



OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
— for —
British Columbia

Order P10-03

**OCCUPATIONAL HEALTH AND SAFETY AGENCY
FOR HEALTHCARE IN BC**

Jay Fedorak, Adjudicator

September 29, 2010

Quicklaw Cite: [2010] B.C.I.P.C.D. No. 48

CanLII Cite: BCIPC 48

Document URL: <http://www.oipc.bc.ca/PIPAOrders/2010/OrderP10-03.pdf>

Summary: The applicant, a former senior executive and research associate requested some of her personal information in the custody or control of OHSAH, a non-profit healthcare agency. OHSAH issued a fee estimate of \$5,075.35 for approximately 8,000 pages of records. It subsequently reduced the fee to \$3,432.70 for 5,455 pages of records. The applicant complained about the fee, on the grounds that it was neither minimal nor reasonable. OHSAH found to have charged labour costs for unnecessary activities. It was also unnecessary to use 20 lb. bond paper and plastic binders. OHSAH ordered to recalculate the fee to exclude unnecessary labour costs, pages and materials. OHSAH also ordered to investigate whether copies could be provided on lower quality paper for a reduced rate.

Statutes Considered: *Personal Information Protection Act*, ss. 32(2) and 36(2).

Authorities Considered: B.C.: Order P08-02, [2008] B.C.I.P.C.D. No. 18; Order P08-03, [2008] B.C.I.P.C.D. No. 34; Order P08-04, [2008] B.C.I.P.C.D. No. 35; Order F08-16, [2008] B.C.I.P.C.D. No. 28; Decision P10-01, [2010] B.C.I.P.C.D. No. 21.

1.0 INTRODUCTION

[1] This decision stems from a complaint that a fee the Occupational Health and Safety Agency for Healthcare in BC (“OHSAH”) assessed in response to an applicant’s request under the *Personal Information Protection Act* (“PIPA”) for her personal information was not in compliance with s. 32 and was not reasonable. The applicant, a former senior executive with OHSAH, made two requests for access to her personal information. The second request was the subject of an

application under s. 37 of PIPA by OHSAH for relief from having to respond to this request. I dealt with that application in Decision P10-01.¹

[2] OHSAH subsequently issued a fee estimate of \$5,075.45 for responding to the second request. The applicant made a complaint to the OIPC that this fee was not in compliance with s. 32 of PIPA.

[3] Mediation failed to resolve the matter and it was referred to a written inquiry under PIPA.

2.0 ISSUES

[4] The Notice of Written Inquiry this Office sent to the parties stated that the issues to be decided are:

1. Whether the fee charged by the organization complies with s. 32(2) of PIPA; and
2. Whether the fee charged by the organization is reasonable under s. 36(2)(c) of PIPA.

[5] Section 51 of PIPA sets out the burden of proof for certain issues, but not the issue in this inquiry. Each party therefore must provide argument and evidence to justify its position on the issue.

3.0 DISCUSSION

[6] **3.1 Background**—The applicant is a former senior executive of OHSAH whom the organization terminated. She indicates that the motive behind her requests for her personal information is her belief that OHSAH has information about her that is incorrect and that it has disclosed this information outside of the organization.² She states that her concern is to protect her professional reputation.

[7] **3.2 Access Request and Fee Estimate**—OHSAH calculated the first fee as follows:

- salary for senior staff to locate, retrieve and prepare records for disclosure (37.5 hours at a rate of \$30 per hour for a total of \$1,125.00);
- salary for a temporary employee to retrieve the electronic records; generate a list of and physically organize the records for review; review records and remove messages copied to, received or sent by the applicant; and consult with senior staff about certain records (75 hours at \$21.72 per hour plus GST for a total of \$1,710.45); and

¹ [2010] B.C.I.P.C.D. No. 21.

² Respondent's submission, p. 22.

- costs for pages printed by professional copying company to produce on 20lb bond paper and place in black binders (8,000 pages at \$0.25 per page, for a total of \$1,363.75 and 11 binders \$8.99 each, for an additional total of \$98.89).³

[8] Despite the fact that the applicant did not pay the fee, OHSAH decided to continue working on the request and prepare a response package for disclosure. As a result of having done some of the work, OHSAH revised the fee estimate, reducing the amount of time that the temporarily employee spent on the request to 36.5 hours and the total number of pages to 5455. This brought the fee down to \$3,432.70.⁴

[9] **3.3 The Parties' Submissions**—The applicant sets out four main arguments as to why the fee that OHSAH assessed is neither minimal nor reasonable. The first point is that she alleges that she already paid a \$275 fee for the response to her initial request to OHSAH. She believes that the information that she is seeking through the second request is information that OHSAH should have provided in response to the first request. In support of this position, she refers to the argument that OHSAH put forward in the application that resulted in Decision P10-01, to the effect that her second request was a repetition of her first request.⁵

[10] Her second argument is that the fee issued is significantly higher than fees assessed by other organizations, as illustrated in previous orders from British Columbia and other jurisdictions. She refers to Order P08-02⁶ where Adjudicator Boies Parker found that a “minimal fee should be based on actual costs and should not be used to generate revenue”. The applicant denies that the actual cost of photocopying would be \$0.25 per page. She asserts that OHSAH has a photocopier on site and the actual costs should be about \$0.05 per page. She challenges OHSAH’s need to employ a temporary employee to work on her requests or to charge for the time spent by senior staff.⁷

[11] Her third point is that she feels that OHSAH is merely using the fee estimate as a pretext to block her access to her personal information.⁸ Her final point is that, as she was an employee of OHSAH, in accordance with s. 33(2) of PIPA, OSHAH cannot charge her for access to her own “employee personal information”.⁹

³ OHSAH’s initial submission, para. 6 and Affidavit of Executive Director, Exhibit B, p. 3 and Exhibit H, p. 51.

⁴ OHSAH’s initial submission, para. 7.

⁵ Applicant’s initial submission, para. 3.

⁶ [2008] B.C.I.P.C.D. No. 18.

⁷ Applicant’s initial submission, paras. 4-6.

⁸ Applicant’s initial submission, para. 7.

⁹ Applicant’s initial submission, paras. 8-13.

[12] OHSAH denies that the fee the applicant paid for the original request is relevant to this request. It asserts that they are two different requests for different sets of information, as indicated in Decision P10-01. It confirms that it will not be charging for copies of any records responsive to the second request that it has already provided to the applicant in response to the first request.¹⁰

[13] OHSAH submits that its fee calculation is appropriately based on actual costs that it has incurred in processing the request. It provided reasons *in camera* as to why it lacked the internal resources to complete the tasks of collecting the records and producing photocopies.¹¹ It has also provided an invoice from a copying service provider to verify its costs.¹² OHSAH submits that all of the activities for which it proposes to charge are consistent with those approved in Order P08-02. It defends its use of senior staff on the grounds that third-party personal information must be removed from the records prior to disclosure to the applicant and OHSAH believes that senior staff are the best qualified to ensure that the appropriate information is removed.¹³ It submitted a sample of records containing the applicant's personal information to demonstrate that the records also contain the personal information of other individuals.

[14] OHSAH denies the applicant's accusation that it is merely using the fee to block her access to her information. It submits that it is charging the fee to offset some of the costs it is incurring in responding to her request:

The fact is that the scope of the Complainant's request is broad and it has yielded a large volume of records which contain the personal information of others. Therefore, in order for it to respond to the Complainant's request, the Organization has necessarily incurred certain actual costs.¹⁴

[15] It also submits that fees are only a barrier to access in cases where the applicant cannot afford to pay the fee. It submits further that the applicant has not provided any evidence to the effect that she is unable to pay the fee.¹⁵

[16] OHSAH devotes the greatest attention in its submission to the question of whether the applicant was an employee of OHSAH and therefore entitled to access to her "employee personal information" free of charge.¹⁶

[17] OHSAH disagrees with the applicant's claim that she was an "employee". OHSAH takes the position that the applicant was an independent contractor and

¹⁰ OHSAH's reply submission, paras. 17-23.

¹¹ OHSAH's initial submission, Affidavit of Executive Director, para. 17.

¹² OHSAH's initial submission, Affidavit of Executive Director, Exhibit H, p. 51.

¹³ OHSAH's initial submission, Affidavit of Executive Director, para. 19; OHSAH reply submission, paras. 26-27.

¹⁴ OHSAH's reply submission, para. 31.

¹⁵ OHSAH's reply submission, para. 30.

¹⁶ OHSAH's initial submission, paras. 9-38.

not an employee, because the definition of “employee” does not explicitly state that it includes contractors or service providers.¹⁷

[18] **3.4 Analysis**—Section 32 of PIPA permits organizations to charge a “minimal” fee for providing access to an applicant’s personal information that is not “employee personal information”. Section 36 gives the Commissioner the power to determine whether a fee issued under s. 32 is reasonable.

[19] The relevant provisions of PIPA are as follows:

Fees

- 32(1) An organization must not charge an individual a fee respecting employee personal information concerning the individual.
- (2) An organization may charge an individual who makes a request under section 23 a minimal fee for access to the individual's personal information that is not employee personal information concerning the individual.

General powers of commissioner

- 36(1) In addition to the commissioner's powers and duties under Part 11 with respect to reviews, the commissioner is responsible for monitoring how this Act is administered to ensure that its purposes are achieved, and may do any of the following:
- (2) Without limiting subsection (1), the commissioner may investigate and attempt to resolve complaints that ...
- (c) a fee required by an organization under this Act is not reasonable, ...

Definitions

"employee": includes a volunteer;

"employee personal information": means personal information about an individual that is collected, used or disclosed solely for the purposes reasonably required to establish, manage or terminate an employment relationship between the organization and that individual, but does not include personal information that is not about an individual's employment;

[20] Several orders have considered the application of ss. 32 and 36 of PIPA.¹⁸ The principles of these orders have guided my deliberations here, as I illustrate below.

¹⁷ OHSAA's initial submission, para. 16.

¹⁸ Order P08-02; Order P08-03, [2008] B.C.I.P.C.D. No. 34; Order P08-04, [2008] B.C.I.P.C.D. No. 35.

Is the information “employee personal information”

[21] First, I will consider whether the personal information at issue in this request meets the definition of “employee personal information” for which, in accordance with s. 32(2) of PIPA, an organization may not charge a fee.

[22] OHSAH and the applicant provided extensive argument as to whether the applicant’s employment relationship with OHSAH, as an independent contractor, meets the definition of “employee”.

[23] I will set aside, for the moment, the question of whether the applicant was an “employee” and focus on the rest of the definition of “employee personal information” to determine whether that applies in this case. If it does not apply, I will not have to settle the question as to whether the applicant is an employee.

[24] According to the definition in PIPA “employee personal information” applies only to personal information that is collected, used or disclosed solely for the purpose of managing an employment relationship. This provision in PIPA permits organizations to collect, use, and disclose personal information (for those purposes) in an employment context that would not otherwise be authorized.

[25] The kinds of records that would be collected, used or disclosed for the purposes of establishing, managing and terminating the applicant’s relationship with OHSAH would normally include personnel records such as letters of application, results of interviews, personal references, performance evaluations and letters of resignation or termination—the type of information collected and retained by human resources officers and an individual’s supervisor.

[26] I saw no “employee personal information”, such as that I describe above, in the sample of records that OHSAH provided. I subsequently invited OHSAH to comment on whether any of the applicant’s personal information in the requested records was collected, used or disclosed solely for the purpose of establishing, managing or terminating the applicant’s working relationship with OHSAH. OHSAH responded that it was not. The requested records were from the email account of a member of OHSAH’s executive who did not have any supervisory responsibility with respect to the applicant. OHSAH submitted that he

... was not a decision maker with respect to the establishment or termination of the Applicant’s relationship with the Organization. Decisions concerning [her] performance and relationship with the Organization are within the exclusive purview of the Organization’s Board of Directors and any related information is kept in the strictest of confidence from the Organization’s employees, including [the individual whose records are at issue] ...¹⁹

¹⁹ OHSAH’s letter of August 24, 2010, para. 11.

[27] The applicant disagrees with OHSAH's assessment because she believes that the employee (whose emails she requested) and other members of the OHSAH executive provided the Board of Directors with information that it subsequently used as follows:

... the board's decision to terminate my employment was largely based on information that apparently came from someone on OHSAH's staff—I believe that this may be found in the personal employment information I am seeking. ... I believe [the individual whose records are at issue] purposely misled Board members and stakeholders to achieve his own aims—which had directly to do with my employment relation [sic] with OHSAH.²⁰

[28] Based on my review of the sample records and the submissions of OHSAH, I am satisfied that the information in the requested records, while the applicant's personal information, is not her "employee personal information". I do not need, therefore, to consider whether the applicant was an employee of OHSAH. Consequently, OHSAH has the authority to charge fees in accordance with s. 32 of PIPA. I will now turn to the issue of the fee itself.

Is the fee "minimal"?

[29] I take the view that Adjudicator Boies Parker adopted in Order P08-02 that the appropriate course is to determine first whether the proposed fee complies with the requirement to be "minimal". In the event that I conclude it does not, I will determine whether it would be appropriate to reduce or excuse the fee.²¹

[30] Adjudicator Boies Parker found that for a fee to qualify as "minimal" it must cover only actual costs incurred in producing the records and not be for the purpose of generating revenue.²² She also found that charging for services not actually required to produce the record was inconsistent with the fee being minimal.²³ OHSAH is proposing to charge for a temporary staff taking 36.5 hours to complete the following tasks:

- retrieve the electronic records;
- generate a list of and physically organize the records for review;
- review records and remove messages copied to, received or sent by the applicant; and
- consult with senior staff about certain records.

²⁰ Applicant's letter of August 27, 2010, p. 6.

²¹ Order P08-02, para. 33.

²² Order P08-02, para. 38.

²³ In that case, it was a charge of \$30 per hour for "filtering" the documents that was not necessary. Order P08-02, paras. 46-49.

[31] It is also proposing to charge for the time senior staff spent to locate retrieve and prepare the records for disclosure.²⁴

[32] The records all came from one email account, and OHSAH says it employed special software to enable its email system to identify messages containing the applicant's name. OHSAH has not broken out the time the temporary staff member spent running the software and directing the system to print off the records from the total for the tasks listed just above. It is also unclear how much time senior staff spent locating the records. I also question why OHSAH is charging for time that the temporary employee spent retrieving records and time senior staff spent retrieving records, with no explanation as to why it was necessary for both of them to be undertaking the same task. As OHSAH has not stipulated the amount of time devoted to each task, it is difficult to determine whether all of the time was spent only on tasks that were necessary to produce the records and whether it was the minimum amount of time required to complete those tasks. In the absence of this information, the total of 36.5 hours seems higher than I would expect, given the work involved and the volume of records.

[33] I also question whether it was necessary to create a list (or "master index") of records. PIPA does not require organizations to provide a list of records to applicants or to put records in any particular order. If organizations want to produce such lists or indices for their own convenience, I do not think that charging applicants for this is consistent with keeping the fee minimal. The same applies to spending more than a few minutes to arrange the records. The applicant should only be charged for time spent on activities that were essential to the processing of the request and providing records.

[34] OHSAH also proposes to charge for time the temporary employee spent consulting with senior staff about the records. It is not clear how much time was involved or why consultation was necessary. OHSAH also charged for time the temporary employee spent organizing the records for review. Again, there is no indication of the time spent on this activity or what it entailed. I do agree that it was necessary to review the records and remove any messages that the applicant had already received and it is appropriate for OHSAH to charge for this, in order that the applicant would not have to pay for the duplicates. However, it is difficult to imagine any activities relating to this function that would have been absolutely necessary and would have taken a significant amount of time.

[35] I also question the proposed charge of \$0.25 per page to provide the applicant with copies of the records. OHSAH submits that it does not have any staff available within its organization to copy the records. Therefore, it is proposing to hire a service provide who has provided a quote at the rate of \$0.25 per page. OHSAH justifies this with material it has provided *in camera*. As a

²⁴ OHSAH's initial submission, Affidavit of Executive Director, Exhibit C, Revised Fee Invoice, p. 7.

result, I am not able to comment directly on what OHSAH has said. Nevertheless, OHSAH has provided a sworn affidavit in support of its position and, with some reservations, I am prepared to accept that.

[36] I question, however, whether \$0.25 per page qualifies as a minimal fee in this case. I do not doubt that the service provider that OHSAH has consulted charges that rate. I am not persuaded, however, that it is the best rate available in the current marketplace. It is common procurement practice for organizations to obtain at least three quotes, in order to ensure value for money. There is no evidence that OHSAH has explored whether other service providers could produce copies at a lesser rate. Moreover, the service provider at issue is charging \$0.25 because it proposes to use 20 lb bond paper. It also proposes to sort the records into eleven black binders for an additional cost of \$98.89. This is a premium level of service for a premium fee, rather than the “minimal” fee required by PIPA. It appears unnecessary to me to use premium quality paper and to put the records in binders. The records are page-prints of standard email messages and I see no reason why the records should not be copied on to the least expensive paper available and presented to the applicant in a stack rather than binders for which she would be required to pay. I find that OHSAH has not taken every reasonable measure to ensure that photocopying costs are “minimal”.

[37] I also have doubts about the accuracy of the number of pages that OHSAH is proposing to disclose. Under PIPA, an individual is entitled only to copies of records of her or his own personal information. Based on the sample that OHSAH submitted, there are many pages that do not contain the applicant’s personal information, to which she is not entitled access and for which, therefore, she should not be charged. There is an example of a stream of emails running at four pages. The name of the applicant appears only on two of the pages. The remaining two pages contain no information relating to the applicant. She should not receive those pages nor be charged for them.

[38] There is also some question in my mind as to whether the mere mention of the applicant’s name in a record is really information “about” her. Senior Adjudicator Francis said the following on this subject in Order F08-16:

While the word “about”, in isolation, undoubtedly has broad general meaning, in access and privacy legislation the requirement for information to be “about” an identifiable individual is tied to the concept of individual privacy. ... [For example], correspondence is not “about” the employee just because she or he prepared and signed it on behalf of the employer.²⁵

[39] There are numerous pages where the applicant is mentioned only incidentally and where only part of one sentence on an entire page refers to her, and it is arguable whether the information is really about her. OHSAH is correct

²⁵ Order F08-16, [2008] B.C.I.P.C.D. No. 28, para. 50.

that it must remove the personal information of all third parties prior to disclosing the records. However, after removal of such information, the result in this instance, and some others, could well be blank pages with her given name and one or two additional words floating in the middle. Most of the information in these types of records is about third parties and there is little about the applicant. This means that the actual number of pages that the applicant would receive could be significantly less than the current estimate.

[40] For all these reasons, therefore, I find that the current fee that OHSAH proposes to charge is not “minimal”, because: it is charging for activities that are not necessary to produce the records; it appears to be charging for pages that are not responsive to the request; and it is charging premium rates for producing them.

Is it appropriate to reduce or excuse the fee?

[41] As I have found that the fee is not “minimal”, I require OHSAH to re-calculate the fee using these guidelines:

1. Explore other copying options, both in-house and externally, to determine whether the records could be produced on lower quality paper for a rate of less than \$0.25 per page and without the purchase of binders;
2. Review the records to exclude all pages that: do not contain personal information about the applicant; or must be withheld in accordance with s. 23(4) of PIPA to protect the personal information of third parties; and
3. Review the time spent for activities performed by the senior executives and temporary employee to exclude all actions that were not absolutely essential to produce the records for the applicant, as mentioned above. The activities necessary to retrieve the records for which OHSAH may charge are:
 - operate the email system to print copies of the records;
 - review the records to determine which pages are responsive to the request; and
 - physically assemble the records into a package to deliver to senior staff for their review.

This would not include time spent creating lists or indices of records. The activities necessary to process the records for disclosure for which OHSAH may charge are:

- review the records to remove the personal information of third parties; and
- prepare the final release package for the applicant.

Any time spent on activities that were not necessary for producing the records should be deducted from the estimate.

[42] OHSAH should provide the applicant and me with a revised fee estimate as a result of those changes.

Is the fee “reasonable”?

[43] As I have required OHSAH to issue a new fee estimate, it would not be appropriate for me to address whether the fee is reasonable, until after I have reviewed it.

4.0 CONCLUSION

[44] For the reasons given above, under s. 52(3) of PIPA, I make the following orders:

1. OHSAH must perform its duty under s. 32(2) to calculate the revised allowable fee it requires the applicant to pay under s. 32(2), in accordance with my directions set out in para. 41 above.
2. As conditions under s. 52(4) of PIPA, I specify the following:
 - a. OHSAH is to submit to me for approval, with a concurrent copy to the applicant, a statement of the revised fee that it has calculated under para. 1 above, with a breakdown demonstrating how it arrived at this revised fee, within 25 days of the date of this order, as PIPA defines “day”, that is, on or before November 4, 2010
 - b. OHSAH is to provide the applicant and me with evidence of its compliance with para. 1 of this order within 30 days of the date of this order, as PIPA defines “day”, that is, on or before November 12, 2010.

September 29, 2010

ORIGINAL SIGNED BY

Jay Fedorak
Adjudicator