Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3627

Appeal MA16-640

Ottawa-Carleton District School Board

June 26, 2018

Summary: This order disposes of the issues relating to part 2 of a six-part request for records relating to bullying or racism at a specified school. The board issued a fee estimate decision, and denied the appellant's request for a fee waiver. In this order, the adjudicator upholds the board's fee estimate. She orders the board to waive 50% of the fee.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 45(4)(c).

Orders and Investigation Reports Considered: Orders MO-3507, M-583, PO-3373, and MO-3477.

Cases Considered: *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504; Workplace Safety and Insurance Appeals Tribunal *Decision No. 409/071*, 2007 ONWSIAT 1663 (CanLII).

BACKGROUND:

[1] A media requester submitted a six-part request to the Ottawa-Carleton District School Board (the board), pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act).* The requester specified that each part be treated as a separate request.

[2] This order deals with part 2 of the request, which was for the following

information:

> All emails sent and received by [a named employee] that were generated between May 24, 2016 and the date that the Ottawa-Carleton District School Board begins processing this request that relate to, that mentions, or that discuss the issue of bullying or racism within one of the school board's schools or that relate to, that mention, or that discuss the issue of bullying or racism by the school board.

[3] In addition, the requester requested a fee waiver stating: "Please also waive any search or additional administrative fees required to retrieve these records as they may relate to public safety issues and are matters that are in the public interest to be disclosed…" He also provided a consent form signed by the mother of a former student.

[4] Following a 30-day time extension, the board issued a fee estimate in the amount of $259.60 and requested a deposit of $129.80 to complete this part of the request. The board estimated that the degree of disclosure for this request is approximately 40%. It also identified a number of exemptions that it will likely apply to some of the responsive records.

[5] The requester, now the appellant, appealed the board's decision this office.

[6] During mediation, the appellant clarified that the school he referenced in his request is a specified public school. He also advised that he believes the fee estimate is unreasonably high.

[7] The board subsequently issued a fee waiver decision denying the appellant's fee waiver request.

[8] As no further mediation was possible, the appeal was moved to the adjudication stage, where an adjudicator conducts an inquiry under the *Act*. The parties were invited to submit representations, which were shared in accordance with the IPC's *Code of Procedure* and *Practice Direction Number 7: Sharing of representations*.

[9] In this order, I uphold the board's fee estimate as reasonable. I order the board to waive 50% of the fee.

ISSUES:

A. Should the fee estimate be upheld for part 2 of the request?

B. Should the fee be waived for part 2 of the request?

DISCUSSION:

A: Should the fee estimate be upheld for part 2 of the request?

[10] Where the fee exceeds $25, an institution must provide the requester with a fee estimate [Section 45(3)].

[11] 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.[1]

[12] 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.[2]

[13] The fee estimate also assists requesters to decide whether to narrow the scope of a request in order to reduce the fees.[3]

[14] In all cases, the institution must include a detailed breakdown of the fee, and a detailed statement as to how the fee was calculated.[4]

[15] This office may review an institution's fee and determine whether it complies with the fee provisions in the *Act* and Regulation 823, as set out below.

[16] Section 45(1) requires an institution to charge fees for requests under the *Act*. That section reads:

> A head shall require the person who makes a request for access to a record to pay fees in the amounts prescribed by the regulations for,
>
> (a) the costs of every hour of manual search required to locate a record;
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> (b) the costs of preparing the record for disclosure;
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> (c) computer and other costs incurred in locating, retrieving, processing and copying a record;
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> (d) shipping costs; and

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[1] Order MO-1699.
[2] Orders P-81, MO-1367, MO-1479, MO-1614 and MO-1699.
[3] Order MO-1520-I.
[4] Orders P-81 and MO-1614.

> (e) any other costs incurred in responding to a request for access to a record.

[17] More specific provisions regarding fees are found in sections 6, 7 and 9 of Regulation 823. Those sections read:

> 6. The following are the fees that shall be charged for the purposes of subsection 45(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.
>
> 7. (1) If a head gives a person an estimate of an amount payable under the Act and the estimate is $100 or more, the head may require the person to pay a deposit equal to 50 per cent of the estimate before the head takes any further steps to respond to the request.
>
> (2) A head shall refund any amount paid under subsection (1) that is subsequently waived.
>
> 9. If a person is required to pay a fee for access to a record, the head may require the person to do so before giving the person access to the record.

[18] The board's fee estimate is broken down as follows:

Search

39.6 minutes (0.66 hour)

39.6 @ 0.5 (15 ÷ 7.5 = $0.50 per minute)	
Total search cost:	$19.80
Photocopying	
99 records @ 2 pages per record – 200 pages	
200 pages @ $0.20 per page	
Total photocopying cost:	$40.00
Preparation	
200 @ 2 minutes per page – 400 minutes	
400 @ 0.5 (15 ÷ 7.5 = $0.50 per minute)	
Total preparation cost:	$200.00
Total cost:	**$259.80**

[19] In its representations, the board submits that its fee estimate is reasonable. It took the following actions to locate the requested records. Six senior managers were advised of all six of the requests and asked to undertake a search for responsive records and provide them to the MFOIPPA coordinator. Records were searched electronically; the Corporate Records department undertook a high level electronic record scan. For email records, the MFOIPPA coordinator made a request for access to the email records of all employees who were considered to have records responsive to the request.

[20] In addition, the board states that its fee estimate for all six parts of the appellant's request was based upon actual work done to search the records electronically. The board used the results of its search to estimate the number of records responsive to each part of the request. The board also states that it looked at a representative sample of the records selected from the index to determine the records responsive to the request and the nature of the exemptions. It further submits that the search time was based solely on searching for electronic records and it was estimated that 120 records per hour had been searched electronically.

[21] In his representations, the appellant submits that the fee estimate is unreasonable. He submits that charging "exorbitant" fees to access records is an attack on his right of free speech. The appellant also submits that an educational institution or organization should be promoting the free exchange of information, ideas and debates, and should not be creating barriers to access to information. He further submits that a

requester should not be required to pay for search and preparation fees related to inadequate electronic systems and databases.

[22] In its reply representations, the board submits that its proposed fees are reasonable and appropriate. It submits that the fees have been calculated in accordance with the provisions of the *Act* and the applicable regulation. The board also submits that the appellant's request is broad and he has refused to make any reasonable effort to limit the scope of the request.

[23] In his sur-reply, the appellant responds that it has been impossible for him to narrow his search because the board has been secretive about the information it is withholding from the public about this file. He states the following:

> [Board] officials have refused to give media interviews and answer questions about their actions. This excessive secrecy and a lack of accountability has forced [him] to seek answers to questions by filing formal freedom of information requests. So if the [board] wishes to narrow the scope of requests, a more democratic and responsible course of action would be for it to be more transparent and proactively disclose information without having to be forced to do so or complaining about it.

[24] In addition, he submits that requesters should not be held responsible because of inadequacies in the record keeping or capacity to search for records by public institutions. The appellant states that public institutions have a responsibility to be prepared to respond to a request for access to information.

Analysis and findings

[25] In determining whether to uphold a fee estimate, my responsibility under section 45(3) of the *Act* is to ensure that the estimated amount is reasonable. The burden of establishing the reasonableness of the fee estimate rests with the board. To discharge this burden, the board must provide me with detailed information as to how the fee estimate has been calculated in accordance with the provisions of the *Act*, and produce sufficient evidence to support its claim.

[26] I note that, during the inquiry, the appellant confirmed that he wishes to receive the records on a CD-ROM. As such, the photocopying cost ($40.00) is replaced with the cost of a CD-ROM ($10.00).

[27] For the reasons that follow, I find the board's fee estimate to be reasonable. I note that the search fee is based on the actual search time for electronic records. In this case, the appellant's request is for all emails sent and received by an individual. As such, the board needed to only search for responsive records in its electronic record holdings. I also note that the board estimates that the degree of disclosure for the request is approximately 40%. The board is relying on a number of exemptions, such as sections 10(1) (third party information), 14 (personal privacy), 7(1) (advice or

recommendation), 9(1) (relations with governments), and 12 (solicitor-client privilege). In the circumstances, I am satisfied that the board's estimated time to sever these records is reasonable. Accordingly, on the basis of the board's search and the identified preparation fees, I uphold the board's fee estimate.

[28] I also note that the appellant argues that requesters should not be held responsible because of inadequacies in the record keeping or capacity to search for records by public institutions. In Order M-583, former Commissioner Tom Wright found that institutions are not obliged to maintain records so as to accommodate the various ways in which an access request could be framed. In any event, the search time stipulated by the board does not indicate to me any inadequacies in this regard. For the above reasons, I uphold the board's fee estimate.

B: Should the fee estimate for part 2 of the request be waived?

[29] Section 45(4) of the *Act* requires an institution to waive fees, in whole or in part, in certain circumstances. Section 8 of Regulation 823 sets out additional matters for a head to consider in deciding whether to waive a fee. Those provisions state:

> 45. (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.

[30] The fee provisions in the *Act* establish a user-pay principle which is founded on the premise that requesters pay the prescribed fees associated with processing a request unless it is fair and equitable that they not do so. The fees referred to in section 45(1) and outlined in section 8 of Regulation 823 are mandatory unless the requester can present a persuasive argument that a fee waiver is justified on the basis that it is fair and equitable to grant it or the *Act* requires the institution to waive the fees.[5]

[31] A requester must first ask the institution for a fee waiver, and provide detailed information to support the request, before this office will consider whether a fee waiver should be granted. This office may review the institution's decision to deny a request for a fee waiver, in whole or in part, and may uphold or modify the institution's decision.[6]

[32] The institution or this office may decide that only a portion of the fee should be waived.[7]

Fair and equitable

[33] For a fee waiver to be granted under section 45(4), the test is whether any waiver would be "fair and equitable" in the circumstances.[8] Factors that must be considered in deciding whether it would be fair and equitable to waive the fees are listed in sections 45(4)(a) to (d). Here the appellant raises section 45(4)(c), which states:

> 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,
>
> > (c) whether dissemination of the record will benefit public health or safety;

[34] The following factors may be relevant in determining whether dissemination of a record will benefit public health or safety under section 45(4)(c):

- whether the subject matter of the record is a matter of public rather than private interest
- whether the subject matter of the record relates directly to a public health or safety issue
- whether the dissemination of the record would yield a public benefit by

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

a. disclosing a public health or safety concern, or

b. contributing meaningfully to the development of understanding of an important public health or safety issue

- the probability that the requester will disseminate the contents of the record[9]

[35] The focus of section 45(4)(c) is "public health or safety". It is not sufficient that there be only a "public interest" in the records or that the public has a "right to know". There must be some connection between the public interest and a public health and safety issue.[10]

Other relevant factors

[36] For a fee waiver to be granted under section 45(4), it must be "fair and equitable" in the circumstances. In addition to the factors that must be considered under section 45(4), other relevant factors must be considered when deciding whether or not a fee waiver is "fair and equitable." These may include:

- the the manner in which the institution responded to the request;
- whether the institution worked constructively with the requester to narrow and/or clarify the request;
- whether the institution provided any records to the requester free of charge;
- whether the requester worked constructively with the institution to narrow the scope of the request;
- whether the request involves a large number of records;
- whether the requester has advanced a compromise solution which would reduce costs; and
- whether the waiver of the fee would shift an unreasonable burden of the cost from the appellant to the institution.[11]

Parties' representations

[37] In its representations, the board submits that it would not be fair and equitable to waive the fee. It submits that the actual cost of processing, collecting and copying the records is higher than the fee estimate. The board also submits that the appellant

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[9] Orders P-2, P-474, PO-1953-F and PO-1962.
[10] Orders MO-1336, MO-2071, PO-2592 and PO-2726.
[11] Orders M-166, M-408 and PO-1953-F.

has provided no information that would assist it in determining if the payment of the fee would cause financial hardship.[12]

[38] In addition, the board submits that the appellant has provided no information that would allow it to determine if the dissemination of the records would benefit public health or safety. It points out that the request relates to records regarding allegations of bullying involving an individual student. These allegations are a matter of public record as a result of court proceedings and multiple media articles. As such, the board submits that public health and safety will not be affected or improved by the release of these records.

[39] In his representations, the appellant submits that the board should waive the fee to encourage free speech about the issue of bullying. He submits that disclosure of the responsive records would encourage an open debate and discussion of the issue of bullying, and, therefore, it could provide lessons and critical knowledge for any public or private school in Ontario, Canada and the rest of the world. The appellant also submits that the information surrounding this case has serious implications for public safety due to the following:

> They relate specifically to the capacity of educational institutions to deliver on their mandate to provide healthy and safe environments and to demonstrate leadership and to provide guidance and education for the youngest members of our society.

[40] In addition, he submits that there is evidence that the board has been obstructive and secretive with respect to its policies in addressing bullying. The appellant refers to information referenced in a certain court proceeding in support of his position.

[41] In its reply representations, the board submits that the appellant has provided no evidence or reasonable submissions as to why he or his employer cannot pay the applicable fees and should, therefore, be entitled to a waiver of those fees.

[42] In his sur-reply representations, the appellant submits that it is well known that media outlets across Canada are suffering and on the verge of bankruptcy. He also submits:

> [The newspaper for which the appellant works] has also publicly disclosed that it is not a profitable media outlet. As stated in [his] previous submission, these records are related to matters of public safety and in the public interest.

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[12] Financial hardship is listed in section 45(4)(c) as one of the factors that must be considered in determining whether a fee waiver would be fair and equitable. However, the appellant has not argued this factor.

Analysis and findings

[43] Having reviewed the representations of the parties and the factors identified as relevant to determine whether 45(4)(c) applies, I find that the dissemination of the requested records will benefit public safety within the meaning of that provision.

[44] The appellant submits that there is a public interest in the subject matter of the requested records as they concern bullying or racism in a public school. The appellant also submits that, the subject matter of the records relates directly to a public safety issue. The board makes no submissions with respect to these two factors.

[45] I find there is a public interest in the subject matter of the requested records, and the records relate directly to a public safety issue. Although the records are about specific incidents with respect to a specific student, the broader topics of bullying and racism in schools and school yards are of public safety interest to the general public, especially to parents and educators.

[46] What is contentious between the parties is whether the dissemination of the records would yield a public benefit by disclosing a safety concern, or by contributing meaningfully to the development of understanding of an important safety issue.

[47] While the appellant argues that the dissemination of the records would yield a public benefit, the board disagrees and argues that they would not yield a public benefit for two reasons. One, the allegations are matter of public record due to court proceedings and multiple media articles. Two, the appellant has not provided any information to determine if the dissemination of these records would benefit public safety.

[48] Although the allegations and some details of the incidents are in the public realm, the specific details on how these matters were addressed by the board are not. As such, I find that the dissemination of the records would yield a public benefit. It would provide the public with more details on what occurred. I have also considered the finding of the Small Claims Court to be of significance.

[49] While I have found that dissemination of the requested records would benefit public safety, I will now consider whether other relevant factors apply in order to determine if it would be fair and equitable to waive the fee in the circumstances.

[50] There are a number of other relevant factors to consider. One factor is whether the request involves a large number of records. In this case, the board has found 99 responsive records, which is not a particularly large number. Another factor to consider is whether waiver of the fee would shift an unreasonable burden of the cost of processing the request from the appellant to the board. I am mindful of the legislature's intention to include a user-pay principle in the *Act.* The user-pay principle is founded on the premise that requesters should be expected to carry at least a portion of the cost of processing a request unless it is fair and equitable that they not do so. The fees

referred to in section 45(1) are mandatory unless the appellant can present a persuasive argument that a fee waiver is justified on the basis that it is fair and equitable to grant it.[13]

[51] After considering the representations of the parties, and given my finding concerning public safety, I find that the evidence supports a finding that it is fair and equitable to waive 50% of the fees. In my view, this respects the user-pay principle contained in the *Act*, while making the records more accessible to the appellant, without shifting an unreasonable burden to the board.

[52] Accordingly, I order the board to waive 50% of the fee in this appeal, which would result in the fee estimate to be $114.90.

[53] As a final matter, in his representations and sur-reply representations, the appellant raises a number of constitutional claims under the *Charter of Rights and Freedoms (Charter)*, including that charging "exorbitant" fees for access to records is an attack on freedom of speech and contravenes section 2(b) of the *Charter*. I have not addressed this argument as at the time it was made the appellant did not have the proper factual foundation.[14] As a result of my finding in this order and in Order MO-3569 (dealing with part 1), the board's fees have been reduced significantly.

[54] Furthermore, the appellant has not met the procedural requirements of raising a *Charter* issue in this office. If he wishes to pursue his *Charter* claim, he must comply with section 12 of this office's *Code of Procedure*, and serve notice to the Attorney Generals of Canada and Ontario.

ORDER:

1. I uphold the board's fee estimate.

2. I order the board to waive 50% of the fee, which result in the fee estimate to be $114.90.

Original Signed by: June 26, 2018

Lan An
Adjudicator

[13] Order PO-2726.
[14] *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54 (CanLII); Workplace Safety and Insurance Appeals Tribunal *Decision No. 409/071*, 2007 ONWSIAT 1663 (CanLII).