

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4284

Appeal MA20-00390

Upper Grand District School Board

November 25, 2022

Summary: This order deals with a fee estimate and access decision made by the Upper Grand District School Board (the board). The access request was a 6-part request made by a board employee under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to complaints filed with the board involving the requester, decisions and outcomes of these complaints, and all electronic communications referring to the requester by her name or initials. With respect to the records relating to complaints, the board located responsive records and denied access to them, claiming the labour relations and employment-related matters exclusion in section 52(3)3 of the *Act*. With respect to the electronic communications referring to the requester by name or initials, the board issued a fee estimate. The requester subsequently made a request to the board for a fee waiver, which the board denied. In this order, the adjudicator finds that the records relating to complaints filed with the board are excluded from the scope of the *Act* under section 52(3)3. Regarding the fee estimate, she reduces the amount for both search time and preparation of records. Lastly, she upholds the board's decision to deny the fee waiver.

Statutes Considered: The *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 45(1), 45(4), and 52(3)3; Regulation 823, R.R.O. 1990, sections 6 and 6.1.

Orders Considered: Order PO-3035.

OVERVIEW:

[1] This order disposes of the issues raised as the result of an appeal of a fee

estimate and access decision made by the Upper Grand District School Board (the board). The access request was a 6-part request made by a board employee under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for:

1. Copies of all complaints filed with the employer (the board) on a specified date involving the requester;
2. Copies of all complaints filed with the employer on a second specified date involving the requester;
3. Any and all decisions/outcomes of any complaints or investigations involving the requester;
4. A copy of a specified letter from the employer to the requester;
5. The specific corrective action and proposed next steps regarding the harassment investigation complaint filed by the requester; and
6. All electronic communications mentioning or referencing the requester's initials or the requester's name.

[2] With respect to parts 1, 2, 3 and 5 of the request, the board located records and denied access to them, claiming the application of the employment or labour relations exclusion in section 52(3)3 of the *Act*.

[3] With respect to part 4 of the request, the board granted partial access to the letter. The board withheld portions of the letter, claiming the discretionary exemption in section 38(b) (personal privacy) of the *Act*.

[4] With respect to part 6 of the request, the board asked the requester for clarification of the specific time frame (start and end dates) of the request, as well as which electronic search terms the requester wished to use to conduct the search. The board also advised the requester that given the anticipated substantial number of records captured by part 6 of the request, it was anticipated that a fee estimate would be issued with respect to this portion of the request. The requester subsequently clarified with the board the time frame of the request (between September 2005 up to and including March 19, 2020) and which electronic search terms she preferred to be used in the search for records (her name and initials).

[5] The board then issued a fee estimate of \$37,961.69 with respect to part 6 of the request, stating:

The board determined there are several databases which may reasonably contain records responsive to the request:

1) Email search in Exchange – computer search completed, document review not completed

2) Email and file search in Google – computer search completed, document review not completed

3) Board file server search – computer search up to February 7, 2020 completed. Computer search after February 7, 2020 to date of request not completed, document review not completed

4) Schools' file servers search – computer search and document review not completed. The board also advised the requester that four schools were affected by the request (as the requester had worked at these schools), but only three of the four had dedicated servers, and hence the school without a dedicated server was omitted from the search.

[6] The board also broke down the fee estimate and described it as follows:

- it conducted a sample review of the records in each of the three searched databases set out above. The ratio of personal to non-personal records was 54.67% personal records to 46.33% non-personal records. This ratio was used to determine the fee estimate,
- the total staff hours involving the computer search was 8 hours. Applying the ratio, this amounted to 3.7 hours of chargeable hours. At \$30 per hour the fee estimate for this portion was \$111.19,
- the searches yet to be completed were estimated to take 136 hours based on previous searches of these databases conducted by the board. Applying the ratio set out above, the chargeable hours were adjusted to an estimate of 63.01 chargeable hours. Multiplied against the \$30 per hour search fee the estimate for this portion was \$1,890.40,
- it had not completed reviewing the records for severances but estimated 2 minutes per page for such severances, based on the actual and estimated number of documents, which was 77,618. Applying the ratio of personal to non-personal records, the board estimated that the number of chargeable records would be 35,960. Applying 2 minutes per page, board estimated that the amount of time to redact chargeable records was 71,920 minutes, divided by 60, equalling 1,198.67 hours. Apply \$30 per hour, to review records, the board's fee estimate was \$35,960.

[7] The board's letter to the requester further stated:

As we have not yet reviewed the records in detail, no final decision has been made regarding access but the following exemptions will likely apply. Records responsive to part 6 might be excluded from *MFIPPA* pursuant to section 52(3) para 3, or subject to redaction of personal information whose disclosure would constitute an unjustified invasion of personal privacy under section 14 and 38(b).

[8] The requester subsequently requested a fee waiver from the board. The requester also advised the board of further specified time frames for the searches of the four individual schools. In response, the board advised the requester that the specified time frames identified by the requester had already been taken into account and, as a result, the fee estimate was unchanged. The board also denied the fee waiver request.

[9] The requester, now the appellant, appealed the board's decision to the Information and Privacy Commissioner of Ontario (the IPC).

[10] During the mediation of the appeal, the appellant confirmed that she was appealing the access decision, the fee estimate decision and the denial of her request for a fee waiver.

[11] The appellant confirmed with the mediator that part 4 of her request was resolved. As a result, part 4 of the access request is no longer at issue in this appeal.

[12] Also during mediation, the appellant attempted to narrow part 6 of her request to specified alleged incidents arising in the workplace. The mediator relayed this information to the board. The board declined to narrow the request and advised the mediator that further mediation was not possible. As well, during mediation, the board advised that it would be relying on section 38(b) in the alternative to s. 52(3)3 with respect to parts 1, 2, 3 and 5 of the request.

[13] The file then moved to the adjudication stage of the appeals process, where an adjudicator may conduct an inquiry. I sought and received representations from both the board and the appellant, which were shared amongst them.

[14] Regarding part 6 of the request and the attempt to narrow its scope, the appellant confirmed with IPC staff that she seeks the original information that she clarified with the board during the processing of the access request. Because the appellant seeks access to the information as originally requested, this order only deals with the fee estimate for the original request, as narrowed prior to the IPC appeal.

[15] For the reasons that follow, I find that the records relating to complaints set out in parts 1, 2, 3 and 5 of the request are excluded from the scope of the *Act* under section 52(3)3. I also reduce the amount of the fee estimate for search time and record preparation in response to part 6 of the request. Lastly, I uphold the board's decision to deny the fee waiver.

RECORDS:

[16] There are 46 pages of records relating to parts 1, 2, 3 and 5 of the appellant's access request, consisting of workplace harassment reporting forms with appendices, a mediation report, letters and emails.

ISSUES:

- A. Does the section 52(3)3 exclusion for labour relations apply to the records?
- B. Should the fee estimate be upheld with respect to part 6 of the request?
- C. Should the fee be waived?

DISCUSSION:

Issue A: Does the section 52(3)3 exclusion for labour relations apply to the records responsive to items 1, 2, 3 and 5 of the request?

[17] Section 52(3)3 states:

Subject to subsection (4), this *Act* does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:

Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

[18] If section 52(3)3 applies to the records, and none of the exceptions found in section 52(4) applies, the records are excluded from the scope of the *Act*.

[19] For the collection, preparation, maintenance or use of a record to be "in relation to" the subjects mentioned in paragraph 3 of this section, it must be reasonable to conclude that there is "some connection" between them.¹

[20] The "some connection" standard must involve a connection that is relevant to the statutory scheme and purpose understood in their proper context. For example, the relationship between labour relations and accounting documents that detail an institution's expenditures on legal and other services in collective bargaining

¹ Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).

negotiations is not enough to meet the "some connection" standard.²

[21] The term "labour relations" refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to analogous relationships. The meaning of "labour relations" is not restricted to employer- employee relationships.³

[22] The term "employment of a person" refers to the relationship between an employer and an employee. The term "employment-related matters" refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship.⁴

[23] If section 52(3)3 applied at the time the record was collected, prepared, maintained or used, it does not cease to apply at a later date.⁵

[24] The exclusion in section 52(3)3 does not exclude all records concerning the actions or inactions of an employee simply because this conduct may give rise to a civil action in which the Crown may be held vicariously liable for torts caused by its employees.⁶

[25] The type of records excluded from the *Act* by section 52(3)3 are documents related to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue. Employment-related matters are separate and distinct from matters related to employees' actions.⁷

[26] For section 52(3)3 to apply, the institution must establish that:

1. the records were collected, prepared, maintained or used by an institution or on its behalf,
2. this collection, preparation, maintenance or use was in relation to meetings, consultations, discussions or communications, and
3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.

[27] The phrase "labour relations or employment-related matters" has been found to

² Order MO-3664, *Brockville (City) v. Information and Privacy Commissioner, Ontario*, 2020 ONSC 4413 (Div Ct.).

³ *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.); see also Order PO-2157.

⁴ Order PO-2157.

⁵ *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507.

⁶ *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.).

⁷ *Ministry of Correctional Services*, cited above.

apply in the context of, for example:

- a job competition,⁸
- an employee's dismissal,⁹ and
- a grievance under a collective agreement.¹⁰

[28] The phrase "in which the institution has an interest" means more than a "mere curiosity or concern", and refers to matters involving the institution's own workforce.¹¹

[29] The records collected, prepared, maintained or used by the institution are excluded only if the meetings, consultations, discussions or communications are about labour relations or "employment-related" matters in which the institution has an interest. Employment-related matters are separate and distinct from matters related to employees' actions.¹²

[30] If the records fall within any of the exceptions in section 52(4), the *Act* applies to them.

[31] Section 52(4) states:

This *Act* applies to the following records:

1. An agreement between an institution and a trade union.
2. An agreement between an institution and one or more employees which ends a proceeding before a court, tribunal or other entity relating to labour relations or to employment-related matters.
3. An agreement between an institution and one or more employees resulting from negotiations about employment-related matters between the institution and the employee or employees.
4. An expense account submitted by an employee of an institution to that institution for the purpose of seeking reimbursement for expenses incurred by the employee in his or her employment.

Representations

[32] The board submits that the records responsive to items 1 and 2 are harassment

⁸ Orders M-830 and PO-2123.

⁹ Order MO-1654-I.

¹⁰ Orders M-832 and PO-1769.

¹¹ *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*, cited above.

¹² *Ministry of Correctional Services*, cited above.

in the workplace report forms relating to claims of workplace harassment between two employees, including the appellant. The board goes on to submit that the records themselves are communications of employees' complaints to the board for the purpose of seeking investigation and redress by it. The board argues that such types of complaints have been routinely been found to be subject to section 52(3)3 and, are therefore, excluded from the *Act*.

[33] The board further submits that the records responsive to item 3 consist of communications from their authors to another individual and address employment or labour relations matters and that the records responsive to item 5 are a subset of the records identified in item 3. The board submits that these records include documentation of workplace corrective actions, and that the IPC has routinely found that records of workplace corrective actions to address employment issues are excluded from the *Act* under section 52(3)3.

[34] The appellant submits that she has a right of access to the records at issue or to as much of them as possible, taking into account the purpose of the *Act* set out in section 1(b)¹³ of the *Act*, the fact that her request was not frivolous or vexatious, and the fact that the records contain her personal information as defined in section 2(1) of the *Act*.

[35] Turning to the exclusion in section 52(3)3, the appellant submits that one of the exceptions in section 52(4) applies, namely that her trade union and the board have a collective agreement, which specifies that a teacher may have a copy of any material in their personnel file. As a result, the appellant argues, in order to comply with the collective agreement and, in turn, with the *Act*, the head shall disclose the records to her either in whole or in part. Further, the appellant submits that the board was able to disclose a severed version of the record in response to item 4 of her request, without relying on the exclusion in section 52(3)3.

[36] In reply, the board argues that whether the records contain personal information is irrelevant to whether the exclusion in section 52(3)3 applies, and that the purpose of the *Act* set out in section 1(b) does not modify the application of the exclusion in section 52(3)3. Regarding the appellant's position that the exception in section 52(4) applies, the board states:

The Board notes that the collective agreement itself would be subject to the *Act* by virtue of paragraph 1 of section 52(4). However, the records in dispute in items 1, 2, 3 and 5 are, as is clear on their face, not part of the collective agreement nor has the requester claimed they are. Rather, as noted previously they are records generated through the application of

¹³ Section 1(b) of the *Act* states that the purpose of the *Act* is to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.

the Board's workplace harassment procedure. Section 53(4) has no application to the records in dispute.

Moreover, to the extent that the collective agreement contains contractual access rights which may extend beyond the access rights provided under [the *Act*], the IPC has no jurisdiction to address such contractual rights.

[37] In sur-reply, the appellant submits that even if a record is subject to one of the exemptions or to the exclusion in section 52(3)3, an institution shall disclose as much of the record as can reasonably be severed as set out in section 4(2) of the *Act*. The appellant also reiterates her assertion that section 52(4) applies to all or some of the records at issue.

Analysis and findings

[38] I begin my analysis by noting that previous decisions issued by the IPC have held that section 52(3) requires a record-specific and fact-specific analysis.¹⁴ I also note that IPC decisions have consistently held that records relating to an employer's investigation into workplace harassment complaints about employees are employment-related.¹⁵

[39] I have reviewed the representations of the parties and the records responsive to parts 1, 2, 3 and 5 of the request. I find that these records fit squarely within the exclusion in section 52(3)3. I find that the records relate to workplace harassment complaints made to the board by two board employees, as well as the documentation of the investigative and corrective actions taken by the board in response to these complaints. The sole purpose of the preparation, maintenance and use of these records by the board was to address and resolve the two workplace harassment complaints made by board employees about each other.

[40] Regarding parts one and two of the three-part test in section 52(3)3, I find that the records were collected, prepared, maintained and used by the board, and that this collection, preparation, maintenance and use was in relation to meetings and communications.

[41] Turning to part three of the three-part test in section 52(3)3, I find that the meetings and communications reflected in the records are about employment-related matters in which the board has an interest that is more than a mere curiosity or concern. In particular, I find that the board's investigation and resolution of workplace harassment complaints made by two of its employees is an employment-related matter in which the board has a direct interest as employer. As a result, I find that all of the components of the three-part test in section 52(3)3 have been met.

[42] I also find that none of the exceptions in section 52(4) apply, agreeing with the

¹⁴ See Orders P-1242 and MO-3163.

¹⁵ See for example, Orders MO-1635, MO-1723, PO-2748, and PO-2809.

board that the records at issue do not consist of an agreement between the board and a trade union. This order does not address the parties' arguments about their respective duties under the collective agreement between the board and the teachers' union because the IPC does not have jurisdiction to resolve these types of differences.¹⁶ This appeal is about whether the *Act* permits the board to apply the exclusion in section 52(3)3 and withhold the information at issue in response to parts 1, 2, 3 and 5 of the appellant's access request.

[43] I also note that the appellant's argument that the board released some parts of record 4 is not relevant to this issue, given that the board did not claim the exclusion in section 52(3)3 with respect to record 4.

[44] I also find that the records do not consist of an agreement between the board and one or more employees which ends a proceeding before a court, tribunal or other entity relating to employment-related matters, or an agreement resulting from negotiations about employment-related matters. Lastly, I find that the records do not consist of an expense account.

[45] As all of the components of three-part test in section 52(3)3 have been satisfied, I find that the records responsive to parts 1, 2, 3 and 5 of the request are excluded from the scope of the *Act*. Because these records are excluded from the scope of the *Act*, it is not necessary for me to determine if any exemptions apply to them.

Issue B: Should the fee estimate be upheld?

[46] The board's fee estimate is in relation to part 6 of the appellant's access request and is for \$37,961.69, broken down as set out below.

[47] Institutions are required to charge fees for request for information under the *Act*. Section 45 governs fees charged by institutions to process requests. 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.¹⁷

[48] 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.¹⁸

[49] 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.¹⁹ The

¹⁶ See, for example PO-4150.

¹⁷ Section 45(3).

¹⁸ Order MO-1699.

¹⁹ Orders P-81, MO-1367, MO-1479, MO-1614 and MO-1699.

fee estimate also assists requesters to decide whether to narrow the scope of a request in order to reduce the fees.²⁰ In all cases, the institution must include a detailed breakdown of the fee, and a detailed statement as to how the fee was calculated.²¹

[50] The IPC 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.

[51] Section 45(1) 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.

[52] More specific provisions regarding fees are found in sections 6, and 6.1 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.

²⁰ Order MO-1520-I.

²¹ Orders P-81 and MO-1614.

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.

6.1 The following are the fees that shall be charged for the purposes of subsection 45(1) of the *Act* for access to personal information about the individual making the request for access:

1. For photocopies and computer printouts, 20 cents per page.
2. For records provided on CD-ROMs, \$10 for each CD-ROM.
3. 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.
4. 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.

[53] Section 45(1)(a) does not include the search time for manually searching a record for the requester's personal information.²²

[54] Section 45(1)(b) includes time for severing a record,²³ and time for a person running reports from a computer system.²⁴ Generally, this office has accepted that it takes two minutes to sever a page that requires multiple severances.²⁵

[55] Section 45(1)(b) does not include time for:

- deciding whether or not to claim an exemption,²⁶
- identifying records requiring severing,²⁷
- identifying and preparing records requiring third party notice,²⁸
- removing paper clips, tape and staples and packaging records for shipment,²⁹
- transporting records to the mailroom or arranging for courier service,³⁰

²² Regulation 823, section 6.1.

²³ Order P-4.

²⁴ Order M-1083.

²⁵ Orders MO-1169, PO-1721, PO-1834 and PO-1990.

²⁶ Orders P-4, M-376 and P-1536.

²⁷ Order MO-1380.

²⁸ Order MO-1380.

²⁹ Order PO-2574.

- assembling information and proofing data,³¹
- photocopying,³²
- preparing an index of records or a decision letter,³³
- re-filing and re-storing records to their original state after they have been reviewed and copied,³⁴ and
- preparing a record for disclosure that contains the requester's personal information.³⁵

[56] Section 45(1)(c) includes the cost of photocopies, computer printouts and/or CD-ROMS and developing a computer program. Section 45(1)(c) does not include the cost of an actual computer to compile and print information.³⁶

Representations

[57] The board submits that during the processing of the access request, the appellant provided clarification of part 6 of the request on two occasions. First, the appellant set out a specified time period and which search terms were to be used in locating records. The board submits that it built this clarification into the cost of the fee estimate. The second clarification, or "narrowing" the appellant made was done after the fee estimate had been issued. This narrowing was to certain time periods the appellant had spent as an employee at certain named schools. The board submits that these time frames had already been taken into account at the time of the search, and that its search had been limited to the periods of time that the appellant was employed at each school. As a result, because the narrowing of the search had already been taken into account, the fee estimate was not impacted.

[58] The board submits that its fee estimate is based on the actual time spent on the computer searches, as well as estimated times based on sample searches used to both extrapolate estimates and derive ratios applied to the records.

[59] Regarding searches for responsive records, the board provided affidavit evidence from the Executive Assistant (the EA) to the Director of Education and Freedom of Information Coordinator (the director), who prepared the fee estimate on behalf of the director, as well as its ICT Infrastructure Manager (the manager).

³⁰ Order P-4.

³¹ Order M-1083.

³² Orders P-184 and P-890.

³³ Orders P-741 and P-1536.

³⁴ Order PO-2574.

³⁵ See note 21.

³⁶ Order M-1083.

[60] Searches – actual search time and estimated search time

[61] The EA submits that she consulted with the manager and determined that there were several databases which may reasonably contain records responsive to the request. The following databases are relevant:

- Email search in Exchange (database 1) – computer search completed, sample document review completed,
- Email and file search in Google (database 2) – computer search completed, sample document review completed,
- Board file server search (database 3) – partially completed and sample document review partially completed, and
- Three school file servers – computer searches and document review were not completed. These schools were selected because the appellant had worked as a teacher at these schools. A fourth school was not searched because it does not have a dedicated server.

[62] The EA further submits that she conducted a sample review of 300 records from the first three computer searches referred to above. The sample review showed that the ratio of records containing the appellant's personal information to records that did not contain her personal information was 54.67% personal records to 46.33% non-personal (the ratio). This ratio was used to build the fee estimate both in terms of search time and in preparation time.

[63] The EA goes on to submit that she was advised by the manager that the actual time spent on computer searches was 8 hours. The manager submits that the searches of databases 1 and 2 took 3 hours each, for a total of 6 hours, which included configuring each search, setting up and starting the run, verifying that the search was producing the appropriate results and downloading the results to a separate location for review. The time did not include the periods when searches were running and did not need attention from a staff member.

[64] The manager goes on to submit that the search of database 3 took 2 hours, due to the fact that the board's file server data was already uploaded and available, and that the steps taken were the same as described in the preceding paragraph.

[65] Applying the ratio of records containing personal information to those with non-personal information, the number of chargeable hours for the 8 hour search was 3.7 hours and at the rate of \$30.00 per hour, the fee for the completed computer searches is \$111.19.

[66] The EA then submits that the balance of the search of database 3 and each of the three schools' servers was not completed in preparing the fee estimate. However,

these searches were estimated to take 136 hours based on previous searches of these databases conducted by the board. The manager submits that the remaining searches of the board server (database 3), as well as the three school servers will require additional steps. In particular, the manager submits that the files will be required to be located, backed up and uploaded onto the cloud in order to permit the board's search tool to be employed. Each of the four remaining searches is estimated to require 7 hours of search time, 20 hours of upload monitoring and verification, and a further 7 hours of search verification and results downloads. The verifications are performed repeatedly to monitor for failures in the process, which happen frequently. The manager goes on to submit that additional verifications are repeatedly required while the records are being uploaded into the cloud, which takes several days, to monitor for failures which may require restarts or even full reruns of the upload. The search time does not include passive time while the system is simply running the search or while it is uploading the data. The search time involves configuring the search, setting up each search and starting the run. As a result, the manager argues, the total search time is 34 hours per server (four servers), for a total of 136 hours.

[67] Applying the personal information to non-personal ratio to the estimated search time, the chargeable hours were adjusted from 136 to 63.01 hours. At the rate of \$30.00 per hour, the fee for the estimated computer searches is \$1,890.40.

[68] Review of records – actual and estimated time

[69] The board notes that it has not reviewed the records for severances, but that it estimates 2 minutes per page for the severances to the actual and estimated number of records, as follows:

Location of search	Actual number of pages	Estimated number of pages
Database 1	33,998	N/A
Database 2	14,178	N/A
Database 3 ³⁷	24,049	188
School file server 1		61
School file server 2		585
School file server 3		4,559

[70] The combined number of estimated and actual pages is 77,618. The board then applied the ratio of personal to non-personal pages to estimate that the number of pages that it may charge a fee for preparation to 35,960. Applying 2 minutes per page as the estimated time to prepare records equals 71,920 minutes, which when divided by 60 equals 1,198.67 hours. The board then applied the \$30.00 per hour rate for a fee estimate of \$35,960.10 to prepare the records.

³⁷ The actual number of records is based on the completed search. The estimated number of records is based on the estimated search that has not been completed.

[71] The board's total fee estimate of **\$37,961.69** is broken down as follows:

- Search time – actual – \$111.19
- Search time – estimated - \$1,890,40
- Preparation of records – \$35,960.10

[72] Lastly, the board submits that the records responsive to the appellant's request have not been reviewed in their entirety, but that the circumstances would give rise to a reasonable conclusion that these records would be excluded from the *Act* under section 52(3)3.

[73] The appellant submits that the fee estimate is not fair, proper or moderate under the circumstances and that during the mediation of the appeal, she attempted to narrow the scope of her request in the mediation, but that the board advised that no further mediation was possible. The appellant also argues that requesters should not bear the financial burden of an improper records management system.³⁸

[74] In reply, the board reiterates that during the processing of the access request, it took into account the appellant's clarified time period and search terms, and also took into account the time periods that the appellant was employed at the schools that are the subject matter of the request. All of this, the board submits, was built into the cost of the fee estimate. The board also submits that it did not agree to the appellant's attempt to narrow the access request during mediation and that the IPC has previously stated that it does not have the authority to order an institution to accept a unilateral narrowing of an access request, citing Order MO-2215.

[75] In sur-reply, the appellant's position is that the fee estimate is unprecedented and unreasonable. As well, the appellant reiterates that the fee estimate calls into question the board's record management system, and that the IPC has found that a requester should not have to pay for a poor records management system, citing Order PO-3035.

[76] Because the appellant nevertheless seeks access to the information as originally requested, this order only deals with the fee estimate for the original request, as narrowed prior to the IPC appeal.³⁹

Analysis and findings

[77] I uphold the board's fee estimate, in part. In particular, I uphold the board's fee estimate regarding the search time for the searches it has already conducted in

³⁸ See Order PO-3035.

³⁹ If the appellant wishes to make a new request using the parameters proposed during mediation, she may do so.

databases 1, 2 and 3, because the figure provided by the board reflects the actual time spent searching for records responsive to part 6 of the request. I am also satisfied that the board did not charge for search time for records containing the appellant's personal information. As a result, I uphold the search time fee of \$111.19 for the searches that were conducted.

[78] With respect to the estimated remaining search time of database 3, I do not accept the board's argument that the remaining search of this database will take 34 hours. The board has already located 24,049 pages of records on this database and did so in the in the space of 2 hours because, as described by the board in its representations, database 3's file server data was already uploaded and available. I find that the estimated search time of 34 hours to search this same database for an estimated remaining 188 pages of records is excessive. As the searches in databases 1 and 2 took 3 hours each and the same process was applied to database 3, I will reduce the remaining search time for database 3 from 34 hours to 1 hour.

[79] Turning to the estimated search time of the three schools' servers, the board has described the additional steps that will be required to search these servers for records responsive to part 6 of the access request, including locating files, backing them up and uploading them into the cloud in order to permit the board's search tool to be employed. This search, the board argues, includes 7 hours of search time, 20 hours of upload monitoring and verification and a further 7 hours of search verification and results downloads per server. The board also acknowledges that additional verifications are repeatedly required, which may require restarts or even full reruns of the upload.

[80] I find that this process, as described by the board, is overly complicated and time consuming. Order PO-3035 is instructive in this regard. In that Order, former Commissioner Brian Beamish found that a figure of 32 hours to search for expense reimbursement records was excessive, coming to the conclusion that the institution's records management process was unwieldy and not conducive to easily focused searches for a well-defined class of records. I agree with and adopt the approach taken by the former Commissioner. The board acknowledges the problems it may encounter in conducting these searches, such as requiring restarts or even full reruns of the upload, problems inherent in the system which should not be visited on the appellant. As a result, I will decrease the estimated search time to search the three schools' servers by 10 percent, specifically from 102 hours to 92 hours.

[81] In sum, I have reduced the remaining estimated search time from 136 hours to 93 hours, broken down as follows:

- Database 3 – 1 hour, and
- The three schools' servers – 92 hours.

[82] Applying the ratio of records with the appellant's personal information to the

records that do not contain the appellant's personal information, I find that the number of chargeable hours for the estimated searches is 43.09 hours. At the rate of \$30.00 per hour, I find that the fee estimate for the searches of database 3 and the three schools' servers is \$1,292.70.

[83] With respect to the board's estimated fee for preparing/severing the records, I find the board's representations to be contradictory and confusing on this issue. On the one hand, the board is claiming that some of the records responsive to the request would be excluded from the scope of the *Act* under section 52(3)3. On the other hand, the board has applied the 2 minutes per page to sever the estimated 35,960 pages of records that do not contain the appellant's personal information. The question then is if all or some of the records are excluded from the scope of the *Act* under section 52(3)3, why would they have to be severed? I find that it is likely that some of the records which do not contain the appellant's personal information would be subject to the exclusion in section 52(3)3 and would, therefore, not need to be severed. As a result, I am reducing the estimated time and cost for preparing the records for disclosure by 10 percent. The board's estimated cost for preparing the records was \$35,960.10. Reduced by 10 percent, I will allow the fee estimate for preparing the records to be \$32,364.10.

Issue C: Should the fee be waived?

[84] The appellant requested a fee waiver with respect to the fee estimate issued by the board in respect of part 6 of her access request.

[85] 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.

[86] 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.⁴⁰

[87] 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.⁴¹

[88] The institution or the IPC may decide that only a portion of the fee should be waived.⁴²

[89] 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.⁴³ Factors that must be considered in deciding whether it would be fair and equitable to waive the fees are the actual cost in comparison to the fee (section 45(4)(a)), financial hardship (section 45(4)(b)) and whether dissemination of a record will benefit public health or safety (section 45(4)(c)).

[90] Where the actual cost to the institution in processing the request is higher than the fee charged to the requester, this may be a factor weighing against waiving the fee.⁴⁴

[91] The fact that the fee is large does not necessarily mean that payment of the fee will cause financial hardship.⁴⁵

⁴⁰ Order PO-2726.

⁴¹ Orders M-914, P-474, P-1393 and PO-1953-F.

⁴² Order MO-1243.

⁴³ See *Mann v. Ontario (Ministry of Environment)*, 2017 ONSC 1056.

⁴⁴ Order PO-3755. See also Order PO-2514.

⁴⁵ Order P-1402.

[92] For section 45(4)(b) to apply, the requester must provide some evidence regarding his or her financial situation, including information about income, expenses, assets and liabilities.⁴⁶

[93] 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 disclosing a public health or safety concern, or contributing meaningfully to the development of understanding of an important public health or safety issue, and
- the probability that the requester will disseminate the contents of the record.⁴⁷

[94] 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.⁴⁸

[95] Any other relevant factors must also be considered when deciding whether or not a fee waiver is “fair and equitable”. 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 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

⁴⁶ Orders M-914, P-591, P-700, P-1142, P-1365 and P-1393.

⁴⁷ Orders P-2, P-474, PO-1953-F and PO-1962.

⁴⁸ Orders MO-1336, MO-2071, PO-2592 and PO-2726.

- whether the waiver of the fee would shift an unreasonable burden of the cost from the appellant to the institution.⁴⁹

Representations

[96] The board submits that there is no basis on which to grant a fee waiver, and the appellant has not submitted compelling evidence of financial hardship. The board further submits that there will be an “overwhelming” volume of records involved and a reasonable expectation that a significant portion will contain the appellant’s personal information for which fees cannot be charged and that this factor favours not granting a fee waiver. The board also argues that at the end of mediation, the appellant identified that she was seeking a subset of records responsive to the request after putting the board to the expense of creating the fee estimate and that this factor weighs against granting the fee waiver.

[97] The appellant submits that the board did not alter or offer to alter the fee estimate even after acknowledging that over 50 percent of the records responsive to part 6 of the request consisted of her personal information, and being aware of her “dire” financial situation, as she was receiving long-term disability preceded by a period of not receiving any income. The appellant also submits that the board improperly disclosed her home address on two occasions to an individual, and that this individual was suing the appellant. The appellant’s position is that the fact that the person who was suing her has her home address puts the appellant at risk in terms of the damages sought, because the house is considered to be an asset.

[98] In reply, the board submits that the appellant’s personal information contained in approximately 50 percent of the records responsive to part 6 of the request was taken into account when calculating the fee estimate. Regarding the fact that the appellant is receiving long-term disability, the board argues that long-term disability is paid at 50 percent of the appellant’s gross earnings and is non-taxable, unlike income. The board further argues that the appellant has not provided the detailed financial data necessary to assess the issue of financial hardship required by the IPC. Lastly, the board submits that the privacy breaches alleged by the appellant are irrelevant to the issue of a fee waiver and that the appellant has not provided evidence to support actual financial losses attributable to her claimed privacy breaches.⁵⁰

[99] In sur-reply, the appellant submits that at the time of the fee waiver request she provided the board with legal documents that indicate how much damages she was sued for by the individual noted above. In addition, the appellant submits that the board has presented a skewed version of the circumstance of her privacy breaches complaint to the IPC. In particular, the appellant notes that the board admitted that due to human error, her address was disclosed on two occasions to the person who was

⁴⁹ Orders M-166, M-408 and PO-1953-F.

⁵⁰ The board notes that the appellant’s privacy breach claim was dismissed by the IPC in file MC20-00059.

suing her, and that this “double privacy breach” is relevant to her request for a fee waiver.

Analysis and findings

Section 45(4)(a)

[100] The board’s position is that the appellant’s personal information contained in approximately 50 percent of the records responsive to part 6 of her request was taken into account when calculating the fee estimate. As previously discussed, I have also decreased the board’s fee estimate. On this basis, I find that the actual cost to the board in processing the request is higher than the fee estimate, and that this is a factor weighing against waiving the fee.

Section 45(4)(b)

[101] The appellant was advised in the Notice of Inquiry that for section 45(4)(b) to apply, that she must provide some evidence regarding her financial situation, including information about income, expenses, assets and liabilities.⁵¹ The appellant has provided evidence about her income, which is that she receives long-term disability benefits. She has also provided evidence about her home, referring to it as an “asset.” She has also referred to a lawsuit in which she is, or was, the defendant. However, the appellant has not provided evidence of her expenses, or any other assets she may have. In addition, I find that the appellant has not provided specific evidence as to how the civil litigation is a liability for her. As a result, I do not have sufficient evidence to conclude that the revised fee estimate will cause financial hardship for the appellant. Therefore, I find that this factor does not apply and does not weigh in favour of a fee waiver.

Section 45(4)(c)

[102] The appellant’s representations do not address whether the disclosure of the records responsive to part 6 of her request will benefit public health or safety. I find that the records she seeks are in relation to her employment with the board, which is not a subject matter that relates directly to a public health or safety matter or concern, or contributes meaningfully to the development of understanding an important health or safety issue. As a result, I find that this factor does not apply and does not weigh in favour of a fee waiver.

Other factors

[103] The appellant cites a privacy breach by the board as a factor that should be taken into consideration in granting a fee waiver. I have taken the privacy breach complaint into account, but I find that it is not relevant to whether the appellant should be granted a fee waiver. Having considered the factors that could weigh in favour of a

⁵¹ See, for example, Orders M-914, P-591, P-700, P-1142, P-1365, P-1393 and PO-4309.

finding that it is fair and equitable for the board to waive its fees, I find that in the circumstances of this appeal that a fee waiver would shift an unreasonable burden of the cost from the appellant to the board.

[104] In sum, I find that the appellant has not demonstrated that a fee waiver is justified on the basis that it is fair and equitable to grant it or the *Act* requires the board to waive its fees. I uphold the board's decision not to waive the fees.

ORDER:

1. I find that the records relating to parts 1, 2, 3 and 5 of the access request are excluded from the scope of the *Act* under section 52(3)3.
2. I uphold the board's fee estimate of \$111.19 for the searches that were actually conducted by the board.
3. I do not uphold the board's estimated search time to complete the search of database 3, as well as search the three schools' servers. I reduce the estimated search time to 43.09 hours of chargeable time. As a result, I do not uphold the fee estimate of \$1,890.40 for these searches and decrease the fee estimate to \$1,292.70.
4. I do not uphold the board's fee estimate of \$35,960.10 to prepare/sever the estimated number of records and reduce the fee estimate for preparing/severing the estimated number of records by 10 percent to \$33,364.10.
5. I uphold the board's decision not to waive the fees.

Original Signed By: _____
Cathy Hamilton
Adjudicator

November 25, 2022 _____