

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 MO-3679**

Appeal MA17-138

Halton District School Board

October 24, 2018

**Summary:** The Halton District School Board (the board) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for all records pertaining to the proposed closure of a high school. The board responded to the request and provided a fee estimate for the records. The appellant claims further responsive records should exist, and disputes the board's fee estimate. This order upholds the board's fee estimate and its search for responsive records as reasonable, and dismisses the appeal.

**Statutes Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 17 and 45.

### **BACKGROUND:**

[1] The Halton District School Board (the board) received the following request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*):

All email communications, text messages, memos, briefing notes, presentations and materials prepared by and developed by [board] employees, presentations and materials, prepared by and developed by external professional services, investigations, and minutes of any and all meetings and any and all correspondence pertaining to the proposed closure of Burlington High School.

[2] The board responded to the request in two parts. First, the board advised that information responsive to the portions of the request for "presentations and materials

prepared and developed by board employees, and external professional services” is found on the board’s website under the Program and Accommodation Review (PAR). As a result, the board denied access to these records, applying the exemption at section 15(a) of the *Act* for information that is published or available to the public.

[3] Second, the board advised that with respect to the request for email communications between board staff and PAR employees pertaining to the closure of Burlington High School, it would require an extension of 60 days to provide an access decision.

[4] The requester, now the appellant, appealed the board’s decision.

[5] During mediation, the appellant confirmed he accepts the board’s time extension and advised he is prepared to wait for the board to issue its decision. The board then issued an interim decision with respect to the email communications, together with a fee estimate.

[6] Following receipt of the interim decision on the records responsive to the second part of his request, the appellant advised he wished to appeal the fee estimate. The appellant also clarified that he is appealing the board’s decision regarding records responsive to the first part of his request as he is of the view that responsive records, in addition to those found on the board’s website, should exist. He does not appeal the board’s reliance on section 15(a) to deny access to records found on the board’s website.

[7] As further mediation was not possible, this appeal proceeded to adjudication, where an adjudicator conducts an inquiry under the *Act*. Representations were sought and received from the board, initially. A copy of the board’s representations was provided to the appellant, along with a Notice of Inquiry, setting out the facts and issues in the appeal. Representations were then sought from the appellant, but there were no representations submitted in response to the Notice of Inquiry provided to him.

[8] In this order, I uphold the board’s fee estimate and search, and dismiss the appeal.

## **ISSUES:**

- A. Should the fee estimate be upheld?
- B. Did the board conduct a reasonable search for records?

## **DISCUSSION:**

### **Issue A: Should the fee estimate be upheld?**

[9] An institution must advise the requester of the applicable fee where the fee is

\$25 or less. Where the fee exceeds \$25, an institution must provide the requester with a fee estimate.<sup>1</sup>

[10] 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.<sup>2</sup>

[11] 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.<sup>3</sup> The fee estimate also assists requesters to decide whether to narrow the scope of a request in order to reduce the fees.<sup>4</sup> 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>5</sup> 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.

[12] 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;
- (b) the costs of preparing the record for disclosure;
- (c) computer and other costs incurred in locating, retrieving, processing and copying a record;
- (d) shipping costs; and
- (e) any other costs incurred in responding to a request for access to a record.

[13] 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:

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<sup>1</sup> Section 45(3) of the *Act*.

<sup>2</sup> Order MO-1699.

<sup>3</sup> Orders P-81, MO-1367, MO-1479, MO-1614 and MO-1699.

<sup>4</sup> Order MO-1520-I.

<sup>5</sup> Orders P-81 and MO-1614.

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.

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

The volume of email that is responsive to your request exceeds fees of \$25. With more than 2,600 email conversations, fees are estimated at approximately 4,000 pages. Including search, preparation of records and copying, the total estimate of fees for your request is as follows:

Search: 90 minutes @\$7.50/15 minutes	\$45.00
Preparation (incl. severing of records), calculated at 100 emails/hr: 26 hours @\$30/hour	\$780.00
Photocopying 4,000 pages @\$0.20 per page, calculated at 1.5 pages per email	<u>\$800.00</u>

**\$1,625.00**

[15] Before issuing its fee estimate, the board sought clarification from the appellant with respect to the timeframe for the emails. The appellant requested a 10-year timeline for emails to/from the Director's Office, Business Services and departments, and all trustees.

[16] The board noted a search was conducted using the following parameters (individually and combinations of): "Burlington", "Burlington Central", "BCHS", "closure", and "removal". This search resulted in more than 2,600 responsive email records. While some of these emails were less than a page in length, others were more than 1-2 pages. Therefore, an average of 1.5 pages per email was used resulting in 4,000 pages.

[17] The board explained the search estimate consists of time for the Information Technology staff to conduct an email search on the more than 25 staff members within the various departments identified by the appellant, and 11 trustees (including the Chair of the Board).

[18] The board estimated the preparation/severing of the records at 100 emails per hour, based on an actual test run of a series of emails. This resulted in an estimate of 26 hours or \$780. The board submits this is a conservative estimate given this office's acceptance "that it takes two minutes to sever a page that requires multiple severances".<sup>6</sup> Using the IPC's two minutes per page, the estimate for preparation/severing would be more than 133 hours or \$3,990.

[19] The board submits it did not include the costs (time or printing) of the emails for redaction/severing. Due to the format of the emails, the board noted they must be printed for manual redaction/severing.

[20] After the redaction of the original records, the board estimated the fee for photocopying to send the records to the appellant to be \$800, based on the estimate of 4,000 pages of records.

[21] The board submits the estimate is based on the fees allowable under Regulation 823 and not the actual cost to the board, which in the case of a request of this scope is significantly greater than the board can recover under the fee schedule.

[22] The board submits it is mindful the appellant would have to pay the final fee before obtaining the records, so it has tried to be as accurate as possible in its estimate. The board submits the fee estimate provided is an accurate representation of the time and resources required to prepare the required emails for disclosure.

[23] As noted above, the appellant made no representations in response to the Notice of Inquiry to substantiate his position that the fee estimate should not be upheld.

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

[24] In determining whether to uphold a fee estimate, my responsibility under section

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<sup>6</sup> The board refers to orders MO-1169, PO-1721, PO-1834 and PO-1990.

45(3) of the *Act* is to ensure 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.

[25] The estimate is broken down into three main parts: search, preparation and photocopying.

[26] With respect to the search, the appellant requested a 10-year timeline for emails to/from the Director's Office, Business Services and departments, and all Trustees. I accept the board's evidence that there are more than 25 staff members within the various departments identified, as well as 11 trustees. Given the long timeframe and number of email accounts to search, I find 90 minutes is a reasonable estimate for search time.

[27] With respect to preparation, the estimate provided by the board to redact/sever the emails is based on an actual test run in which the board found it could redact/sever 100 emails per hour. This estimate uses a more conservative estimate than the generally accepted "2 minutes per page" for redaction/severing. Therefore, I find the board's estimate for the preparation of the emails to be reasonable.

[28] With respect to photocopying, I am satisfied that the board's estimate of 4,000 pages is reasonable given that 2,600 emails were responsive to the request and an average of 1.5 pages per email was used for the purposes of the estimate.

[29] The board's representations are very detailed with respect to how it arrived at its fee estimate. Moreover, when determining the amounts to be charged, the board made conservative estimates. The fees charged by the board are all calculated using rates prescribed in accordance with the *Act*. Finally, given the scope and 10 year span of the appellant's request, I find the board's estimate to be reasonable. For all these reasons, I find the board's fee estimate to be reasonable under the *Act*.

### **Issue B: Did the board conduct a reasonable search for records?**

[30] Where a requester claims additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17.<sup>7</sup> If I am satisfied the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[31] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show it has made a reasonable effort to identify and locate responsive records.<sup>8</sup> A

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<sup>7</sup> Orders P-85, P-221 and PO-1954-I.

<sup>8</sup> Orders P-624 and PO-2559.

reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.<sup>9</sup>

[32] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding such records exist.<sup>10</sup>

[33] The board submits there is no additional information responsive to the appellant's request "pertaining to the proposed closure of Burlington Central High School" ("BCHS").

[34] The board explained that excluding the emails which were addressed above, the scope identified in the original request was specific enough for the board to conduct a search for responsive records without further clarification.

[35] The board noted the "closure of BCBS" was contextually part of a larger issue: the Burlington Program and Accommodation Review (PAR). BCBS was one of seven schools identified in the initial recommendation to start the PAR process, and it then became part of the larger discussion about all Burlington secondary schools under review.

[36] Further, the board noted that during this PAR, the board's website was the point of reference for all related documentation. The initial report including board minutes reflecting trustee discussions, presentation materials, school profiles, enrolment data, boundary areas, building reports, staff presentations, committee deliberations and discussions, minutes and agenda, as well as presentations, and input consolidated from various surveys from the third-party facilitations (IPSOS), were all posted to the board's website throughout the entire process.

[37] Finally, the board explained that the PAR progressed from October 2016 to May 2017. As information was constantly changing, the board's website was the most accurate and dynamic resource for all PAR information. Minutes/notes, data, the final report and board decision were posted to the board's website as a resource. Newspaper ads and print materials shared at the community information nights were posted on the board's website.

[38] As noted above, the appellant made no representations in response to the Notice of Inquiry to substantiate his position that the board did not conduct a reasonable search for responsive records. However, in moving forward with his appeal, the appellant is of the view that responsive records, in addition to those found on the board's website, should exist.

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<sup>9</sup> Orders M-909, PO-2469 and PO-2592.

<sup>10</sup> Order MO-2246.

***Analysis and findings***

[39] As noted above, while a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding such records exist. In the absence of representations from the appellant, I am not satisfied there is a reasonable basis for his belief that further responsive records exist.

[40] As outlined in the previous issue, the board has provided an explanation of the steps it has taken to locate responsive email records for the period relevant to the request. Furthermore, the board has provided an explanation of its position that further records, responsive to the first part of the request, do not exist outside of the board's website. I accept that the closure of the BCHS was part of a bigger discussion which evolved into the PAR and that all the PAR-related documents were posted on the board's website with the goal of ensuring the PAR was conducted in an open and transparent manner.

[41] Based on the information it has provided, and in the absence of any evidence to the contrary, I am satisfied that the board's search for these records was reasonable.

**ORDER:**

1. I uphold the board's fee estimate of \$1,650 as reasonable.
2. I uphold the board's search for records as reasonable.

Original signed by \_\_\_\_\_  
Anna Truong  
Adjudicator

\_\_\_\_\_ October 24, 2018