

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3404

Appeal MA15-98

Simcoe County District School Board

January 31, 2017

Summary: A former trustee filed a request under the *Act* for emails and other records which refer to her. The school board located a significant number of records and issued a fee estimate to the appellant requesting partial payment of its \$6,734.50 fee. The appellant appealed the board's fee decision to this office. The board's fee is upheld in part but its fee to locate responsive information in the records is reduced from \$6,247.50 to \$3,142.00.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, ss.45(1)(a), *Regulation 823*, ss. 6.3.

OVERVIEW:

[1] The appellant, a former school board trustee submitted a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Simcoe County District School Board (the board) for email records for the time period of 2010 to 2014. Specifically, the request sought access to:

Soft copies of reports, emails, voice mails or other records – including notebook records held by staff and trustees, which reference or allude to myself...(This would include correspondence between trustees, staff and the public through the board's computer databases/email systems).

[2] In her request, the appellant also provided a list of trustee and staff email addresses (28 trustee email addresses and 7 staff email addresses). She stated that she believes the requested information would most likely be located using these email

addresses. She also indicated that there may be additional email addresses from trustees and staff she is unaware of and those should be included as well.

[3] The board and the appellant exchanged correspondence in an effort to clarify the request. The board subsequently issued an interim fee estimate, requesting payment of 50% of its estimated \$6,734.50 fee to continue processing the request.

[4] The appellant appealed the board's fee to this office and a mediator was assigned to explore settlement with the parties. During mediation, the appellant confirmed that she was no longer interested in phone records and that the board's search for notes could be restricted to the Director's notes. The appellant also confirmed that she was not seeking access to publicly available records which may refer to her.

[5] No further mediation was possible and the file moved to the adjudication stage of the appeals process, in which an adjudicator conducts an inquiry under the *Act*. During the inquiry stage, the parties submitted and exchanged written representations in support of their positions.

[6] In this order, I uphold a portion of the board's fee but reduce its fee to review the email records from \$6,247.50 to \$3,142.50.

PRELIMINARY MATTER:

[7] The only issue identified in Mediator's Report is whether the board's fee estimate is reasonable. Accordingly, a Notice of Inquiry was sent to the parties to invite their representations on this issue.

[8] The appellant's representations in response appear to question whether the board's search is reasonable taking into account that some trustees use their personal email addresses. The board submits that its search captured all emails exchanged on its servers from trustees, including any emails which fell within the search parameters which were sent from external email addresses but were received by one of the email addresses identified by the appellant. The appellant was dissatisfied with the board's explanation and appears to take the position that the board should also search the personal computers of the trustees identified in her request. In its reply representations, the board advises that it does not have custody or control of emails exchanged exclusively between trustees using external email addresses. Given the manner in which this appeal has proceeded and the nature of the issues raised, I will not review issues relating to whether any searches conducted by the board were reasonable. Furthermore, a determination on this issue would be premature considering the board has only reviewed a sample of the records. Accordingly, this order will not address these issues. Should the appellant pursue access to the responsive records and continue to believe that additional records in the board's custody or control exist, she will have an opportunity to appeal the board's final access decision.

DISCUSSION:

[9] Where the fee exceeds \$25, an institution must provide the requester with a fee estimate.¹ Where the fee is \$100 or more, the fee estimate may be based on either

- the actual work done by the institution to respond to the request, or
- a review of a representative sample of the records and/or the advice of an individual who is familiar with the type and content of the records.²

[10] 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.³

[11] The fee estimate also assists requesters to decide whether to narrow the scope of a request in order to reduce the fees.⁴

[12] In all cases, the institution must include a detailed breakdown of the fee, and a detailed statement as to how the fee was calculated.⁵ In its fee estimate letter dated January 17, 2015, the board estimates that its fee to process the request would be \$6,734.50. The board requested that the appellant pay a deposit before it took any further steps to process the request. The board also provided the appellant with the following breakdown of its estimated fee:

Estimated time to manually locate and review the sample records	208.23 hours at \$30.00 per hour	\$6247.00
Estimated time expended to locate the notebooks of senior staff members	3.75 hours at \$30.00 per hour	\$ 112.50
Actual time expended to conduct an electronic search for email records	4 hours at \$30.00 per hour	\$120.00
Actual time expended to develop a computer program to produce a machine readable record	4.25 hours at \$60.00 per hour	\$ 255.00
Total Estimated Fee		\$6734.50

¹ Section 45(3).

² Order MO-1699.

³ Orders P-81, MO-1367, MO-1479, MO-1614 and MO-1699.

⁴ Order MO-1520-I.

⁵ Orders P-81 and MO-1614.

[13] The appellant questions the reasonableness of the board's estimated fee and appealed the board's fee decision to this office. This office may review an institution's fee and determine whether it complies with the fee provisions in the *Act* and Regulation 823.

Representations of the parties

[14] The parties appear to agree that after her receipt of the board's initial fee estimate the appellant narrowed the scope of her request and limited her request for the Director of Education's notebook. The appellant also removed the requested telephone records from the scope of request and agreed that the board's search for email records was restricted to the individuals named in the appellant's correspondence to the board, dated January 22, 2015.

[15] The appellant's request seeks access to electronic copies of "reports, emails, voicemails or other records – including notebooks" which reference herself for a four-year period.

[16] The appellant acknowledges that her request is broad and has the potential to capture voluminous records given her role as a former trustee. However, she takes the position that the responsive records should be "relatively easy to find, if there exist appropriate databases of all emails staff and trustees utilize for board business and exclusion lists for public documents". The appellant also states:

It is reasonable to expect that [the board] would have a database that allows it to exclude or include public documents when making searches and that further it would have a complete list of all email addresses personal and [board] issued upon which board business, duties and conversations are conducted. In addition, [it] is reasonable that policy and procedure should require clear easily searchable subject lines on email, rather than blanks or non-specifics. The absence of both these basic expectations results in additional time for searches being attributed to FOI requesters such as myself.

[17] The board submits that its fee estimate is reasonable. In an affidavit filed by its Superintendent of Business⁶, the board takes the position that:

- The affiant assisted the board's former Freedom of Information [FOI] Coordinator with the board's search for responsive records;

⁶ In her representations, the appellant takes the position that the board's affidavit is inadmissible on the ground that it is based on second hand information. Tribunals, such as this office, routinely accept hearsay evidence and accord such evidence its proper weight (See Order PO-2242). In any event, the affiant in this appeal stated that he assisted the board's former FOI Coordinator with the search in question.

- The board conducted an electronic search using the 5 “filter words”⁷ provided by the appellant and the 13 board issued email addresses identified by the appellant. This search identified 12, 494 records.
- The FOI Coordinator selected a random sampling of 200 records and reviewed them to determine which records responded to the request. She found that 141 records were responsive to the request. At the same time, the board reviewed the records “for potential exemptions”.
- The sample search took 205 minutes. Based on this time, the board estimated it would take 1 minute to “review each record to determine if it was in scope and to review the record for applicable exemptions”.
- Applying a 1 minute per record estimate, the board estimated that it would expend 208.23 hours at a rate of \$30.00 per hour (\$6,247.00) to review each of 12,494 records.
- The FOI Coordinator determined that no responsive records in the sample contained the appellant’s personal information.

[18] With respect to its search for notebooks, the board advises that it conducted a sample search for this information and that “[t]he search of the Director of Education’s notebook took 45 minutes to determine if it contained any responsive records”. Applying the \$30.00 per hour for search time to the 45 minutes expended, the board calculated a fee of \$22.50.

[19] Finally, the board advises that it will waive the following fees identified in its fee estimate:

- search time for notebooks other than the Director of Education’s thus discounting this fee from \$112.50 to \$22.50; and
- \$375.00 representing the time it had already expended to conduct an electronic search to identify email records (\$120.00) and develop a method to produce a machine readable record (\$255.00).

Decision and analysis

[20] Section 45(1) requires an institution to charge for fees for requests under the *Act*. Section 45(1) provides that requesters are expected to pay fees in the amount prescribed by the regulations for search and preparation time for records that do not contain their personal information. Section 45(1)(a) states:

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

⁷ The filter words refer to the variations of her name, the appellant provided the board.

(a) the costs of every hour of manual search required to locate a record

[21] Given the board's revised position, the only fees remaining in dispute is the board's \$6,247.00 fee representing its estimated search time to review the email records and \$22.50 representing its time expended to locate and review the Director's notebook.

[22] The appellant takes the position that records contain her personal information and thus the board is not entitled to charge fees under section 45(1).⁸ The board's submits that the records do not contain the appellant's personal information. I note that in her request the appellant advises that she made the request in response to information she obtained that two other trustees exchanged email correspondence where she was referred to her in a "negative and inaccurate manner". Though I have not had the benefit of reviewing the sample records, there is insufficient evidence to conclude that the records responding to the appellant's request, if disclosed to another party, would reveal something of a personal nature about her.

[23] Based on the information before me it would appear that the responsive records refer to the appellant in her professional capacity. However, should the board determine in its final fee and access decision that some of the records contain the trustee's personal information, the board cannot charge the appellant a fee for manually searching or preparing a record which contains her personal information and will have to adjust its final fee.

[24] The appellant also takes the position that her only charge should be \$10.00 prescribed by *Regulation 823*, section 6.2 for one CD disc. The appellant advises that her request was for soft records from electronic sources and states that:

It is not acceptable for the [board] to create hard copies from soft ones, then copy and charge fees. Clearly all copying fees must be brought to zero.

[25] The board's interim fee decision did not include a photocopying charge.⁹ It appears that the appellant's point is that the board should have the ability to search and review the records on its computer which would drastically reduce its manual search time. The board responded that "...it is not reasonably feasible to simply store the records requested on a disk since hardcopies are required to perform any redactions by hand. The Board does not have software which permits it to simply conduct redactions of emails by electronic means".

⁸ In an email to the board, dated February 10, 2015 the appellant requested an exemption "from all fees" on the basis that the request is "personal in nature and as such should be fully fee exempt". However, there is no evidence that the appellant submitted a fee waiver request to the board upon her receipt of the fee estimate.

⁹ I note that the affidavit filed by the board refers to a \$1,761.60 copying cost. However, this amount was not included in the board's interim fee estimate and the board did not issue a revised fee estimate. The issues in this appeal are restricted to the board's interim fee estimate, dated February 17, 2015.

[26] Based on the board's evidence, it appears that its search for email records was done through electronic means and it waived its \$120.00 fee to conduct this search. Further, despite the board's advice that it printed some of the emails to review them, the associated photocopying charge was not identified in the fee estimate.

[27] The bulk of the board's fee represents its estimate of 1 minute per record, it submits its staff will require to review the 12,494 records to determine whether they are responsive. The board also submits that while it reviewed "each record to determine if it was in scope [it also reviewed] the record for applicable exemptions". However, institutions cannot charge a fee for deciding whether to claim an exemption¹⁰ or identifying which records require severing¹¹. Accordingly, I must determine whether the board's fee constitutes an allowable search fee under the *Act* and *Regulation 823, section 6.3*.

[28] The board submits that its estimate of 1 minute per record is reasonable and considerably lower than the 2 minutes per record this office has accepted it takes to sever a record. Generally, the permitted preparation time for severing records is two minutes per page, for pages that require multiple severances.¹² However, this refers to the time institutions take to sever a record as opposed to the time to locate and review a record to determine responsiveness.

[29] Nonetheless, based on the board's evidence that it took 205 minutes to review the 200 sample records, I find that its estimate to review these records reasonable. However, I am not satisfied that each of the 12,494 records require the same level of review given the nature of the records. The board advises that its electronic search identified 12,494 records which included all emails sent and received by staff and trustees, including emails copied to the appellant in her capacity as a trustee. Given that some of the emails could have up to 13 recipients, I find that it is reasonable to expect that many of the 12,494 records identified would comprise lengthy email chains which contain duplicate information. In addition, many of these records would be duplicates of group emails sent and received by multiple parties.

[30] For the purposes of the fee estimate¹³, I find that it is reasonable to estimate that only half of the 12,494 records (6,247 records) would require the level of review requiring the board's estimate of 1 minute per record. In my view, the board should be able to quickly determine which record is a duplicate of another. In addition, a full minute would not be required for the board to review the beginning of an email chain to determine which portion of the record contains duplicate information. Finally, I find that the reduction in search time is reasonable taking into consideration that the board's estimated search time included an unspecified block of time "to review the record for applicable exemptions".

¹⁰ Orders M-376, P-4 and P-1536.

¹¹ Order MO-1380.

¹² Orders MO-1169, PO-1721, PO-1834 and PO-1990.

¹³ As noted above, the purpose of the fee estimate is to give the appellant sufficient information to make an informed decision on whether narrow the scope of request or pay the fee and pursue access.

[31] As noted above, institutions cannot charge a fee for deciding whether to claim an exemption or identifying which records require severing.

[32] One-half of the 12,494 records is 6,247 records. Accordingly, I calculate that the board's allowable estimated search fee prescribed by the regulations is \$3,120.00 (6,247 records x 1 minute = 6,247 minutes = 104 hours x \$30.00 per hour).

[33] I will also allow the board's \$22.50 search fee to locate and review the Director's notebook. This fee amount the board proposes to charge is in accordance with *Regulation 823*, sections 6.3 and 6.4.

[34] In making my decision, I took into consideration the appellant's concerns about the board's record management systems. The appellant submits that the board has failed to maintain "basic standards for information management" and as a result has failed to "identify the data and records generated by the [board's] expense payments to Trustees". In her appeal letter, the appellant requests that this office order the board to "revamp" its databases and create a searchable public database.

[35] Though this office has in the past made recommendations to institutions regarding their record management practices, such recommendations have been generally restricted to rectify search issues related to documents being deleted or documents not being maintained in an easily searchable manner despite there being considerable public interest in the documents.¹⁴ The appellant submits that the board's fee is inflated as a result of its obsolete record management practices. However, my review of the board's fee suggests that any time the board spent on executing an electronic search to locate the records or developing a computer program to produce a machine readable record was not passed onto the appellant. Rather, the board's fee is largely based on its estimate that it will take its staff one minute per record for it to review a significant number of records to determine if they respond to the request. The fee provisions under the *Act* allow institutions to charge a fee to conduct a document by document review of records to identify responsive information. However, as discussed above I find that the board's search fee should be reduced having regard to nature of email records exchanged between numerous individuals.

[36] Accordingly, I find that the board's fee estimate of \$6,247.00 fee is not in accordance with the fee provisions in the *Act* and Regulation 823 and have reduced it to \$3,142.50 (\$3,120.00 + \$22.50).

ORDER:

1. I uphold the board's fee estimate of \$22.50 to locate and review the Director's notebook.

¹⁴ See for example, Orders MO-3149 and PO-3035.

2. I reduce the search fee claimed by the board to review the email records from \$6,247.00 to \$3,142.50.

Original Signed By: _____

Jennifer James
Adjudicator

January 31, 2017 _____