

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4309

Appeal PA20-00276

Windsor Regional Hospital

September 28, 2022

Summary: Windsor Regional Hospital (the hospital) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for emails of 17 named staff members over a period of several years. The hospital issued an interim access and fee estimate decision. The appellant appealed the hospital's fee estimate and sought a fee waiver.

In this order, the adjudicator upholds the hospital's fee estimate of \$145,132.34 for the appellant's revised request and the hospital's decision not to waive the fee.

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

Orders Considered: Orders PO-4035 and PO-4298.

OVERVIEW:

[1] This order concerns a fee estimate and a fee waiver request concerning emails sought by the appellant.

[2] Windsor Regional Hospital (WRH or the hospital) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following:

All emails (inbox, sent, all email subfolders, deleted for the following individual's emails etc.) from January 1, 2010 until January 28, 2019 [for 17 named WRH staff members]

Background - Order PO-4035

[3] The hospital issued a decision to the appellant advising it would not process his request on the basis that the request was frivolous or vexatious. The appellant appealed the hospital's decision to the Information and Privacy Commissioner of Ontario (the IPC) and Appeal PA19-00138 was opened. Appeal PA19-00138 resulted in IPC Order PO-4035, in which the adjudicator ordered the hospital to issue an access decision responding to the request.

[4] In response to IPC Order PO-4035, the hospital issued a fee estimate decision dated August 12, 2020.

[5] The decision advised that the estimated fee to process the request was \$1,800,590, comprised of \$1,800,000 for preparation time (based on 3.6 million minutes) and \$590 for 59 CD-ROMS.

[6] The decision letter stated that:

I estimate that only partial access to the records will be granted. Many records will require severances or will be subject to exemptions or exclusions. It is likely that full access will be granted only to a minority of the records.

[7] This decision letter referenced the following exclusions that could apply to the records: sections 65(5.4) (hospital foundation), 65(5.5) (administrative records of a member of a health profession), 65(5.6) (charitable donations made to a hospital), and 65(8.1) (research or teaching materials) of the *Act*. This decision letter also referenced the following exemptions that could apply to the records: sections 15(a) (relations with other governments), 18 (economic and other interests), 19 (solicitor-client privilege), and 21(1) (personal privacy) of the *Act*.

The present appeal

[8] The appellant appealed the hospital's fee estimate decision to the IPC. Appeal PA20-00276 was opened and a mediator was appointed to attempt a resolution.

[9] During mediation, the appellant requested a fee waiver. The hospital denied the appellant's request for a fee waiver and that issue was added to the appeal.

[10] As further mediation was not possible, the appeal was transferred to the adjudication stage of the appeal process, where an adjudicator may conduct an inquiry under the *Act*. The former adjudicator assigned to this appeal decided to conduct an

inquiry and sought representations from the hospital.

[11] The hospital provided representations. The former adjudicator shared the hospital's representations with the appellant and asked him to address, in his representations, whether the scope of his request could be narrowed to potentially reduce the fee estimate amount.

[12] The appellant revised the request and sought records from the same 17 WRH staff members as those in his original request, but he narrowed the time frame to a variety of ranges (between one and five years during the years 2012 to 2018) for each WRH staff member named in the request. The appellant also provided approximately one hundred search terms that he wanted the hospital to use in searching for responsive records.

[13] The hospital provided reply representations and provided a revised fee estimate of \$145,132.34 to process the revised request.

[14] The appellant provided sur-reply representations in response. The appeal was then transferred to me to continue the adjudication of the appeal. The issues before me are whether the revised fee estimate and the denial of the fee waiver should be upheld.¹

[15] In this order, I uphold the hospital's fee estimate of \$145,132.34 for the appellant's revised request and I uphold the hospital's decision not to waive the fee.

ISSUES:

- A. Should the fee estimate of \$145,132.34 be upheld?
- B. Should the fee be waived?

DISCUSSION:

Issue A: Should the fee estimate of \$145,132.34 be upheld?

Representations

[16] The hospital submits that the revised request remains exceptionally broad. It states that the list of search terms accompanying the revised request is so long and includes close to 100 generic search terms that certainly yield thousands of "responsive" records, particularly given that the email custodians are all individuals who

¹ Neither party raised the issue of time extension under *FIPPA* for the hospital to process the revised request. Therefore, although time extension was an issue concerning the original request, it is not an issue before me concerning the revised request that I am adjudicating upon in this order.

are administrators, employees or professional staff at a public hospital. It states that, for example, the list of search terms includes the following search terms:

... "criteria", "AI", "fundraising", "fundraise", "multidisciplinary", "multi-disciplinary", "RFP", "Confidentiality", "charting", "E", "lease", "donation". Moreover, the list includes search terms that are not relevant to the stated purpose of the request... For example, the list of search terms includes [name] which is the name of the appellant's [relative], and a WRH employee.

[17] It states that to determine the scope of the records responsive to the narrowed request, it engaged its third-party service provider, Transform Shared Service Organization (TSSO),² which conducted an electronic search using the search terms from the "narrowed" request. These searches yielded 144,946 email records, and 62.2 GB of data.

[18] The hospital states that in consultation with TSSO's Information Security and Privacy Analyst (who was also consulted for the purposes of preparing the original fee estimate for the appellant's request and referenced in the initial representations), the hospital calculated a revised fee estimate of \$145,132.34 for processing the "narrowed" request, as follows:

Activity	Calculation	Total
Time for preparing record for disclosure	145,000 [pages of] records ³ × 2 minutes [per page]	290,000 minutes
Fee for preparing record for disclosure	290,000 minutes/15-minute segments = 19,333.33 × \$7.50	\$145,000.00
CD-ROMS	14 CD-ROMS ⁴ × \$10	\$132.34
Total		\$145,132.34⁵

[19] In response, the appellant did not provide representations on the fee estimate.

² TSSO is a Shared Service Organization created by its five-member hospitals, which includes WRH. TSSO provides Information Technology/Information Management Services.

³ The hospital states that its estimate of each record being one page long is a conservative estimate and it is likely that many if not most emails sent/received by the individuals listed in the revised request are longer than one page, and many emails will contain attachments. As a result, it states that the actual cost is highly likely to far exceed the estimate.

⁴ Each holding 4.7 GB of data. The hospital did not explain why it is charging less than \$140 (\$10 x 14) for the CD-ROMS.

⁵ The hospital did not charge the appellant a computer search fee, which it indicated was \$90 for 3 hours of search time to locate the responsive records.

Instead, his representations focus on seeking a fee waiver.

Findings

[20] The purpose of a fee estimate is to give the requester sufficient information to make an informed decision on whether or not to pay the fee and pursue access.⁶

[21] The fee estimate also assists requesters to decide whether to narrow the scope of a request in order to reduce the fees.⁷

[22] In all cases, the institution must include a detailed breakdown of the fee, and a detailed statement as to how the fee was calculated.⁸

[23] 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.

[24] Section 57(1) requires an institution to charge fees for requests under the *Act*.

[25] That section reads:

A head shall require the person who makes a request for access to a record to pay fees in the amounts prescribed by the regulations for,

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

[26] More specific provisions regarding fees for records that do not contain the requester's personal information⁹ are found in section 6 of Regulation 460, which reads:

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:

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

⁶ Orders P-81, MO-1367, MO-1479, MO-1614 and MO-1699.

⁷ Order MO-1520-I.

⁸ Orders P-81 and MO-1614.

⁹ Neither party submitted that the responsive records could contain the appellant's personal information.

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.

[27] Where the fee is \$100 or more, as is the case here where the fee estimate is \$145,132.34, 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.¹⁰

[28] In this case, under section 57(1)(a), the hospital searched for and located potentially responsive records to arrive at the estimate. It did not charge the appellant a search fee for these searches.

[29] Section 57(1)(b), the preparation fee provision in *FIPPA*, includes time for

- severing a record¹¹
- a person running reports from a computer system¹²

[30] Generally, the IPC has accepted that it takes two minutes to sever a page that requires multiple severances.¹³

[31] Under section 57(1)(b), the hospital estimated its preparation time to sever the records based on the advice of TSSO. TSSO is an Information Technology/Information Management Services company that is familiar with the type and content of the records. Based on this advice, the hospital estimated two minutes per estimated page of records at the allowable preparation fee of \$7.50 per each 15 minutes, for a total of

¹⁰ Order MO-1699.

¹¹ Order P-4.

¹² Order M-1083.

¹³ Orders MO-1169, PO-1721, PO-1834 and PO-1990.

\$145,000.

[32] The remaining fee charged by the hospital is \$132.34 for 14 CDs, which is a fee allowed under section 57(1)(c) for costs in processing the records.

[33] Based on my review of the hospital's representations and its detailed fee estimate, I am upholding the hospital's fee estimate as reasonable in the circumstances of this appeal.

[34] The hospital has explained how it estimated the fees. It has relied on appropriate expertise to identify the estimated volume of responsive records. In my view, the fee estimate in the amount of \$145,000 is reasonable considering the time necessary to review and sever a large number of electronic records. I accept the hospital's submissions that when one considers the breadth of the search, a number of exemptions and exclusions may apply. Further, the hospital also considered and calculated the estimated preparation time for the responsive records based on the IPC's generally-accepted approach that it takes two minutes to sever a page that requires multiple severances and the fee estimate for the CDs is in line with the fee permitted under section 57(1)(c).

[35] Accordingly, I uphold the \$145,132.34 fee estimate. I will now consider whether this fee estimate of \$145,132.34 should be waived.

Issue B: Should the fee be waived?

[36] The hospital has estimated a fee of \$145,132.34 to process the revised access request. The appellant has sought a waiver of this fee estimate.

[37] 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.

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.

[38] 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 8 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.¹⁴

[39] 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.¹⁵

[40] The institution or the IPC may also decide that only a portion of the fee should be waived.¹⁶

Representations

[41] The appellant states that he seeks access to the records for a number of reasons, including to investigate issues related to the public interest. In particular, he seeks the documents requested so that he can examine the conduct of the hospital that he believes has been contrary to the public interest. For example, he is of the view that the hospital:

1. misled the public about the site selection process for the new hospital site in the Windsor region,
2. wasted public funds in its expenditures for the new site,
3. misled the Windsor City Council about the continued availability of health services in the City of Windsor, before the City Council imposed a tax levy on the public, and

¹⁴ Order PO-2726.

¹⁵ Orders M-914, P-474, P-1393 and PO-1953-F.

¹⁶ Order MO-1243.

4. misled the Local Integrated Health Network about its new chronic kidney disease clinic.

[42] In reply, the hospital states that although the revised fee estimate is reduced from the original fee estimate, it remains exceptionally high and represents a tremendous cost for it, a public hospital. Moreover, it states that the revised fee estimate represents a very small fraction of the actual costs to the hospital of responding to the revised request.

[43] The hospital states that it has already spent almost three years attempting to facilitate the appellant's access to responsive records, at a significant financial and human resources cost to the hospital and that the actual costs to process, collect and prepare the records for disclosure would far exceed the amount of the revised fee estimate.

[44] It states that:

...the purported purposes for the revised request are wide ranging and are expressly requested so that the Appellant can examine conduct that "he believes has been contrary to the public interest." This is not the criteria to be considered under section 57(4) of the *Act*..

The appellant has not explained how dissemination of the records responsive to the revised request (or the original request) will benefit public health or safety.

[45] In sur-reply, the appellant submits that in relation to public health and safety, his request focuses on whether the hospital misled the public and the Windsor City Council regarding certain elements of patient care and spending of public funds. He submits that by ensuring transparency and accountability on the hospital's part, and by having the potential to expose the hospital's improper conduct, his request plainly stands to improve the administration of public health and, by extension, patient safety.

[46] The appellant refers to another request for records that he made to another hospital, Hôtel-Dieu Grace Healthcare.¹⁷ He submits that the combined fee estimates of both hospitals are crushing and prohibitive and that it is self-evident that these fee estimates would cause financial hardship and act as a bar to accessing information for almost all individuals.

[47] The appellant further states that the hospital is also well aware that he is currently unemployed and is subject to restrictions that make it impossible for him to

¹⁷ The appellant was advised that the appeals of his two requests, which were made to separate institutions and involve different records, would be considered by me in separate orders. An order was made in that appeal, Order PO-4298, in which I upheld Hôtel-Dieu Grace Healthcare's fee estimate and denied the appellant a fee waiver.

earn an income. He submits that the only reason for the hospital to maintain the fee appears to be to avoid producing the documents and that public institutions should not hide behind punishing cost recovery positions to prevent access to information that members of the public are otherwise entitled to.

Findings re: whether it would it be fair and equitable to waive the fee?

[48] 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.¹⁸ Factors that must be considered in deciding whether it would be fair and equitable to waive the fees are set out in section 57(4)(a) to 57(4)(d). The factor at section 57(4)(d) is not relevant to the circumstances of the present appeal.¹⁹ As discussed below, other factors may be relevant.

[49] I will consider each of the remaining sections separately.

Section 57(4)(a): actual cost in comparison to the fee

[50] Where the actual cost to the institution in processing the request is higher than the fee charged to the requester, this may be a factor weighing against waiving the fee.²⁰

[51] The hospital has indicated that the actual cost for the third party TSSO’s review and preparation of the records would exceed the amount of the fee estimate. As explained above, the appellant has not challenged the calculation of the fee estimate, nor has he challenged the hospital’s claim that the estimated actual cost would be higher as the hospital has estimated the preparation fee based on one page per email record, whereas many, if not most, of the emails sent/received by the individuals listed in the revised request are longer than one page, and many emails will contain attachments.

[52] Considering that the bulk of the \$145,132.34 fee, the amount of \$145,000, is for preparing at least an estimated 145,000 pages of records, I find that the estimated actual cost to process this request will exceed the estimated fee of \$145,132.34. Therefore, this factor weighs against a fee waiver.

¹⁸ See *Mann v. Ontario (Ministry of Environment)*, 2017 ONSC 1056.

¹⁹ Under section 57(4)(d) and section 8 of Regulation 460, 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.

²⁰ Order PO-3755. See also Order PO-2514.

Section 57(4)(b): financial hardship

[53] The fact that the fee is large does not necessarily mean that payment of the fee will cause financial hardship.²¹

[54] The appellant has indicated that the combined fees of the request at issue in the current appeal and the request at issue, in a separate appeal, would cause him financial hardship. He has not indicated how the payment of the specific fee at issue in this appeal for the amount of \$145,132.34 will cause financial hardship.

[55] The appellant was advised in the Notice of Inquiry that for section 57(4)(b) to apply, the he must provide some evidence regarding his financial situation, including information about income, expenses, assets and liabilities.²²

[56] The appellant has provided evidence about his income, and that he is unemployed. He has not provided evidence about his expenses, assets and liabilities. As the appellant has not provided evidence of his expenses, assets and liabilities, and taking into account the amount of the revised fee estimate of \$145,132.34, I find that I do not have sufficient evidence to conclude that payment of the revised fee estimate of \$145,132.34 will cause financial hardship for the appellant. Therefore, this factor does not apply and does not weigh in favour of a fee waiver.

Section 57(4)(c): public health or safety

[57] The following factors may be relevant in determining whether dissemination of a record will benefit public health or safety under section 57(4)(c):

- 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
- the probability that the requester will disseminate the contents of the record²³

²¹ Order P-1402.

²² Orders M-914, P-591, P-700, P-1142, P-1365 and P-1393.

²³ Orders P-2, P-474, PO-1953-F and PO-1962.

[58] The focus of section 57(4)(c) is “public health or safety”. It is not sufficient that there be only a “public interest” in the records or that the public has a “right to know”. There must be some connection between the public interest and a public health and safety issue.²⁴

[59] The records responsive to the appellant’s revised request are the records of the following 17 WRH staff members²⁵ for varying time periods ranging between one to 5 years, during the years 2012 to 2018:

1. President and Chief Executive Officer
2. Regional Vice President, Cancer Services, Renal Services, Patient Relations & Legal Affairs
3. Vice President, Medicine, Emergency and Diagnostic Imaging
4. Director, Renal Program and Mental Health
5. Clinical Practice Manager, Renal Program
6. A nephrologist
7. A second nephrologist, (also a Medical Director of the Renal Program)
8. A third nephrologist
9. Chief of Medicine
10. Chief of Staff
11. Vice President, Public Affairs, Communications and Philanthropy
12. Director, Public Affairs, Communications and Philanthropy
13. Manager, Renal Dialysis / Operations Manager – Renal Program
14. Director, Renal, Stroke and Allied Health
15. Director, Medical Affairs
16. A fourth nephrologist (also a Medical Director of the Renal Program)
17. Manager, Renal Program Development

²⁴ Orders MO-1336, MO-2071, PO-2592 and PO-2726.

²⁵ The request referred to the names of these 17 staff members. I have substituted their titles at the relevant times instead of their names in this order.

[60] In his representations, the appellant indicates that he requires the records to examine the conduct of the hospital including examining information about:

- the site selection and expenditure of funds for a new hospital site in the Windsor region,
- the availability of health services before a tax levy, and
- the new chronic kidney disease clinic.

[61] Nowhere in his representations does the appellant explain how the records sought connect or relate to the issues that he wishes to examine.

[62] Although the records that the appellant wishes to examine appear to involve matters of public rather than private interest, the appellant has not demonstrated in his representations how the responsive records, which are dated between 2012 and 2018:

- involve a subject matter that relates directly to a public health or safety issue,
- if disseminated, 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; and,
- will be disseminated by the appellant.

[63] In my view, the appellant has not sufficiently explained how the information requested would or could benefit public health or safety. Accordingly, I find that I do not have sufficient evidence to conclude that dissemination of the records would benefit public health or safety, therefore this factor does not apply or weigh in favour of a fee waiver.

Other relevant factors

[64] 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;

- 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.²⁶

[65] The parties did not provide representations on these or any other relevant factors.

[66] I have considered whether any other relevant factors are relevant. I note that although the scope of the request was narrowed at adjudication by the appellant reducing the time frames for the records sought, it still included a request for records of the same 17 hospital staff as in the original request.

[67] The revised request also included an extensive list of approximately 100 search terms, many of which are general terms that result in numerous records being responsive to the revised request. The revised request, therefore, involves a large number of records, estimated at 145,000 pages above, and the appellant has not advanced a compromise solution to reduce the \$145,132.34 cost. It is my view, waiver of the fee would shift an unreasonable burden of the cost from the appellant to the hospital.

[68] Having considered the factors that could weigh in favour of a finding that it is fair and equitable for the hospital to waive the fee, I have concluded that none apply. I find that in the circumstances of this appeal, a fee waiver would shift an unreasonable burden of the cost from the appellant to the hospital. For these reasons, I am upholding the hospital's decision to deny the fee waiver as I find that a fee waiver is not fair and equitable in the circumstances of this appeal.

ORDER:

1. I uphold the hospital's fee estimate of \$145,132.34 for the appellant's revised request.
2. I uphold the hospital's decision not to waive the fee.

Original signed by: _____
Diane Smith

September 28, 2022 _____

²⁶ Orders M-166, M-408 and PO-1953-F.

Adjudicator