be for time actually spent and if its prior experience reduces that time, then the appellant will benefit.

[40] Ornge submits that it offered to provide the ministry response-time reports to the appellant, but she refused to accept them, as they do not suit her purposes. Ornge submits that those reports could be produced without any of the fees associated with the generation of different reports. Ornge submits that since that is not acceptable, it is required to generate different records in response to the request and must undertake the various tasks it has outlined in the estimate.

[41] Ornge submits that the appellant focuses on the idea of "data cleaning" and argues Ornge is attempting to improperly charge for that service. Ornge submits that it is not charging for data cleaning, but for the manual search, collection and severance of data that cannot be extracted using automated systems alone.

[42] Ornge submits that the appellant cites Order M-1038, which addresses "proofing

data", but does not define the term. Ornge argues that the proposed charges are not for "proofing data", as made clear in detail in its initial representations. Ornge notes that it is actually for a manual extraction of an estimated 6,000 rows of free text data to ensure they are appropriately included. Ornge submits that the data is free text, which is not coded or classified as other data fields are, and a computer extraction program cannot easily review it. Ornge submits, therefore, the data must be manually extracted, and reviewed and sorted appropriately to ensure the eventual record is responsive.

Analysis and findings

[43] In reviewing Ornge's fee estimate, I must consider whether its fee estimate is reasonable, giving consideration to the circumstances of this appeal and the provisions set out in section 57(1) of the *Act* and Regulation 460. The burden of establishing the reasonableness of the fee estimate rests with Ornge. To discharge this burden, Ornge must provide me with detailed information as to how the fee estimate was calculated in accordance with the provisions of the *Act* and produce sufficient evidence to support its claim.[1]

[44] Ornge breaks down the fee estimate as follows:

Cost	**Amount**
Developing a computer program or other method of producing a record from machine readable record 22 hours at $60/hour	$1,320.00
Search 28 hours at $30/hour	$840.00
Preparing documents for disclosure 5 hours and 15 minutes at $30/hour	$157.50
CD-ROM	$10.00
Total	$2,327.50

Section 6.5 of Regulation 460 – Development of a computer program

[45] Ornge submits that the creation of a computer program is necessary in order to produce the responsive record and that cost under section 6.5 of Regulation 460 is $1,320, or 22 hours of work at the rate of $60 per hour.

[46] Ornge submits that the type of reports responsive to the appellant's request do not currently exist, but can be produced by extracting the relevant data from Ornge's ambulance dispatch database. Ornge explains that the creation of a computer program to extract the data is required, because its database is not a spreadsheet, and the response times cannot be extracted from the database using copy and paste or quick export functions.

[1] Orders MO-3013 and MO-3014.

[47] Ornge's Acting Director of Decision Support, an employee with 10 years' experience creating similar reports for the ministry, provided the 22-hour estimate. Ornge explains that the estimated 22 hours includes time for an analyst to review the required fields, write computer code to extract the data from its database, and then format the data into a form that can be viewed and manipulated.

[48] I accept that the type of reports responsive to the appellant's request currently do not exist. I accept Ornge's explanation that its database is not similar to a spreadsheet and that the relevant data cannot be easily exported without creating a computer program to specifically extract the responsive data. While the appellant argues that Ornge has not explained why it would take 22 hours to extract the relevant data from its system, I am satisfied with Ornge's explanation that its estimate is based on prior experience producing similar types of records for the ministry. The appellant also argues that if a similar report already exists, that should reduce the time required for this extraction. Based on Ornge's reply representations, I am satisfied that any timesaving from this prior experience will be reflected by Ornge in its final fee to the appellant, as would be expected.

[49] Based on the evidence provided by Ornge, I accept that it must create a computer program to extract the data to create the records responsive to the appellant's request. I am satisfied that Ornge's 22-hour estimate is based on its experience of creating similar reports in the past. Accordingly, I find that Ornge's fee estimate for the development of a computer program under section 6.5 of Regulation 460 is reasonable, and I uphold it.

Section 57(1)(a) of the Act and Section 6.3 of Regulation 460 – Search

[50] With respect to the search portion of the fee estimate, Ornge estimates that the search will take 28 hours at the rate of $30 per hour. Ornge submits that the majority of the 28 hours will be spent validating data located in "free text fields" within the source system. Ornge explains that the steps involved in the search are validating that the computer program works as intended and is collecting all the requested data; and querying outlier data for accuracy by manually reviewing additional data in the source system to validate outlier data.

[51] Based on Ornge's representations, these two steps are not allowable search activities chargeable by Ornge under section 57(1)(a). In my view, "validating that the computer program works as intended" should have been captured by the charge for the development of a computer program under section 6.5 of Regulation 460. One would assume that part of developing a computer program entails validating that it works as intended. Section 57(1)(a) states that an institution shall charge fees for the "costs of every hour of manual search required to locate a record". Validating a computer program is unrelated to a search to locate a record. Furthermore, as the appellant notes, "querying outlier data for accuracy by manually reviewing additional data in the source system to validate outlier data" in simpler terms means an analyst would identify response times that seem unusual, and correct any errors. This is also not part of a search for records as contemplated by section 57(1)(a) of the *Act*.

[52] In Ornge's reply, it clarifies the activities involved in its search and it explains that the search fee is not for "proofing data", but for the manual extraction of free text data that cannot be completed by the computer. In my view, this task cannot be considered a "manual search" to locate a record. As Ornge noted, the records responsive to the

appellant's request do not currently exist. Therefore, Ornge has no records to locate. Even if I were to consider that each row of data was an individual record, the manual extraction of the data cannot be considered a "manual search" to locate a record. This data has already been located.

[53] In Order PO-1943, in considering whether the assembling of records already located was chargeable under the *Act,* Adjudicator Laurel Cropley stated:

> In my view, much of the work she undertook cannot be reasonably characterized as encompassing a part of the manual search. Nor does "assembling" the records fall within this activity. Once the manual search has been completed and the records are located, the chargeable costs must be calculated under one of the other categories set out in section 57(1) and only in the amounts prescribed by the regulations.

[54] In Order MO-1083, with respect to allowing a search fee for the assembling of information already located, Adjudicator Holly Big Canoe stated:

> The Board specifies that the 5 hours of manual search time includes a manual check of birth dates and recording of information, calculated on the basis of approximately one minute per name. These activities relate to information which has already been located and cannot, in my view, be properly included as search activities for the purposes of calculating a fee estimate. Accordingly, I find that the Board is not entitled to charge a fee for these activities under section 45(1)(a).[2]

[55] I accept the reasoning in these orders and adopt it in this appeal. Ornge argues that the search fee is for the manual extraction, review, and sorting of the free text data. These activities amount to the assembling of the free text data, which I find does not qualify as a manual search to locate records under section 57(1)(a) of the *Act.*

[56] I have also considered whether these activities are allowable as "preparing a record for disclosure" under section 57(1)(b), and I find that it does not, as previous IPC orders have found that activities such as data analysis, reviewing of data, assembling information and records, and proofing data are not allowable charges under the *Act*.[3]

[57] Accordingly, I find that Ornge is not entitled to charge the appellant a search fee for the activities it has listed under search. I reduce the search fee in the fee estimate from $840 to $0.

57(1)(b) – Preparation for disclosure

[58] With respect to the preparation portion of the fee under section 57(1)(b), Ornge estimates that it will take 5 hours and 15 minutes for Ornge staff to sever the record for disclosure. The appellant did not specifically address this portion of the fee estimate in her representations. As prescribed in section 6.4 of Regulation 460, Ornge may charge $7.50 per quarter of an hour for severing the record in accordance with the *Act* to prepare it for

[2] Section 45(1)(a) is the municipal equivalent of section 57(1)(a).
[3] Orders M-1083, PO-1943, and PO3590.

disclosure. Ornge submits that it has based the time estimate on the fact that Ornge performs 20,000 patient-related transports per year and therefore each year's report would have at least 20,000 rows of data to review and sever. On a per minute basis, that means Ornge would review and sever about 191 rows of data per minute. Generally, the IPC has accepted that it takes two minutes per page to sever exempt information on pages requiring multiple severances.[4] Given this, I find Ornge's estimate of severing 20,000 rows of data at 191 rows of data per minute to be reasonable. Therefore, I allow Ornge's fee estimate of $157.50 to prepare the records for disclosure.

Section 6.2 of Regulation 640 – CD-ROM

[59] With respect to the $10 charge for a CD-ROM, Ornge submits that a CD-ROM was determined to be necessary because the data is expected to be larger than can be sent via email. The appellant does not appear to dispute this charge. Section 6.2 of Regulation 640 allows an institution to charge for a CD-ROM, and I find that it is reasonable in the circumstances of this appeal. Therefore, I will allow the $10 charge for a CD-ROM in the fee estimate.

Summary

[60] After reviewing the representations of the parties, I find that Ornge has not provided me with sufficient evidence to support its position that the search portion of the fee estimate was calculated in accordance with the provisions of the *Act*. Therefore, I partially uphold Ornge's fee estimate. I allow it to charge $1,320.00 to develop a computer program, $157.50 for preparation, and $10 for a CD-ROM, but I do not allow it to charge a search fee. Accordingly, I reduce the search fee from $840 to $0, resulting in a reduction of the total fee estimate from $2,327.50 to $1,487.50.

B. Should the fee be waived?

[61] Section 57(4) of the *Act* requires an institution to waive fees, in whole or in part, in certain circumstances. 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) 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.

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

> 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:
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> 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.

[62] 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.[5]

[63] A requester must first ask the institution for a fee waiver, and provide detailed information to support the request, before the IPC will consider whether a fee waiver should be granted. The IPC 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.[6]

[64] The institution or the IPC may decide that only a portion of the fee should be waived.[7]

[65] 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.[8] Factors that must be considered in deciding whether it would be fair and equitable to waive the fees are:

- Section 57(4)(a): actual cost in comparison to the fee
- Section 57(4)(b): financial hardship;
- Section 57(4)(c): public health or safety; and
- Section 57(4)(d)/section 8 of Regulation 460: whether the institution grants access, fee of $5 or less.

[66] Any other relevant factors must also be considered when deciding whether or not a fee waiver is "fair and equitable". Relevant factors may include:

- the manner in which the institution responded to the request;
- whether the institution worked constructively with the requester to narrow and/or clarify the request;
- whether the institution provided any records to the requester free of charge;

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[5] Order PO-2726.
[6] Orders M-914, P-474, P-1393 and PO-1953-F.
[7] Order MO-1243.
[8] See *Mann v. Ontario (Ministry of the Environment)*, 2017 ONSC 1056.

- 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.[9]

Representations of the parties

[67] Ornge submits that a fee waiver would not be fair and equitable in the circumstances of this appeal. Ornge acknowledges that the factor at section 57(4)(c) may weigh "somewhat" in favour of a fee waiver, because the appellant is a journalist and publication of the information could promote better public health and safety. Ornge argues, however, there should be less weight given to this factor. Ornge submits that, while the information relates to Ornge's services and quality of services, it is substantially similar to information already available. Ornge submits that it already releases monthly reports on its response and reaction times, which were offered to appellant in response to this request. Ornge further submits that it produces daily and historic transport statistics in its online Statistics Centre. Ornge argues that while any publication of the responsive records by the appellant might shed some additional light on Ornge's services, it would be incremental given the majority of the information is already available to the public. Ornge argues, therefore, that the actual benefit to the public from the request is likely quite low.

[68] Ornge argues that all the other factors in section 57(4) weigh against the fee waiver. Ornge submits that with respect to the factor in section 57(4)(a), the actual fee charged to the appellant is likely to be far less than the actual cost incurred by Ornge due to the substantial amount of staff time that is required in order to create the responsive records. Ornge further submits that the request requires work by multiple employees who are paid far more than the allowable fee under the *Act.*

[69] With respect to the factor in section 57(4)(b), Ornge submits that there is no question that the fee will not cause financial hardship to the appellant. Ornge submits that the appellant is seeking the records in a professional capacity and she is employed as a reporter for a private corporation with profits of over $200 million in 2019 alone. Ornge argues that waiving the fee for the appellant would equate to a publicly funded healthcare institution funding a request for a successful billion dollar for-profit private corporation. Ornge submits that previous IPC orders have found that a fee waiver is not "fair and equitable" just because the requester is a journalist, and has repeatedly upheld the denial of a fee waiver when the requester was a journalist.[10]

[70] Ornge submits that a key factor weighing against a fee waiver is that Ornge staff must take significant time out of their regular duties to create the type of record that the appellant is requesting. Ornge submits that this was also a key factor that the adjudicator

[9] Orders M-166, M-408 and PO-1953-F
[10] Ornge refers to orders PA-050216-1, MO-2911, and MO-2603.

considered in Order MO-2862, when the IPC upheld the denial of a fee waiver by the police. In that order, the appellant was also a journalist intending to publish the requested information. Ornge notes that the same issue was considered in Order PO-3768, where the IPC upheld the denial of a fee waiver to a journalist because doing so "would shift an unreasonable burden of the cost of processing the request from the appellant to the ministry."

[71] Ornge argues that the same conclusion should be drawn in this appeal, because the appellant is seeking to have multiple Ornge employees spend significant time generating records in order to fulfill a very specific request, despite the availability of the substantially similar Reaction/Response Reports and online statistical information that are already available to the appellant.

[72] Ornge submits that it has cooperated and worked diligently with the appellant to facilitate the request and minimize fees, and this should weigh against granting the fee waiver. Ornge has made extensive efforts at each stage of the process to help the appellant obtain the type of record she seeks with minimal cost. Ornge submits that it took a collaborative approach to the fee itself, breaking it down by report type and year, and based on that breakdown the appellant has the full power to narrow or expand her request, while only paying the fee for the portions specifically sought.

[73] Ornge notes that it likely could have refused the request entirely because the appellant is really asking for record creation, which is outside the scope of the *Act*. Ornge notes that the IPC upheld a refusal under similar circumstances in Order MO-3254. Ornge submits, however, that it did not take that approach, and instead, it has worked diligently to provide the appellant with the information sought. Ornge submits that it has only asked the appellant to pay for costs permitted by the *Act* based on the user-pay principle of the *Act*.

[74] The appellant argues that the fee should be waived, because releasing the data is in the public interest. The appellant submits that she is an experienced investigative journalist with a track record of reporting on healthcare in remote communities. The appellant notes that people who live in remote indigenous communities rely on nursing stations and medevac services for life-saving emergent care, and nursing stations cannot put patients on life support. The appellant submits that every hour that critical patients wait for an Ornge air ambulance can contribute to permanent disability or death.

[75] The appellant submits that in 2013, the Office of the Chief Coroner for Ontario published a review of deaths linked to Ornge's service, and the report's sixth recommendation was that responses to nursing stations "be treated as scene calls, and not inter-facility transfers, in terms of their prioritization and level of paramedic care assigned." The appellant submits that the coroner noted that nursing stations "are not staffed or equipped like community hospitals, and therefore the response needs to proceed as quickly as possible using the most immediately available paramedics."

[76] The appellant argues that since Ornge notes in its response that it still classifies calls to nursing stations as inter-facility transfers, response times remain a matter of public interest. The appellant argues, therefore, that the fee should be waived.

Analysis and findings

[77] After reviewing the representations of the parties, I uphold Ornge's decision to deny a fee waiver.

[78] The appellant argues that the fee should be waived because releasing the information would increase public health or safety. I acknowledge that the appellant is a journalist who reports on healthcare in remote communities. I accept that the appellant plans to publish the information requested and that the dissemination of this information may benefit public health or safety. However, the fact that the information may benefit public health or safety alone is not sufficient to establish that a fee waiver is fair and equitable under section 57(4). The other factors must also be considered in deciding whether it would be fair and equitable to waive the fee.

[79] I have considered the other factors in section 57(4) and whether it would be fair and equitable in the circumstances of this appeal to grant a fee waiver, and I find that it would not. As stated above, the *Act* establishes a user-pay principle. This principle is founded on the premise that requesters should be expected to pay the fees associated with a request unless it is fair and equitable that they not do so. The fees outlined in the *Act* are mandatory unless the appellant can present a persuasive argument that a fee waiver is justified on the basis that it is fair and equitable to grant it.[11] The appellant has not provided a persuasive argument as to why it would be fair and equitable for Ornge to grant a fee waiver.

[80] In considering whether it would be fair and equitable to grant a fee waiver, I took into consideration that Ornge worked with the appellant to narrow the scope of her request in order to reduce the fee, and that Ornge has agreed to create a record specifically responsive to the appellant's request. I accept Ornge's argument that the actual cost of processing the request will be significantly higher than the fee that the appellant will pay. I also accept that the fee will not cause financial hardship to the appellant, who is a journalist employed by a successful for-profit private corporation. I conclude that granting a fee waiver would shift an unreasonable burden of the cost of processing the request onto Ornge.

[81] Accordingly, I find that it would not be fair and equitable to waive the fee in the circumstances of this appeal.

ORDER:

1. I do not uphold Ornge's fee estimate as reasonable. I order Ornge to reduce the search fee from $840 to $0, resulting in a reduction of the total fee estimate from $2,327.50 to $1,487.50.

2. I uphold Ornge's decision to deny the fee waiver.

Original signed by: July 28, 2021
Anna Truong

[11] Order PO-2726.

Adjudicator