

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER PO-4423

Appeal PA20-00252

Queen's University

July 21, 2023

**Summary:** This appeal disposes of the issues arising from a fee estimate issued as part of Queen's University's response to a request made under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The requester sought access to records pertaining to a member of the university's teaching staff and requested a fee waiver. The university issued an interim access decision, which the requester appealed. During mediation the university provided the requester full access to some records, without charge. The university issued a revised interim access decision, which included a fee estimate of \$12,400 to respond to remaining parts of the request. The university stated that it required additional information in order to respond to the request for a fee waiver. The appeal proceeded to adjudication of the university's fee estimate and a review of its response to the request for a fee waiver.

In this order, the adjudicator upholds the fee estimate in part and reduces the estimate for search time and preparation time from \$10,000 to \$8,010. The adjudicator otherwise upholds the university's fee estimate and its decision not to waive its fee.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 57(1) and 57(4); Regulation 460 under the *Freedom of Information and Protection of Privacy Act* (R.R.O. 1990, Reg 460), sections 6 and 8

**Order Considered:** Order P-474.

**Case Considered:** *Committee for Justice and Liberty et al. v National Energy Board et al.* [1978] 1 SCR 369, 1976 CanLII (SCC).

## **OVERVIEW:**

[1] This order disposes of the issues arising from an interim access decision issued by Queen's University (the university) in response to a request made under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The requester sought access to records relating to a member of the faculty (the affected party) and its Employment Relations program. The requester stated that his request included but was not limited to the following list of records:

- a. Current teaching schedule, Schedule of courses and seminars taught, Syllabi of courses and seminars taught, letter of appointment, date of appointment, Curriculum Vitae, List of Publications, List of Presentations and Talks, Lectures, Public Lectures, Papers, Experience, Faculty Seniority and Hire Date, Grant applications, Funded conferences, Funded talks, Funded research, Invited lectures, Clinics, Faculty review, Current projects
- b. Role, duties, relationship, job description 'Continuing Adjunct'
- c. Role, duties, teaching, employment and relationship with the Centre for Law in the Contemporary Workplace at [the university]
- d. Briefing notes, meeting notes, meeting minutes, faxes, letters, reports, audits, inquiries, memoranda, corporate plans and intra-Provincial Ministry correspondence including to/from all outside institutions, including but not limited to, Ontario Public Service Employees Union (OPSEU), Lancaster House, [a specified legal partnership]
- e. Emails, SMS, PIN to PIN and other mobile messages, including Message-ID and full headers
- f. Voice Mails, Phone Recordings, Audio Recordings and transcriptions and data of the same
- g. Correspondence notes data and records in any form relating to [the affected party]
- h. Include [the university] confidences and records subject to solicitor-client privilege
- i. All other records already released under [the *Act*] by [the university] on [the affected party]

[2] The requester also sought a fee waiver in his request and provided information relating to his income.

[3] The university wrote to the requester seeking clarification of the request under

section 24(2) of the *Act*. The requester stated that he is seeking records relating to the affected party and the university's "Masters Program Industrial Relations" (the program).

[4] The university issued an interim access decision outlining records that it could not disclose in response to the request explaining that much of what the requester was seeking did not exist, was exempt or excluded under the *Act*. In relation to parts (d) to (g) of the request, the university stated that these categories are all too broad to be searched and asking the requester to narrow the search to particular topics or search terms.

[5] In the interim access decision, the university stated that it expected to be able to grant access to some records responsive to the request, specifically current teaching schedule, schedule of courses and seminars taught, syllabi of courses and seminars taught, letter of appointment and job description of 'continuing adjunct.' The university issued an initial fee estimate of \$242.50 to provide these records.

[6] The university indicated that further information pertaining to the affected party's published papers, grant applications, funded research, invited lectures and current projects may be available in annual reports within the program's office.

[7] In addition, the university responded to the request for a fee waiver and stated that it acknowledged the requester's financial situation but required more documentation regarding assets and expenses before it could decide about waiving fees.

[8] The requester, now appellant, appealed the university's interim access decision to the Information and Privacy Commissioner of Ontario (IPC) and a mediator was assigned to explore resolution.

[9] During mediation, the appellant identified specific records from part (a) of the request, specifically teaching schedules and course syllabi, to which he was pursuing access. The university issued revised decisions granting full access to those identified records, consisting of 75 pages in total, without a fee.

[10] The appellant then advised the mediator that he wished to move the appeal to adjudication. The university provided a fee estimate for responding to the remaining parts of the request, which it identified as parts (d) to (g). The fee estimate is for \$12,400 and is broken down as follows:

Search and locate records – 200 hours @ \$30 per hour	\$6,000.00
Prepare records for disclosure – 67 hours @ \$30 per hour	\$4,000.00
Photocopies – 12,000 pages @ \$0.20 per page (alternative \$10 for records in electronic format on USB drive)	\$2,400.00

[11] As a mediated resolution of the appeal was not achieved, the file was transferred

to the adjudication stage of the appeal process, in which an adjudicator may conduct an inquiry.

[12] Upon receipt of the mediator's report, the appellant asked that the issues to be decided on appeal include the reasonableness of the university's search and the application of exemptions and exclusions cited by the university in its interim response to his request.

[13] The decision giving rise to this appeal is an interim access decision concerning the threshold issues of fee estimate and fee waiver. The reasonableness of the university's searches and the application of the exclusion or any exemptions under the *Act* is outside the scope of this appeal. The university has not yet conducted searches to respond to the appellant's request and a final access decision regarding access to responsive records has not yet been issued.

[14] I decided to conduct an inquiry and invited and received representations from the parties, which were shared in accordance with section 7 of the *IPC Code of Procedure and Practice Direction 7*.

[15] In his representations, the appellant alleges bias in favour of the university, on the part of the IPC. I address the appellant's allegations as a preliminary issue below.

[16] In this order, I uphold the university's fee estimate in part and reduce the estimate for search and preparation time from \$10,000 to \$8,010. I otherwise uphold the university's fee estimate and its decision not to waive its fee.

### **ISSUES:**

- A. Should the IPC uphold the university's fee estimate?
- B. Should the university waive its fee?

### **DISCUSSION:**

#### **Preliminary issue: Is there a reasonable apprehension of bias on the part of the IPC, in favour of the university?**

[17] The appellant alleges "institutional bias" on the part of the IPC, in favour of the university and states:

The APPELLANT's research suggests that government institutions often do not respond with citizens, members of the public and/or APPELLANTS, regarding a file in order to buy the INSTITUTIONAL RESPONDENT more time and/or decide on a course of action to obstruct the rights of the citizen, member, and/or APPELLANT. Usually, this takes the form of

allowing the INSTITUTIONAL RESPONDENT to write a letter in order to parse issues, and/or obstruct certain issues/matters in moving forward.

[18] More specifically, the appellant alleges that the IPC, through its mediator, demonstrated bias by (i) failing to communicate with him over a period of time, (ii) communicating with the university while ignoring the appellant's correspondence and (iii) asking the university to issue a fee estimate after his appeal had been moved to the adjudication stage of the appeal process.

[19] I address the appellant's specific allegations only. Actual bias need not be proven. The appellant need only establish a reasonable apprehension of bias and the test for doing so relies on perception. The widely-accepted test for establishing a reasonable apprehension of bias was articulated by Justice De Grandpr in his dissenting opinion in *Committee for Justice and Liberty et al. v National Energy Board et al.* as follows:

[T]he apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [a decision-maker], whether consciously or unconsciously, would not decide fairly."<sup>1</sup>

[20] For the reasons set out below, I am not satisfied that the appellant has established a reasonable apprehension of bias in favour of the university, on the part of the IPC or the mediator.

### ***Delay and the appellant's communications with the IPC***

[21] From my review of the appeal file, I note that at the beginning of the appeal process, the appellant communicated with the IPC office via fax. As a result of operational changes at the IPC during the Covid-19 pandemic, transmission of documents via fax has been phased out and the appellant was notified of this change. Parties now have the option to correspond with the IPC via mail or email. The appellant elected to send and receive communications in the mail via Canada Post.

[22] During the mediation stage of the appeal process, an IPC mediator will typically communicate with parties via telephone and/or email. The university communicated with the IPC mediator via these means.

[23] As already noted, the appellant elected to receive communications via mail and scheduled phone calls in advance, by letter to the mediator. From my review of the file, I note that the appellant and the mediator sometimes experienced difficulties

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<sup>1</sup> [1978] 1 SCR 369, 1976 CanLII 2 (SCC)

scheduling times for telephone calls and the appellant expressed frustration at these difficulties. I also note that there were occasions when the mediator could not reach the appellant via telephone causing time to lapse between their communications.

[24] I am not satisfied that the appellant's difficulties in his communications with this office nor the time that elapsed between them establishes a reasonable apprehension of bias on the part of the mediator. An informed person, viewing the matter realistically and practically and having thought the matter through, would conclude that the mediator's communications with the parties were impartial.

### ***The university's fee estimates***

[25] As I have summarised in the background section above, the records to which the appellant is seeking access include the categories of records listed in parts (a) to (g) of the request. In its response to the request, the university issued an initial fee estimate of \$242.50 to provide some of the records listed in parts (a) to (c) and indicated that the scope of parts (d) to (g) of the request was too broad to be searched and the appellant was invited to narrow the request to specific topics or search terms.

[26] During mediation, the university issued a fee estimate of \$12,400 for responding to parts (d) to (g) and the appellant asserts that the mediator demonstrated bias by allowing the university to issue a fee estimate.

[27] The fee provisions of the *Act* require institutions to charge fees to process requests and that requesters pay the prescribed fees, unless it is fair and equitable for them not to do so.<sup>2</sup> The *Act* also requires that an institution *must* provide a fee estimate where the fee is more than \$25.<sup>3</sup> As I explain below, one of the purposes of the fee estimate is to assist a requester to decide whether to narrow the scope of a request in order to reduce the fee.

[28] I find that the appellant's claims of bias on the part of the IPC in providing the university with an opportunity to issue a fee estimate for responding to the appellant's request are unfounded. The provisions of the *Act* impose the requirement for a fee estimate and the appellant has not demonstrated how issuing a fee estimate renders the mediation stage of the appeal process unfair. On the contrary, in my view, issuing a fee estimate for responding to parts (d) to (g) of the request serves to assist the appellant in deciding whether and how to proceed with his request and access the records he is seeking.

[29] Accordingly, I find that the appellant has not established a reasonable apprehension of bias on the part of the IPC or its mediator.

[30] I now address the issues arising from the fee estimate and the university's

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<sup>2</sup> Section 57(4).

<sup>3</sup> See section 57(3).

response to the appellant's request for a fee waiver.

**Issue A: Should the IPC uphold the university's fee estimate?**

[31] In this appeal, the appellant challenges the reasonableness of the university's fee estimate of \$12,400.00.

[32] Under section 57(3), an institution must provide a fee estimate where the fee is more than \$25. The purpose of the fee estimate is to give the requester enough information to make an informed decision on whether or not to pay the fee and pursue access.<sup>4</sup> The fee estimate also helps requesters decide whether to narrow the scope of a request to reduce the fee.<sup>5</sup>

[33] The institution can require the requester to pay the fee before giving them access to the record.<sup>6</sup> If the estimate is \$100 or more, the institution may require the person to pay a deposit of 50 per cent of the estimate before it takes steps to process the request.<sup>7</sup>

[34] Where the fee is \$100 or more, the fee estimate can 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.<sup>8</sup>

[35] In all cases, the institution must include a detailed breakdown of the fee and a detailed statement as to how the fee was calculated.<sup>9</sup>

[36] The fee provisions are set out in the *Act* and Regulation 460 (the Regulation). The IPC can review an institution's fee estimate and can decide whether it complies with the *Act* and the Regulation.

[37] The mandatory fee provisions in the *Act* are found in section 57(1), which provides 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;

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<sup>4</sup> Orders P-81, MO-1367, MO-1479, MO-1614 and MO-1699.

<sup>5</sup> Order MO-1520-I.

<sup>6</sup> Regulation 460, section 9.

<sup>7</sup> Regulation 460, section 7(1).

<sup>8</sup> Order MO-1699.

<sup>9</sup> Orders P-81 and MO-1614.

- (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.

[38] More specific fee provisions are found in sections 6 and 6.1 of the Regulation. Section 6 applies to general access requests, while section 6.1 applies to requests for one's own personal information:<sup>10</sup>

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.
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.

### ***University's representations***

[39] It is the university's position that the fee estimate for processing the appellant's request is reasonable and compliant with the *Act*. The university provides background information about the processing of the appellant's request and states that its initial fee estimate of \$242.50 was for the records that the university expected to be able to identify in response to parts (a) to (c) of the request. This initial fee estimate was based on 6.75 hours of search time. During mediation, the university provided the appellant with records from these parts of the request, namely teaching schedules, course schedules and syllabi and the time spent searching for these records was 5.25 hours. The university waived its fee.

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<sup>10</sup> As this appeal does not address a request for the appellant's own personal information, the fee provisions in section 6.1 of the Regulation are not relevant.



[40] In its response to the appellant's request, the university determined that for parts (d) to (g), a fee estimate could not be made due to the broad scope of these categories of records. The records requested in parts (d) to (g) of the appellant's request included briefing notes, meeting notes, meeting minutes, emails, SMS messages, PIN to PIN messages and "other mobile messages", voicemails, phone records and audio recordings, correspondence notes data and records in any form relating to the affected party.

[41] Notwithstanding its concerns that a fee estimate would not be accurate, in order to progress the appellant's appeal, the university produced a fee estimate of \$12,400 broken down as follows:

Search and locate records – 200 hours @ \$30 per hour	\$6,000.00
Prepare records for disclosure – 67 hours @ \$30 per hour	\$4,000.00
Photocopies – 12,000 pages @ \$0.20 per page (alternative \$10 for records in electronic format on USB drive)	\$2,400.00

[42] The university states that it consulted with the program chair, who delegated the program's administrator and an employee in its finance and administration office to work with the university's privacy office. The university determined that the searches to be carried out to respond to parts (d) to (g) of the request would include both the records of the program department and those held by the affected party. The university states that there is no central search functionality in the university whereby records could be searched across the institution by keyword. Instead, the university reached out to the affected party, who is still a member of faculty, to obtain an estimate of the number of responsive records.

[43] The affected party advised the university's privacy office that she estimated that she had approximately 10,000 emails and another 2,000 documents that could be responsive to parts (d) to (g) of the appellant's request. The affected party has been employed by the university since 1994. The university states that to identify responsive records, the affected party would be required to read emails and documents and an estimated time of 1 min per record is submitted as a reasonable average reading time. Accordingly, the university estimates 200 hours of search time for the 12,000 responsive records.

[44] The university states that the affected party maintains her own university email account and her own paper and electronic files and the university submits that she is in the best position to estimate the number of responsive records. The university states that some records held by the affected party will be considered to be their own personal records and not within the university's custody or under its control.

[45] The university states that there are other records held by the program master

relating to the affected party but that most of these are not responsive to the appellant's request as they would be employment related.<sup>11</sup>

[46] The university estimates that an additional 1.5 hours of search time would be required to locate some additional records from parts (a) and (b) of the appellant's request beyond those already disclosed. The search time for these additional records is not included in the fee estimate as, in the university's view, this search time estimate is trivial in comparison to the time required for the affected party to locate other responsive records.

[47] Regarding the preparation time, the university estimates that one third of the responsive records would require severing. The fee estimate for time spent preparing the records for disclosure is calculated at 2 mins per page, which the university submits is the IPC's accepted allowance for this work. The university estimates \$4,000 for preparation time.

[48] Regarding photocopying, the university states that it estimated photocopying fee of \$2,400 for the 12,000 pages of records is made using the allowable rate of \$0.20 per page. The university submits that this fee was included to acknowledge the appellant's preference not to use electronic mail. However, the university states that the fee for providing the records electronically on a USB drive would be \$10, as an alternative to the photocopying fee.

[49] The university submits that it does not anticipate any computer programming would be required for it to respond to the appellant's request and it would meet the cost of shipping in the event that the appellant wished to receive the records in hard copy.

[50] The university acknowledges that its fee estimate of \$12,400 is high, however, it submits that this is likely to be an underestimate given the broad scope of the request and the fact that the affected party has worked at the university since 1994.

### ***Appellant's representations***

[51] The appellant poses a number of questions in his representations about the IPC's process that allowed the university to issue its fee estimate after the appeal had been transferred to the adjudication stage. I have addressed these issues above in the discussion of the appellant's allegations of bias.

[52] In relation to the fee estimate, the appellant submits that it is high and unreasonable and "an abuse of process" to block access to records and information to

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<sup>11</sup> As this appeal relates to the threshold issues of fee and fee waiver, the university has not yet conducted searches in response to the appellant's request. Submissions concerning which records the university anticipates may be accessible are premature and not necessarily relevant to the issues before me.

which the public has a right under the *Act*. The appellant states that he has “no research interests in emails to and from students” and the high and unreasonable fee estimate of \$12,400 obstructs his research of significant issues of public interest. The appellant provides some background information related to his research and cites publications supporting the principles of open government and access to information.

[53] The appellant also provides submissions about the affected party as further context for his access request.

[54] The appellant’s representations do not directly address the university’s submissions regarding the calculation of its fee estimate and the work that it states has to be done to respond to the appellant’s request.

### ***Analysis and findings***

[55] For the reasons that follow, I uphold in part the university’s fee estimate to respond to categories (d) to (g) of the appellant’s request. I find that a fee estimate of \$8,010 is reasonable and in accordance with the Regulation for search time and preparation time. I also find the fee estimate of \$2,400 for photocopying, or \$10 in the alternative for the cost of a USB should the appellant elect to receive the records electronically, is reasonable and in accordance with the Regulation.

[56] In the fee estimate, the university provided a breakdown of the work to be done to process the outstanding parts of the request. The university also explained that the affected party had been employed there for more than 25 years and the broad scope of the request would necessitate searching through large numbers of records.

#### *Search time*

[57] I accept the university’s submission that it sought the advice of the affected party named in the request when preparing the fee estimate. I am satisfied that the affected party is an individual familiar with the type and content of the records to which the appellant is seeking access. Regarding the search time estimated by the university to respond to parts (d) to (g) of the request, I have considered the length of time that the affected party has been employed at the university and the scope of parts (d) to (g).

[58] From my review of the request, I find that it is expressed in open-ended language. I note that the appellant requests access to the records “including but not limited to” those listed in the different categories that form the 9 parts (a) to (i) of the request.

[59] In my view, the records described in parts (d) to (g) are the broadest of those categories and seek access to the affected party’s briefing notes, meeting notes, meeting minutes, faxes, letters, reports, audits, inquiries, memoranda, corporate plans, ministry correspondence including to/from identified organisations, emails, SMS, PIN to

PIN and other mobile messages, including Message-ID and full headers, voice mails, phone recordings, audio recordings, transcriptions and corresponding data, correspondence notes, data and records in any form relating to the affected party. The appellant is seeking access to both electronic and physical records and I accept that searches will have to be made of records in both of these formats and that those records will be located in the university's program department and held by the affected party.

[60] In the context of a period of employment spanning more than 25 years and the estimated 10,000 responsive emails and 2,000 responsive documents, I accept the university's estimate of 1 minute of search time per record. Accordingly, I find a total time estimate of 200 hours to be reasonable.

[61] Section 6 of the Regulation provides for a charge of \$7.50 for every 15 minutes of search time (i.e. \$30/hour). The university's search fee of \$6,000 is therefore in accordance with the Regulation.

*Preparation time*

[62] The university estimates that one third of the responsive records will require severing to prepare them for disclosure. I find this estimate to be reasonable.

[63] The university has explained the need for the records to be prepared for disclosure. The university anticipates a significant amount of the affected party's documentation would be of a personal nature (either relating to the affected party or individual correspondents, such as students). The university's fee estimate is based on the expectation that the personal information of the affected party and other individuals would need to be severed from some records prior to disclosure to the appellant.

[64] The appellant's position is that emails to and from students are of "no research value" to him. However, the appellant has not narrowed the scope of his request to exclude any type of record. These emails are therefore responsive to the current scope of the request. Accordingly, I am satisfied that the university's fee estimate is based upon the reasonable expectation that a portion of the responsive records located in its searches will require severing prior to disclosure.

[65] I find the university's estimate that 4000 records are likely to require severing to be reasonable. The IPC has generally accepted that it takes two minutes to sever a page that requires multiple severances.<sup>12</sup> The university has not estimated the number of pages to be severed. However, assuming that each of the 4000 records that require severing comprise at least a single page, this gives a time estimate of 67 hours to sever 4000 pages. I find this estimate to be reasonable.

[66] Section 6 of the Regulation provides for a fee of \$7.50 per 15 minutes (i.e.

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<sup>12</sup> Orders MO-1169, PO-1721, PO-1834 and PO-1990.

\$30/hour) spent preparing a record, including severing part of a record. The university's fee of \$4,000 for preparation time is therefore in excess of the rate allowed by the Regulation. Accordingly, I reduce the fee estimate for preparation time to \$2,010.

### *Photocopying*

[67] Regarding the photocopying fee, I have accepted the university's estimate that its searches will locate 12,000 records. Assuming each record is at least a single page, the university's photocopying fee is based on photocopying 12,000 pages and I find this to be reasonable.

[68] Section 6 of the Regulation provides a photocopying fee of \$0.20 per page. On the basis of 12,000 pages, a photocopying fee of \$2,400 is in accordance with the Regulation.

[69] I note that the university has included the photocopying fee estimate acknowledging that the appellant has expressed a preference not to use email for his communications with the university. In the event that the appellant elects to receive the records in an electronic format, I find that the university's fee of \$10 for the USB to be reasonable.

[70] Section 6 of the Regulation provides a fee of \$10 for records provided on CD-ROM. The IPC has previously upheld a fee of \$10 for a USB on the basis that it is akin to a CD-ROM<sup>13</sup> and I am satisfied that it is a comparable form of electronic file transfer.

[71] Accordingly, I find a fee estimate of \$8,010 is reasonable and in accordance with the Regulation for the search time and preparation time estimated for processing parts (d) to (g) of the appellant's request. In addition, the photocopying fee of \$2,400 is reasonable and in accordance with the Regulation or, in the alternative, the fee of \$10 for the appellant to receive the records electronically.

[72] I have considered the appellant's submission that the university's fee estimate is high and an abuse of process for obstructing his right of access under the *Act*. As noted above, the university is required to issue a fee estimate under the fee provisions of the *Act* and I have determined the fee estimate that is reasonable and calculated in accordance with the Regulation for responding to the request in its current form. The appellant is reminded that one of the purposes of a fee estimate is to assist him decide whether to narrow the scope of his request. The fee estimate may be reduced, if the time spent preparing records can be saved. Having indicated that he has no research interest in some of the records that are responsive to the request, for example student emails, the appellant may wish to consider expressly excluding them from his request.

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<sup>13</sup> See, for example, PO-3818.

## **Issue B: Should the university waive its fee?**

[73] The fee provisions in the *Act* establish a “user-pay” principle. The fees referred to in section 57(1) of the *Act* and section 6 of the Regulation are mandatory unless the requester can show that they should be waived.<sup>14</sup>

[74] The *Act* requires an institution to waive fees, in whole or in part, if it is fair and equitable to do so. Section 57(4) of the *Act* and section 8 of the Regulation set out matters the institution must 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.

[75] A requester must first ask the institution for a fee waiver, and provide detailed information to support the request. If the institution either denies this request, or chooses to waive only a portion of the fee, the IPC may review the institution’s decision, and can uphold or modify the institution’s decision.<sup>15</sup>

[76] The appellant requested a fee waiver when he submitted the access request to the university and stated that the reason for seeking the fee waiver is financial

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<sup>14</sup> Order PO-2726.

<sup>15</sup> Section 57(5), Orders M-914, MO-1243, P-474, P-1393 and PO-1953-F.

hardship.

[77] A fee must be waived, in whole or in part, if it would be “fair and equitable” to do so in the circumstances.<sup>16</sup> As noted above, the factors that must be considered by an institution in deciding whether it would be fair and equitable to waive a fee include whether the payment of the fee will cause a financial hardship to a requester.<sup>17</sup>

[78] For the financial hardship factor in section 57(4)(b) to apply, a requester must provide evidence regarding their financial situation, including information about income, expenses, assets and liabilities.<sup>18</sup> The fact that the fee is large does not necessarily mean that payment of the fee will cause financial hardship.<sup>19</sup>

[79] The institution (and, on appeal, the IPC) must consider any other relevant factors when deciding whether it would be fair and equitable to waive the fee. 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 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 offered a compromise that would reduce costs,
- whether the institution provided any records to the requester free of charge, and
- whether the waiver of the fee would shift an unreasonable burden of the cost from the requester to the institution.<sup>20</sup>

## ***Representations***

### *University’s representations*

[80] The university states that the appellant’s access request is overly broad and this is why it had initially declined to issue a fee estimate. The university submits that parts (d) to (g) of the request amount to a request for access to *all* documentation of and about the affected party during their entire teaching career in the program. The

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<sup>16</sup> See *Mann v. Ontario (Ministry of Environment)*, 2017 ONSC 1056.

<sup>17</sup> Section 57(4)(b).

<sup>18</sup> Orders M-914, P-591, P-700, P-1142, P-1365 and P-1393.

<sup>19</sup> Order P-1402.

<sup>20</sup> Orders M-166, M-408 and PO-1953-F.

university states that processing such a broad request is not fair and equitable and would interfere with the operations of the institution both in terms of the time involved and the cost which, from a salary perspective, would be substantial, including the need to hire additional staff to review and redact responsive records.

[81] The university states that the appellant sought a fee waiver in his initial access request citing financial hardship and provided documentation showing his financial situation. However, the university submits that the information provided is insufficient for it to confirm whether the appellant is able to pay the estimated fee. The university states that the appellant is required to provide evidence of expenses, assets and liabilities and cites Order PO-3383.

[82] The university submits that the appellant's financial position is not clear from the documents that he has provided. The university also submits that rather than attempt to work with the university constructively to try and narrow the scope of his request as the university has suggested in its correspondence, the appellant appealed the interim access decision.

[83] The university states that during mediation, it responded to the appellant's requests targeting specific records relating to the affected party. The university provided the affected party's teaching schedules for courses and seminars from 2014 to 2019 and course syllabi to the appellant without charging a fee and understanding that these targeted requests reflected a narrowing of the scope of the initial request. However, the appellant then asked to move the appeal to adjudication to pursue access to all the records originally requested.

[84] The university submits that the subject matter of the requested records is not a matter of public interest, nor does it relate to a public health or safety issue and the appellant has not articulated in any way that dissemination of the records would yield a public benefit.

#### *Appellant's representations*

[85] The appellant submits that the records he is requesting and the research that flows from those records is in the public interest. The appellant explains that he is working on a study about how lawyers, institutions, educational institutions, unions, members of the same, all profit from human rights violations. Part of the appellant's research pertains to the affected party as a publicly-funded member of staff at the university.

[86] The appellant submits that his research and the request for access to records aligns with the principles of the *Act*, namely to provide a right of access to information under the control of institutions that should be available to the public. In light of this, the appellant submits that all fees should be waived.

[87] The appellant reiterates the submissions made above regarding the fee acting as



an obstruction to his right to access information and cites academic writing on open government. The appellant also cites section 57(4)(c) and submits that giving attention to the conduct of arbitrators regarding human rights will benefit public health and safety and the subject of public teaching of students on the employment relations program is in the public interest. The appellant's position is that releasing this information to members of Parliament is "purely public interest and public service research and initiative."

[88] Regarding the fee waiver provisions of section 57(4), the appellant submits that the criteria listed are vague and do not provide direction to a requester. In particular, the appellant states that there is no direction regarding the documentation required to meet the criteria listed in section 57(4).

[89] The appellant submits that neither the university nor the IPC has defined the documentation required to demonstrate the criteria in section 57(4). The appellant acknowledges that he bears the onus of establishing the basis for the fee waiver but submits that there is a conflict between this onus of proof and section 21(3) of the *Act*.<sup>21</sup>

[90] The appellant states that he is willing and fully and completely co-operative to submitting details of his financial situation in support of the request for a fee waiver due to undue hardship. The appellant provided information relating to his total income in 2017 and details of his tax assessment for 2018 issued by the Government of Canada. The appellant stated that his income for 2018 was below Canada's poverty line for a single adult at that time. This information was provided with his access request to the university.

[91] In his representations, the appellant provides context to the termination of his employment in 2017 and some confidential details of the source of his current income and his expenses. The appellant asks me to find that the payment of the fee estimate would cause him financial hardship or, in the alternative, to provide direction of the financial details or documents he required to provide, in a manner that is consistent with the provisions of the *Act* that protect personal privacy.

### ***Analysis and findings***

[92] For the reasons that follow, I find that it would not be fair and equitable for the university to waive its fee under section 57(4) of the *Act* in the circumstances of this appeal.

[93] The appellant has asked the university to waive payment of its fee on two grounds: that the dissemination of the records he is seeking will benefit public health or safety and that payment of the fee will cause him financial hardship.

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<sup>21</sup> Section 21(3) provides for circumstances when the disclosure of personal information is presumed to be an unjustified invasion of personal privacy.

*Public health or safety*

[94] In Order P-474, the adjudicator set out four factors to be considered in determining whether the dissemination of a record will benefit public health or safety under section 57(4)(c). These factors have been generally accepted as the applicable criteria where this section is relied upon for seeking a fee waiver. The factors are:

1. Whether the subject matter of the record is a matter of public rather than private interest;
2. Whether the subject matter of the record relates directly to a public health or safety issue;
3. 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; and
4. The probability that the requester will disseminate the contents of the record.

[95] The appellant submits that the records he is seeking are a matter of public interest. However, this submission is made in a general sense and with reference to the public interest in knowing about breaches of human rights, which is the subject matter of the appellant's research. Notwithstanding the fact that the subject of the appellant's research may have broader interest, I am not persuaded that the subject matter of the records he is seeking is a matter of public rather than private interest.

[96] As I have noted above, the scope of the appellant's request encompasses a broad range of communications and records that span the affected party's 25-year career at the university. The appellant is seeking access to the affected party's meetings notes, emails, SMS and PIN to PIN messages, voice mails and all correspondence. Specifically, the appellant has not defined the scope of the request with reference to *any* subject matter.

[97] As the appellant has not specified any topic in relation to the records he wishes to access, I am not satisfied that the subject matter of the responsive records is a matter of public rather than private interest. There is similarly no reasonable basis for me to find that the subject matter of the responsive records relates directly to a public health or safety issue or that their dissemination would benefit the public. Accordingly, I find that the public health or safety consideration in section 57(4)(c) does not apply to support the appellant's request for a fee waiver.

*Financial hardship*

[98] As already noted, the appellant bears the onus of demonstrating that payment of the fee estimate will cause him financial hardship and that to do so, he should provide

evidence regarding his financial situation, including information about income, expenses, assets and liabilities. The appellant's position is that neither the university nor the IPC have provided specific direction about what this evidence should entail.

[99] During my inquiry, I sent the appellant a Notice of Inquiry providing some guidance on the issue of fee waiver and the appellant's representations show that he has accessed the IPC's published guidance on *Fees, Fee Estimates and Fee Waivers* on its website.<sup>22</sup>

[100] The appellant has provided some information about his financial situation. I accept that the appellant's employment was terminated in 2017 and that since then his income has become dramatically reduced. The appellant has provided confidential details of the source and amount of his income in September 2022 and his monthly expenses.

[101] The appellant has not disclosed any assets or liabilities and I understand his submission in this regard to be that to do so would be a presumed unjustified invasion of his personal privacy, with reference to section 21(3) of the *Act*.

[102] On the basis of the limited information provided by the appellant, it is arguable that payment of the fee estimate for the university to process parts (d) to (g) of his request, which I have determined is reasonable and in accordance with the Regulation, in the amount of at least \$8,010 to search for and prepare records, would result in financial hardship. In previous orders of the IPC, adjudicators have been prepared to assume financial hardship, without making a determination to that effect, for the purposes of the appeal and in order to consider the fairness and equity of granting a fee waiver.<sup>23</sup> I adopt this approach in this appeal.

#### *Fair and equitable*

[103] Assuming that the payment of the fee would cause the appellant financial hardship, I must consider whether it is fair and equitable to waive payment of all or part of the fee. Section 57(4) of the *Act* lists financial hardship as one of the factors to be considered. Previous orders of the IPC have identified other factors that may be relevant and that an institution must consider when deciding whether it is fair and equitable to waive the fee. These factors, listed above, may include how the institution responded to the request, whether the parties worked constructively to narrow the scope of the request, whether the requester offered a compromise to reduce costs, whether the institution provided any records free of charge and any financial burden on the institution that may be caused by waiving the fee.<sup>24</sup>

[104] In my view, besides the appellant's assumed financial hardship, there are other

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<sup>22</sup> [https://www.ipc.on.ca/wp-content/uploads/2018/06/fees-fee\\_estimates-fee\\_waivers-e.pdf](https://www.ipc.on.ca/wp-content/uploads/2018/06/fees-fee_estimates-fee_waivers-e.pdf)

<sup>23</sup> See for example, Order M-220.

<sup>24</sup> See Orders M-166, M-408 and PO-1953-F.

relevant factors to be considered in this appeal. As I have noted a number of times in this decision, the appellant's request is broad both in scope and time. Despite opportunities to do so and the invitation of the university, the appellant has not narrowed the scope of the request.

[105] In addition, I note that when the appellant identified particular records from parts (a) to (c) of the request during mediation, the university provided them without charge. I accept the university's submission that this was done in the interests of resolving the appeal.

[106] I also note that the appellant requested the fee waiver at the time of submitting his request and his position is that, as a matter of principle, the records to which he seeks access should be available to him free of charge. I do not accept the appellant's submission in this regard, which contradicts the user-pay principle of the fee provisions of the *Act*.

[107] In addition, the only compromise that the appellant has offered is that the fee be waived in full.

[108] I have accepted the university's estimate that responding to the appellant's request will require 200 hours of time spent locating records and a further 67 hours of time spent preparing them for disclosure. I note that the university submits this may be an underestimation of the work involved. I accept the university's submission that this burden of time will also be a financial burden by redirecting salary to the work required to respond to the request.

[109] As I explain above, I have not been persuaded that the subject matter of the records sought in the appellant's request is a matter of public rather than private interest. In these circumstances and weighing all relevant factors, I find that waiving the fee in this appeal would be neither fair nor equitable. Requiring the university to waive the fee would shift the cost of the work to be done from the appellant to the university and, ultimately, to the public. In my view, notwithstanding the financial hardship that may be caused by payment of the fee, there is no reasonable basis for waiving it in the circumstances of this appeal where the appellant has not demonstrated that he is seeking access to records of public interest nor, despite expressing a lack of interest in some responsive records, has he worked constructively to narrow the scope of his request to attempt to reduce the fee.

[110] Accordingly, I uphold the university's decision not to grant the appellant a fee waiver.

## **ORDER:**

1. I uphold the university's fee estimate in part. The university's fee estimate for search time and preparation time is reduced from \$10,000 to \$8,010.

2. Except as set out in provision 1, I uphold the university's fee estimate.
3. I uphold the university's decision not to waive its fee.

Original Signed By: \_\_\_\_\_

Katherine Ball  
Adjudicator

July 21, 2023 \_\_\_\_\_