Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3136

Appeal MA13-533

Halton Catholic District School Board

December 8, 2014

Summary: The Halton Catholic District School Board (the board) received a request for access to records relating to the requester and the Ontario College of Teachers, created during a specified time period. In response, the board issued an interim decision and fee estimate for producing the records, as well as a time extension. The requester appealed the initial fee estimate and time extension. During the appeal, the board issued a revised decision increasing the fee estimate and reducing the length of the time extension. The requester narrowed his appeal to the revised fee estimate only. In this decision, the adjudicator upholds the board's revised fee estimate.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 45(1), Regulation 823, section 6.

Orders Considered: Orders MO-2474 and PO-1259.

OVERVIEW:

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

> … all records as defined by the *Municipal Freedom of Information and Protection of Privacy Act* Sec. 2 (1) held by the Halton Catholic District School Board and it's Trustees, concerning or related to The Ontario College of Teachers and [name of the requester] for the time period September 1, 2009 to September 23, 2013 inclusive. Specifically records from [six named individuals] and/or from associates, legal counsel or support staff on their behalf.
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> Please note that I have relied on MO-2941.

[2] The board contacted the requester in order to clarify and discuss the possibility of narrowing his request. As a result of this communication, the requester agreed to narrow the request to the following, as confirmed in the Board's October 23, 2013 interim decision:

> Communications between the Board (including by the named individuals) and the Ontario College of Teachers regarding [name of the requester] that were sent and received during the stated time period and other records (i.e., non-communications that pertain to the Ontario College of Teachers and [name of requester] and that were created during the period from October 1, 2009 to December 31, 2010.
>
> … "non-communications" [means] records other than e-mail and letters…

[3] The board issued an interim decision and fee estimate as follows:

> We acknowledge your assertion that the request may produce a limited amount of records. We estimate that the costs of responding to this request will be largely driven by the cost of searching and retrieving e-mails from individuals who are no longer with the Board and that must be retrieved from e-mail archives. We estimate the costs of responding to this request will be **$2,500.**
>
> ...
>
> Please also be advised that some, all or part of the records you have requested may also be subject to exemptions in the *Act* or may be excluded from the *Act* as employment-related.
>
> We will not know until we process the records, but your request raises the potential for the application of the exemption in 14 of *MFIPPA* (unjustified invasion of privacy) and the employment-related records exclusion.

> We will also require a 45 day time extension to answer your request in light of the Board's resources, which we claim under section 20(1)(a) of *MFIPPA*.

[4] The requester (now the appellant) appealed the fee estimate and time extension set out in the board's interim decision.

[5] During mediation, the appellant removed three of the named individuals from the scope of the request, thus limiting it to three individuals. The parameters of the request otherwise remained the same. As no further mediation was possible, this appeal was moved to the inquiry stage, where an adjudicator conducts an inquiry under the *Act*.

[6] I first sought representations from the board in support of its position that the fee estimate and time extension are reasonable. The board was asked in particular to address whether the cost of searching and retrieving e-mails from individuals who are no longer with the board, which appears to comprise much of the fee, falls within the ambit of section 6.1 of Regulation 823.

[7] The board submitted its representations, which included a copy of a supplementary decision letter to the appellant that increased the fee estimate to $5700 (95 hours charged at $60.00 per hour) and reduced the requested time extension to 21 days.

[8] I then sought and received representations from the appellant on the facts and issues set out in the Notice of Inquiry and in response to the representations and supplementary decision letter provided by the board. The appellant withdrew his objections to the board's request for a time extension. I then sought and received reply representations from the board on the remaining issue of the fee estimate.

[9] The sole issue in this appeal is whether the board's fee estimate should be upheld.

[10] In this decision, I uphold the board's revised fee estimate of $5700.

DISCUSSION:

FEE ESTIMATE

[11] Previous orders have established that, where the fee is $100.00 or more, the fee estimate may be based on either:

- 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. The fee estimate also assists requesters to decide whether to narrow the scope of a request in order to reduce the fees. In all cases, the institution must include a detailed breakdown of the fee, and a detailed statement as to how the fee was calculated.[2]

[13] 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.

[14] 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.

[15] More specific provisions regarding fees are found in sections 6, 6.1, 7 and 9 of Regulation 823. Section 6, applying to requests for general records, reads:

> 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.

[1] Order MO-1699.
[2] Orders P-81 and MO-1614.

> 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.

[16] Section 6.1, applying to requests for access to the requester's own information, states:

> 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.

[17] In reviewing the board's fee estimate, I must consider whether its fee of $5700 is reasonable, giving consideration to the content of the appellant's request and the provisions set out in section 45(1) of the *Act* and Regulation 823. 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 was calculated in accordance with the provisions of the *Act*, and produce sufficient evidence to support its claim.

[18] Section 45(1)(c) does not include the cost of "a computer to compile and print information."[3]

[19] In this appeal, the central issue is whether the board's fee estimate is justified under paragraph 3 of section 6.1 of Regulation 823, above.

Representations

[20] In its representations and revised fee estimate, the board estimates that it will require 95 hours of Information Technology Services (IT) staff time to respond to the request. The board treated the request as a request for personal information, and states that it bases its fee estimate entirely on the estimated "computer costs" of responding. The board states that the fee estimate is largely driven by the cost of searching and retrieving e-mails from its e-mail archives, characterizing the request as one covering e-mails sent and received a significant time ago by a number of individuals who are no longer with the board. It submits that it needs to go through a "laborious technical process" to create a data source that it can search – in this case, a .pst file that can be searched by Microsoft Outlook. The board states that while its initial fee estimate was based on the advice of one of the members of its IT department, the revised fee estimate was issued after it decided to conduct a sample search of one individual's sent emails. The process of this sample search is described in two affidavits the board submitted with its representations. The board states that the sample search was much more challenging than anticipated and that it incurred $3000 in computer costs on conducting the sample search alone.

[21] In support of its position, the board refers to IPC orders which confirm that engaging in technical work to restore data to a form that can be searched is properly chargeable as "computer costs." The board argues that this work represents "producing a record from a machine readable record" so it can be manually searched.[4] For example, it refers to Order P-1259, in which Assistant Commissioner Tom Mitchinson found that e-mail restoration costs relate to "developing a computer program or other method of producing a record from a machine readable record", and, therefore, fall within the parameters of paragraph 5 of section 6 of Regulation 460 (the provincial equivalent to Regulation 823) and may be charged by the institution.

[22] As indicated, the board provided two affidavits from members of its IT staff describing the sample search and providing the basis for the board's estimate of the

[3] Order M-1083.
[4] MO-2474 and PO-1259.

work required to respond to the request. The sample search consisted of the emails sent by one of the persons named in the request, from October 2009 to December 2010. These emails were stored in six email archive databases. One of the six email archive databases was in turn stored on multiple backup tapes. A software program was used to identify the data that needed to be restored from the backup tapes. This step (excluding computer processing time) took four hours of staff time.

[23] The board changed its backup and recovery software in 2010. Therefore, in order to restore data from tapes recorded under the previous software, a member of IT staff was required to reconnect and reconfigure the previous software, which took about 4.75 hours. Following this, staff worked on restoring a backup email archive from the six tapes, using the software to inventory the tapes, cataloguing data, and selecting and restoring data to a server, all of which took about 45 minutes, not including processing time. The board did not charge for the time spent reconnecting the tape library to its current backup system.

[24] The data restored from the tapes, as well as the data in the five other email archive databases, was not in a form that could be read by Microsoft Outlook. One of the affidavits described the six-step process required to export the data to a .pst file that could be read through Outlook. Time was also spent in inspecting and repairing two archives which were corrupt. Exporting the data was the most time-consuming step in the above process, and required 39 hours of staff time, not including computer processing time.

[25] Having regard to the above as well as additional information, the board estimates that exporting sent and received emails for the second individual named in the request, and the received emails for the individual who was the subject of the sample search, will take approximately 40 to 45 hours. The board indicates that the cost of asking the third individual to retrieve her emails will likely be inconsequential and it does intend to charge a fee for this part of the request.

[26] In its revised decision, the board also advised the appellant that the processing of the sample search did not lead to the identification of any responsive emails.

[27] The appellant submits in his representations that the fee estimate should be denied, given the prohibition against charging a fee for searches involving a requester's own information. The appellant states that he is requesting his own personal information only and cites various orders in support of his position that fees may not be charged for searching and severing records containing personal information.[5]

[28] Generally, the appellant challenges the fee estimate increase as lacking in explanation or justification for such a change, and the manner in which it was

[5] Orders MO-2878 and MO-2528.

calculated. In addition to a number of additional issues, the appellant expresses a concern about the process and insufficiency of the evidence supporting the estimate tendered by the board. The appellant states that the board has provided no information about why it increased its estimate and asserts that he is not confident in the board's process of deriving an estimate.

[29] The appellant also alleges a number of deficiencies with the restoration process and estimate, including the fact that the board did not conduct a sample search for records when formulating its initial estimate. The appellant finds the board's consultation with an IT expert "clearly lacking." The appellant argues that, in his view, the advice and affidavits from the individuals are inadequate and insufficient. He also observes that the board merely employs what the appellant terms "well established software and methods to restore e-mail archives" rather than creating or developing a new computer program. The appellant asserts that the board has the technical experience and ability to restore large volumes of e-mail records and any additional hours allegedly required to produce useable data suggests errors occurring in the restoration process. The appellant suggests the board's efforts ought to have produced the records he is seeking without the need for further time and expense.

[30] The appellant also asserts that the board unilaterally "redefined" his request so as to exclude other record forms like active e-mail accounts, as opposed to the less available archived e-mail records.

[31] In its reply representations, the board states that the fee estimate did not include search and preparation costs, but only the cost of developing a computer program or other method of producing a record from a machine readable record, as permitted by section 6.1 of Regulation 823. The board reiterates that the process for creating an estimate included processing part of the request so it could reliably determine the cost of processing the whole request. This estimate is supported by technical experts in the form of sworn evidence.

[32] The board rejects the appellant's narrow construction of the phrase "develop a method" and again refers to IPC orders that recognize processes similar to that followed by the board as falling under the "developing a method" cost recovery provision.[6]

[33] The board rejects the appellant's assertion that it unilaterally "redefined" his request, stating that it was the appellant who agreed at mediation to limit his request to e-mails sent and received by three individuals. Two of the three individuals' e-mails are not in active storage. As indicated above, the board is not seeking to recover any costs for retrieving emails from the third individual as they will likely be inconsequential.

[6] Orders MO-2474 and PO-1259.

Analysis/Findings

[34] Based on my review of the representations and fee estimates provided by the board, I find that the revised fee estimate of $5700.00 is reasonable and is in accordance with the requirements of section 6.1.3 of Regulation 823 which permits the charging of a fee for "developing a computer program or other method of producing the personal information requested from machine readable record." This type of cost (which is also referred to in section 6.5, dealing with requests for general records), is a permissible fee when responding to requests for a requester's own personal information.

[35] I accept the board's evidence about the steps it will be required to take to produce a readable file which can then be searched for the records the appellant is seeking. The board's evidence on the cost of responding to the request is based on sworn affidavits from members of its IT staff. The evidence is detailed and persuasive and I have no basis to doubt its reliability. This request, as narrowed, covers archived emails and backup tapes from inactive accounts dating back four years before the request. It is evident that the time required to respond to it is directly related to the fact that most of the search requires retrieval of electronic records from sources that are not part of the board's current active email accounts. The board has stated that the time required to search through active email accounts will likely be "inconsequential". Although there may be times (due to a particular system in use) that such a search may not be difficult, it is also not unusual for a search through archived or deleted email databases to be more complicated and time consuming than a search through current email accounts. Previous IPC decisions have recognized this and have, as long as detailed information is provided about the steps required, upheld fee estimates for similar data recovery processes as a "method of producing a record from a machine readable record."

[36] The revised fee estimate is in keeping with the outcome of some other appeals that have involved similar work. In Order MO-2474, the institution's time estimate of 30 hours for restoration of deleted emails of six individuals over six months was upheld. In Order MO-2764 the adjudicator upheld an invoiced cost of $5490 from a computer consultant to recover deleted emails of four individuals over a one month period.[7] In Order MO-2154, the IPC upheld a fee estimate of $12,587.50 (reduced from $31,783.13) for recovery of deleted emails from the accounts of ten individuals, over seven months. In the appeal before me, as indicated above, the appellant sought emails dating back to four years before the request, and covering a period of over a year, from the accounts of individuals who had left the board's service. Of course, each case cannot be compared directly with another – there are multiple ways in which the work may differ from one scenario to another. Nevertheless, these other cases

[7] See, however, Order MO-3014, where this office rejected a fee estimate for similar computer costs, because of an absence of detailed evidence supporting the estimate.

demonstrate the possibility that the time (and cost) of responding to requests that cover deleted email records may indeed be extraordinary.

[37] The appellant takes issue with the board's assertion that it was required to develop a method for producing records, asserting that the board's IT personnel "simply employed well established software and methods to restore e-mail archives." The process outlined in the affidavits is more complex and complicated than a database query.[8] In addition, in this case, the IT staff could not merely use existing backup and recovery software, but had to reconnect and reconfigure the software to work with the board's current tape library. I have addressed this above - the IPC has recognized that e-mail restoration processes similar to that followed by the board in answering this request qualify as "developing a method of producing a record from machine readable record", for which the board is entitled to recover its costs.[9]

[38] I accept the board's assertion that in order to search for the information sought by the appellant, it had to develop a way to extract the information from archived databases. Regardless of whether the work which must be done to extract the responsive information can be defined as computer programming, I am satisfied that it constitutes an "other method of producing the personal information requested from machine readable record" within the meaning of paragraph 3 of section 6.1 of Regulation 823.

[39] Before concluding, I must acknowledge that the board's original fee estimate in hindsight was not reasonable. Although the board based it on the advice of an IT professional on its staff, this advice turned out ultimately to vastly underestimate the computing costs required to respond to the search. A substantial difference between a fee estimate and the actual costs might well prejudice a requester who, for instance, pays a deposit and agrees to proceed with a request in reliance on an interim access decision and fee estimate. Both institutions and requesters benefit from interim fee estimates which are based on the best available information. In this case, the requester decided to appeal the interim decision instead of proceeding with the request.

[40] As well, in another case, such a significant change from one estimate to another might have cast doubt on the reliability of the revised estimate. In the end, I find that the sworn affidavits provide detailed and convincing evidence on the anticipated costs of responding to the request and rely on them in my determinations.

[41] In sum, I uphold the board's revised fee estimate of $5700 for responding to the request.

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[8] See Order MO-2603 for a discussion of the distinction between "computer programming" and a database query.

[9] See, for example, Orders MO-2474 and PO-1259. Also, Order MO-3121, in which the IPC stated that "institutions under the *Act* are generally not required to modify existing information storage facilities or data retrieval systems in order to accommodate the needs of requesters."

ORDER:

I uphold the board's revised fee estimate of $5700.

Original Signed By: December 8, 2014
Sherry Liang
Senior Adjudicator