ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2013-10

April 10, 2013

PEMBINA HILLS REGIONAL DIVISION NO. 7

Case File Number F5646

Office URL: www.oipc.ab.ca

Summary: Under the *Freedom of Information and Protection of Privacy Act* (the "Act"), the Applicant, a journalist, asked Pembina Hills Regional Division No. 7 (the "Public Body") for information relating to a former Superintendent's employment, leaves of absence, the termination of his employment, any investigations of him and any complaints about him. The Public Body assessed fees of approximately $4,000 in order to process the request. The Applicant then requested a fee waiver on the basis of public interest, but the Public Body refused to grant one. The Applicant then requested a review of the Public Body's decision not to grant a fee waiver, and a review of the amount of the fee estimate.

As a preliminary matter, the Adjudicator first found that the Public Body had the jurisdiction to require an applicant to pay fees under section 93 of the Act, even though, as a local public body, it did not have a bylaw or other legal instrument by which it had set fees under section 95(b).

The Adjudicator further found that the Applicant was entitled to a partial fee waiver, on the basis that 50% of the records requested by him related to a matter of public interest under section 93(4). The Adjudicator accordingly concluded that, once the Public Body processed the Applicant's access request and determined the actual costs, the Applicant could be required to pay no more than 50% of those actual costs.

Finally, the Adjudicator found that the Public Body did not properly estimate the amount of some of the fees to process the Applicant's access request in accordance with section 93 of the Act and the *Freedom of Information and Protection of Privacy Regulation*. In respect of the remaining 50% of the fees to process the Applicant's access request, the Adjudicator ordered the Public Body to estimate fees, and subsequently charge the actual costs, in accordance with particular guidance set out in the Order.

Statutes and Regulation Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1(d)(v), 1(j)(i), 6(3), 10(2), 17, 17(1), 17(4)(d), 72, 72(3)(a), 72(4), 93, 93(1), 93(3), 93(4), 93(4)(b), 93(6), 95 and 95(b); *School Act*, R.S.A. 2000, c. S-3, ss. 60 and 68; *Freedom of Information and Protection of Privacy Regulation*, Alta. Reg. 186/2008, ss. 11(6), 13(1), 14(1)(a), 14(4) and the Schedule.

Orders Cited: AB: Orders 96-002, 99-012, 99-014, 2000-008, 2000-011, 2001-023, F2006-032, F2007-023, F2007-024, F2009-034, F2009-039, F2010-036 and F2011-015; External Adjudication Order No. 2 (2002).

Cases Cited: CAN: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27; *R. v. Sharpe*, 2001 SCC 2.

Other Sources Cited: E.A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983); Legislative Assembly of Alberta, *Alberta Hansard*, 23rd Legislature, 2nd Session, p. 1127 (Ty Lund, April 12, 1994).

I. BACKGROUND

[para 1] In an access request dated October 28, 2010, the Applicant, an editor with *The Westlock News* and journalist with the *Barrhead Leader*, asked for the following from Pembina Hills Regional Division No. 7 (the "Public Body" or "PHRD") under the *Freedom of Information and Protection of Privacy Act* (the "Act"):

> Any information relating to [a] former [Superintendent's] employment: remuneration, information on all leaves of absence and the reasons for them, information relating to the termination of his employment, information about any investigations or complaints [he] was the subject of, and anything else that might be relevant.

The Applicant requested the above information for the time period of January 1, 2006 onwards.

[para 2] In a letter dated November 3, 2010, the Public Body told the Applicant that information about the former Superintendent's remuneration was publicly available, and it pointed to an online source for the information. It also referred the Applicant to a media release, dated October 23, 2010, announcing that the Superintendent was no longer an employee of the Public Body. The Public Body also provided some information about a leave of absence taken by the former Superintendent beginning October 1, 2010. As for the remaining parts of the Applicant's access request, the Public Body wrote that the

responsive information could not be disclosed under section 17 of the Act (disclosure harmful to personal privacy), as the records related to a personnel matter. The Public Body concluded by stating that, if the Applicant nonetheless wished to continue with his request for information, he should specify the information that he was seeking, and the Public Body would then prepare a fee estimate in order to process the request.

[para 3] In a letter dated November 4, 2010, the Applicant confirmed that he wished to proceed with his access request and clarified it by writing the following:

> Furthermore the specific information I'm looking for, if it was not made clear in the original request, is as follows:
>
> Under what circumstances did [the former Superintendent's] employment with PHRD end?
> Did he quit, or was he fired?
> Did he receive any severance following [a specified] leave of absence, or his [specified] termination date?
> Is or was [he] the subject of any investigation into any kind of misconduct?
> Have there been any complaints from any PHRD staff about [him] during the course of his various contracts with PHRD?
>
> I would also like to see copies of all correspondence, including e-mails, sent or received by [him]. In addition, any correspondence between other staff members relating to complaints about [him], investigations into [his] activities, or his departure from the board.

The Applicant also narrowed the time period associated with his access request by indicating that he was seeking records only from January 1, 2010 onwards.

[para 4] In a letter dated November 12, 2010, the Public Body told the Applicant that it construed his request for "copies of all correspondence, including e-mails, sent or received by [the former Superintendent]" as relating to the matters set out in his original access request (i.e., not every item of correspondence sent or received by the former Superintendent in relation to any matter whatsoever). In order to process the Applicant's access request, the Public Body estimated the fees to be $3,916.25, citing section 93 of the Act, section 13 of the *Freedom of Information and Protection of Privacy Regulation* (the "Regulation") and attaching a breakdown of the calculations.

[para 5] In a letter dated November 29, 2010, the Applicant asked the Public Body to waive the fees, on the basis that the information that he had requested related to a matter of public interest. By letter dated December 20, 2010, the Public Body denied the Applicant's request for a fee waiver, stating that it did not consider the matter to relate to public interest.

[para 6] In a form dated January 26, 2010, the Applicant requested a review of the Public Body's fee estimate and its refusal to waive the fees. The Commissioner at the time authorized a portfolio officer to investigate and try to settle the matter. This was not successful, and the Applicant requested an inquiry by way of a form dated April 27,

2011. A combined written and oral inquiry was subsequently set down. The parties made some initial written submissions followed by further oral submissions at a hearing on August 23, 2012. At the oral hearing, the Public Body's FOIP Coordinator/Secretary-Treasurer/Corporate Secretary (the "Secretary-Treasurer") and its Assistant Secretary-Treasurer attended as witnesses.

II. RECORDS AT ISSUE

[para 7] As this inquiry involves a review of a refusal to grant a fee waiver and a review of a fee estimate, rather than a decision to withhold information, there are no records at issue. For context, the information requested by the Applicants is set out above.

III. ISSUES

[para 8] The Notice of Inquiry, dated February 17, 2012, set out the following two issues:

> Should the Applicant be excused from paying all or part of a fee, on the basis that the requested records relate to a matter of public interest under section 93(4)(b) of the Act?
>
> If the Applicant should not be excused from paying all or part of a fee, did the Public Body properly estimate the amount of fees in accordance with section 93 and/or 95(b) of the Act, and the Regulation?

[para 9] By letter dated April 11, 2012, I added a third issue to the inquiry:

> In order to require an applicant to pay fees under section 93 of the Act, is a local public body required to have a bylaw or other legal instrument by which it has set fees under section 95(b)?

I will discuss the above issue first, as it involves a jurisdictional question, namely whether the Public Body can charge the Applicant fees in the first place.

[para 10] For clarity, this inquiry does not address the Public Body's indication that it intends to sever much of the information requested by the Applicant on the basis that disclosure would be an unreasonable invasion of the former Superintendent's personal privacy under section 17(1) of the Act. That decision has not actually been made, as the Public Body is still at the initial stages of processing the Applicant's access request.

IV. DISCUSSION OF ISSUES

A. In order to require an applicant to pay fees under section 93 of the Act, is a local public body required to have a bylaw or other legal instrument by which it has set fees under section 95(b)?

[para 11] Section 93 of the Act reads as follows:

> *93(1) The head of a public body may require an applicant to pay to the public body fees for services as provided for in the regulations.*
>
> *(2) Subsection (1) does not apply to a request for the applicant's own personal information, except for the cost of producing the copy.*
>
> *(3) If an applicant is required to pay fees for services under subsection (1), the public body must give the applicant an estimate of the total fee before providing the services.*
>
> *(3.1) An applicant may, in writing, request that the head of a public body excuse the applicant from paying all or part of a fee for services under subsection (1).*
>
> *(4) The head of a public body may excuse the applicant from paying all or part of a fee if, in the opinion of the head,*
>
> > *(a) the applicant cannot afford the payment or for any other reason it is fair to excuse payment, or*
> >
> > *(b) the record relates to a matter of public interest, including the environment or public health or safety.*
>
> *(4.1) If an applicant has, under subsection (3.1), requested the head of a public body to excuse the applicant from paying all or part of a fee, the head must give written notice of the head's decision to grant or refuse the request to the applicant within 30 days after receiving the request.*
>
> *(5) If the head of a public body refuses an applicant's request under subsection (3.1), the notice referred to in subsection (4.1) must state that the applicant may ask for a review under Part 5.*
>
> *(6) The fees referred to in subsection (1) must not exceed the actual costs of the services.*

[para 12] Section 95 of the Act reads as follows:

> *95 A local public body, by bylaw or other legal instrument by which the local public body acts,*

> *(a) must designate a person or group of persons as the head of the local public body for the purposes of this Act, and*
>
> *(b) may set any fees the local public body requires to be paid under section 93, which must not exceed the fees provided for in the regulations.*

[para 13] The Public Body in this inquiry is a local public body under the Act, by virtue of sections 1(j)(i) and 1(d)(v). Previous orders of this Office raised the possibility that, in order for the head of a local public body to require an applicant to pay fees for services under section 93(1), the local public body must first have a bylaw or other legal instrument that sets the fees under section 95(b) (Order F2009-039 at para. 32; Order F2010-036 at para. 130). In other words, it is arguable that, if a local public body does not have a bylaw or legal instrument that sets the fees that it requires to be paid by an applicant making an access request, the local public body has not given itself the authority to charge fees and therefore cannot charge them. Taking the line of analysis further, if a local public body does not yet have the authority to charge fees, a fee estimate in any amount would be unauthorized. The question of whether a fee waiver is warranted would also be moot.

[para 14] In response to an inquiry from me by letter dated April 5, 2012, the Public Body indicated that it does not have a bylaw or other legal instrument by which it has set fees, as contemplated by section 95(b). However, at the oral hearing, the Public Body argued that it did have the requisite legal instrument in the form of Administrative Procedure AP 30-45 of its Administrative Procedures Manual, which states: "The Division will provide access to information consistent with the *Freedom of Information and Protection of Privacy Act* and this Administrative Procedure".

[para 15] I can agree that AP 30-45 is a legal instrument within the meaning of section 95(b) of the Act. The Public Body explained that the *School Act* gives it the authority to conduct its affairs by establishing rules, policies and procedures (see, e.g., *School Act*, ss. 60 and 68). However, I find that AP 30-45 does not "set any fees the local public body requires to be paid", as contemplated by section 95(b). The Administrative Procedure does not mention fees at all, and the general reference to providing access to information "consistent with" the Act is insufficient. To fulfill section 95(b), the bylaw or other legal instrument of the local public body must actually set out one or more fees for processing an access request.

[para 16] As I find that AP 30-45 does not satisfy the requirements of section 95(b) of the Act, I now turn to whether a local public body must satisfy those requirements, in the first place, in order to be entitled to charge fees to process an access request.

[para 17] The modern approach to statutory interpretation is as follows:

> …the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

> [*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27 at para. 21 and *R. v. Sharpe*, 2001 SCC 2 at para. 33, each quoting E.A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983), p. 87]

[para 18] In its written submissions and at the oral hearing, the Public Body argued that the clear wording of section 93(1), regardless of the existence of section 95(b), authorizes it to charge the Applicant fees because, as a "local public body", it is also a "public body", and section 93(1) permits the head of a "public body" to require an applicant to pay to the "public body" fees for services as provided for in the regulations.

[para 19] I agree that, given the grammatical and ordinary meaning of the words in section 93(1), the provision authorizes a local public body to charge fees in accordance with the Regulation, whether or not the local public body has created the bylaw or other legal instrument that is contemplated by section 95(b). Section 93(1) is unambiguous in allowing all "public bodies" to charge fees in order to process an access request. Had the Legislature intended otherwise, it could very easily have provided that the ability to require an applicant to pay fees under section 93(1) was "subject to section 95(b)".

[para 20] In my view, the foregoing interpretation also accords with the intention of the Legislature. The Public Body noted the following comments made during debate of the bill that gave rise to the Act:

> Now, by regulation there will be a fee schedule, and certainly it only makes sense that if in fact there's a party asking for information that in fact they will gain by, then it's not reasonable that the taxpayer should have to foot the bill for providing that information.
>
> [Legislative Assembly of Alberta, *Alberta Hansard*, 23rd Legislature, 2nd Session, p. 1127 (Ty Lund, April 12, 1994)]

[para 21] If it is reasonable to assume that the particular applicant, rather than the taxpayer, should pay some or most of the costs associated with processing his or her access request, it appears to me that the Legislature would not have intended for local public bodies to have to take the unique and additional formal step of enacting a bylaw or having another legal instrument in order to charge such fees. Indeed, if the cost of processing an access request were to otherwise fall to the taxpayers, there would be even fewer taxpayers bearing that cost where the access request is made to the smaller local public body, such as a school board or town. This would not be in keeping with the comments excerpted above.

[para 22] A requirement that a local public body first have a bylaw or other legal instrument under section 95(b) in order to charge an applicant fees would also, as argued by the Public Body, not be in keeping with the "user pay principle" that has been articulated by this Office (see, e.g., Order 96-002 at p. 16 or para. 50). This principle is derived from section 6(3) of the Act, which states:

6(3) The right of access to a record is subject to the payment of any fee required by the regulation.

The foregoing is to say that I also consider my interpretation of section 93(1) to be consistent with the overall context, scheme and object of the Act.

[para 23] I conclude that, in order to require an applicant to pay fees under section 93 of the Act, a local public body is not required to have a bylaw or other legal instrument by which it has set fees under section 95(b).

B. Should the Applicant be excused from paying all or part of a fee, on the basis that the requested records relate to a matter of public interest under section 93(4)(b) of the Act?

[para 24] Section 93(4)(b) of the Act, reproduced earlier in the Order, contemplates a fee waiver if the records requested by an applicant relate to a matter of public interest. An applicant requesting a fee waiver on the basis of public interest must present sufficient information to show how the records relate to a matter of public interest (Order 96-002 at pp. 4 and 5 or paras. 14 and 15; Order 2000-011 at para. 27). At the same time, a public body must form a proper opinion as to whether the requested records relate to a matter of public interest, and properly exercise its discretion as to whether to grant a fee waiver, by reviewing all of the relevant facts and circumstances and considering the principles and objects of the Act (Order 2001-023 at para. 29; Order F2007-023 at para. 18).

[para 25] Two overriding principles have been articulated when deciding whether records relate to a matter of public interest. The two principles are that the Act was intended to foster open, transparent and accountable government, subject to the limits contained in the Act, and that the user seeking records should normally pay [Order 96-002 at p. 16 or para. 50; External Adjudication Order No. 2 (2002) at para. 26].

[para 26] The Applicant set out his position regarding a fee waiver in his initial request of November 29, 2010 to the Public Body, an additional letter of March 30, 2011 to the legal counsel for the Public Body, his written inquiry submissions of March 14, 2012, his submissions at the oral hearing, and an additional written submission of November 28, 2012. The Public Body set out its position in its initial response of December 20, 2010 to the Applicant, its written inquiry submissions of March 19, 2012, its submissions at the oral hearing, and its responses of December 3 and 20, 2012 to the Applicant's additional submission.

[para 27] Order F2006-032 (at para. 43) set out a non-exhaustive list of three main criteria, each followed by sub-criteria, to consider in determining whether an applicant should be excused from paying all or part of a fee on the basis of public interest. The criteria were drawn to the attention of the parties in the Notice of Inquiry, and the parties addressed these criteria in their written and oral submissions. In their earlier correspondence, as well as at the oral hearing, the parties also made reference to criteria

that had previously been set out by this Office in Order 96-002 (at pp. 16 and 17 or para. 51). For the purpose of this Order, I prefer to use the new criteria set out in Order F2006-032, although I will consider the parties' submissions in reference to the old criteria by placing them under the new criterion that is most fitting. Indeed, many of the old and new criteria repeat or overlap. I will then go on to consider other points raised by the parties that are not so easily placed under the list of non-exhaustive criteria.

1. Review of the criteria for a fee waiver in the public interest

Will the records contribute to the public understanding of, or to debate on or resolution of, a matter or issue that is of concern to the public or a sector of the public, or that would be, if the public knew about it?

Have others besides the applicant sought or expressed an interest in the records?

Are there other indicators that the public has or would have an interest in the records?

[para 28] Subsequent to the oral hearing and the close of submissions, the Applicant learned that the former Superintendent has been charged by the RCMP with fraud over $5,000 and breach of trust in relation to an allegation, which has not yet been proven, that he submitted excessive expense claims to the Public Body between May 1, 2006 and December 31, 2010. I accepted this new information for the purpose of the inquiry, and the Public Body wrote that it did not object, provided that it had an opportunity to respond.

[para 29] The Public Body notes that one order of this Office indicates that I have jurisdiction to only consider the evidence and information available to the Public Body at the time that it initially made its decision not to grant a fee waiver (Order 99-012 at paras. 25-26), while another order issued shortly afterwards indicates that I may make a "fresh decision" as to whether a fee waiver is warranted based on new information (Order 2000-008 at paras. 14-15). I believe that the latter approach is the correct one. If it were otherwise, an applicant could simply re-make the access request, re-request the fee waiver, and re-request a review by the Office, which would be extremely inefficient.

[para 30] At the time of the oral hearing, the Applicant admitted that he did not know for sure what had transpired in respect of the former Superintendent's departure from the Public Body, but argued that this was due to the secrecy of the Public Body and its very short press release to announce that the Superintendent was no longer an employee. Still, the Applicant was aware that the RCMP was investigating an unnamed employee of the Public Body, and knew that this investigation had commenced within weeks of the Superintendent's departure. He was also aware that the Superintendent had received no severance package.

[para 31] At the oral hearing, which again was prior to the former Superintendent being criminally charged, the Public Body characterized the Applicant as merely

speculating that there had been misconduct on the part of the Superintendent. It argued that it is not unusual for a senior-ranking official to leave employment with a school division, even partway through a contract. However, I find that there was a reasonable basis, even at the time of the oral hearing, for the Applicant to believe that the former Superintendent had allegedly done something wrong in the course of his employment. The new information provided by the Applicant confirms this, in any event.

[para 32] I now turn to whether the alleged misconduct means that the records requested by the Applicant will contribute to the public understanding, debate or resolution of a matter that is or would be of concern to the public.

[para 33] In support of his view that the records relate to a matter of public interest, the Applicant submits that the former Superintendent was paid a relatively high salary with public money and left under dubious circumstances. He argues that the public has a right to hold the Public Body accountable, and to know greater details about any misconduct on the part of the former Superintendent and the reasons that his employment ended. He says that the public must know what happened in order to ensure that it does not happen again. He argues that taxpayers deserve more than the terse news release issued by the Public Body in October 2010.

[para 34] The Public Body agrees that the way in which it spends taxpayer money, and the way it is accountable, is of interest to the public. However, it notes that information about its expenditures and its audited financial statements are already publicly available, so as to ensure a degree of accountability. It argues that the information requested by the Applicant is about a single employee, and while members of the public may be curious about his departure, this is not sufficient to give rise to public interest within the meaning of section 93(4)(b). The Applicant counters that the Superintendent was not just a regular employee, but the head of the Public Body, and was directly accountable to the publicly elected board of trustees through his employment contract.

[para 35] While the Public Body indicates that it has not received any similar access requests, the Applicant testified that many residents of the division have expressed concern about the former Superintendent's departure, and continue to ask him for updates on the matter. The Public Body responds that much of the public's curiosity in this matter has been generated by news articles written by the Applicant himself.

[para 36] In any event, the role of a journalist is to draw matters to the public's attention. While not all news stories may garner interest from readers, I find that, in this case, a sector of the public has or would have an interest in the records requested by the Applicant. I also find that the records would contribute to the public's understanding of the circumstances surrounding the Superintendent's departure from the public body, which is of sufficient importance, given his high-level position and alleged misconduct.

[para 37] The criterion and sub-criteria above accordingly weigh in favour of a fee waiver.

Is the applicant motivated by commercial or other private interests or purposes, or by a concern on behalf of the public or a sector of the public?

> *Do the records relate to a conflict between the applicant and government?*
>
> *What is the likelihood the applicant will disseminate the contents of the records?*

[para 38] The Applicant submits that he is not motivated by commercial or private interests, but by his responsibility as a journalist to inform his readers, who include taxpayers in the school division and the parents of children attending the Public Body's schools. I note that the records do not relate to a conflict involving the Applicant personally.

[para 39] At the oral hearing, the Public Body conceded that the Applicant is not motivated by commercial or private interests – and that he is likely to disseminate the contents of the records – but added that the fact that an applicant is a journalist does not necessarily mean that records requested by him or her relate to a matter of public interest. I agree with this point, but find here that the Applicant is motivated by a sufficient concern on behalf of a sector of the public.

[para 40] The criterion and sub-criteria above accordingly weigh in favour of a fee waiver.

If the records are about the process or functioning of government, will they contribute to open, transparent and accountable government?

> *Do the records contain information that will show how the Government of Alberta or a public body reached or will reach a decision?*
>
> *Are the records desirable for the purpose of subjecting the activities of the Government of Alberta or a public body to scrutiny?*
>
> *Will the records shed light on an activity of the Government of Alberta or a public body that has been called into question?*

[para 41] Noting the alleged misconduct of the former Superintendent and his close connection to the school board elected by residents of the division, the Applicant writes that the records will explain how the school board came to the decision to part ways with the Superintendent, and will "shine a spotlight" on the workings of the Public Body. He believes that something went awry at the highest levels of the division, and wonders about the extent to which the Superintendent was paid while engaging in alleged misconduct, possibly breaking the law and possibly violating his contract. He questions the judgment of the trustees regarding the way that they dealt with the matter.

[para 42] For its part, the Public Body submits that there is already publicly available information on the operation of the school board, such as minutes of meetings and

financial statements. I find, however, that such information will not shed light on the specific matter raised by the Applicant in respect of the termination of the former Superintendent's employment.

[para 43] Before public funds are expended in order to shed light on an alleged problem, there must be some convincing evidence or a convincing argument that the problem exists or likely exists (Order F2006-032 at para. 26). I find that the Applicant has presented sufficient evidence and argument that the requested records are about the process or functioning of the Public Body, that they will show how it reached its decision to part ways with the former Superintendent, and that they are desirable for the purpose of subjecting the activities of the Public Body to scrutiny. There is a public interest in knowing the details of the alleged misconduct of the former Superintendent, whether and when the Public Body became aware of it, and the manner in which the Public Body dealt with it.

[para 44] Given the foregoing, I find that the records will contribute to open, transparent and accountable government in such a way that a fee waiver would be warranted.

[para 45] The Public Body referred to other inquiries in which it was found that requested records did not relate to a matter of public interest, and compared this inquiry to them so as to argue that a fee waiver is likewise unwarranted (see, e.g., Orders F2006-032 and F2009-034). However, the issue regarding the appropriateness of a fee waiver depends on the particular case. In the inquiry that gave rise to Order F2009-034, the applicant had not presented sufficient evidence to show that the activities of the particular public body had been called into question, and his allegations were found to be speculative and not sufficiently grounded (Order F2009-034 at para. 57). In the inquiry that gave rise to Order F2006-032, there were again only speculations and assertions, rather than any real indication that a problem existed (Order F2006-032 at paras. 25-26 and 36). I have found the facts differently in this inquiry.

2. Other points raised by the parties

[para 46] There are a few points made by both the Applicant and the Public Body that are generally irrelevant to the question of whether the requested records relate to a matter of public interest. In fairness to the parties, however, some of these points were made in reference to the previous criteria for determining whether a fee waiver is warranted in the public interest. The fact that the points are not relevant is essentially why the criteria were subsequently reformulated.

[para 47] For instance, the efforts of the Public Body and Applicant to narrow the scope of the access request do not inform whether records relate to a matter of public interest. While applicants are encouraged not to request information that they do not really want or need, they are entitled to do so. Where an access request is broad in scope,

the question becomes whether all, some or none of the records relate to a matter of public interest, which I address later in this Order.

[para 48] It also does not matter that the Applicant has not requested the information from the former Superintendent directly. The Act entitles him to make an access request to the Public Body.

[para 49] Conversely, it does not matter that the Public Body has possibly spent more than the amount of the fee estimate defending its decision not to grant the fee waiver. The Public Body is entitled to do so.

[para 50] The Public Body notes the presumption against disclosure of the former Superintendent's personal information relating to his employment history under section 17(4)(d) of the Act. However, the possibility that the Public Body may properly withhold most of the requested information from the Applicant is not relevant to whether a fee waiver is warranted on the basis of public interest. A determination that records relate to a matter of public interest simply means that there is sufficient public interest to justify the taxpayers bearing the cost of the public body's processing of the access request, during which it will go on to decide whether the records should be disclosed, sever any information that is believed to be subject to an exception to disclosure, and produce a copy of the records to be released to an applicant (Order F2009-034 at para. 69).

[para 51] I now turn to whether the Applicant has established that the records relate to a matter of public interest, in view of my various findings above.

3. Conclusion as to public interest

[para 52] For requested records to relate to a matter of public interest, they should be of significant importance in order for the cost of processing the access request to be passed on to taxpayers (Order 2000-011 at para. 52). Fee waivers on the basis of public interest are to be granted only when there is something about the records that clearly makes it important to bring them to the public's attention or into the public realm (Order F2006-032 at para. 39). It is not sufficient for there to be some marginal benefit or interest in the record; there should be a compelling case for a finding of public interest (Order F2007-024 at para. 47).

[para 53] In my view, the records requested by the Applicant are of significant importance and there is something about them that should be brought into the public realm. The allegation in this particular case is that the former Superintendent, a high-ranking official, submitted excessive expense claims to the Public Body over the course of approximately five years. The misappropriation of public money by employees of government, including school divisions, is a matter that is typically of great concern to the public, as it involves serious questions about accountability. Also of importance and public interest is the manner in which the Public Body addressed the alleged misconduct of the former Superintendent once it was discovered, and the length of time that it took to discover the possible misappropriation of funds.

[para 54] At the oral hearing, the Public Body repeatedly argued that the Applicant has not shown the benefit to the public that would accrue in relation to the records. It noted the distinction between mere curiosity of the public and public interest, as follows:

> … "interest"" can range between individual curiosity and the notion of interest as a benefit, as in a collective interest in something. The weight of public interest will depend on a balancing of the weights afforded "curiosity," "benefit" and "broad" versus "narrow" publics. Where an access request relates to a matter that is of "interest" in both the sense of curiosity and benefit and the relevant "public" is broad, the case for removing all obstacles to access is very strong. So a matter that is the subject of curiosity to the larger public and also relates to a benefit to the broad public would present a very strong case for the waiver of fees. A matter which is of curiosity to many but affects no general benefit would present a less compelling case. Similarly, a matter that affects a benefit but in which few citizens are interested may present a less compelling case. In the less compelling cases, the importance of respecting the integrity of the legislated fee structure could outweigh the public interest dimension.
>
> (Order 96-002 at pp. 15-16 or para. 49)

[para 55] In this inquiry, I find that the requested records evoke more than just curiosity on the part of the public. Their possible disclosure – if that is later the decision of the Public Body, or of this Office in the case of a request for review – would have a public benefit by shedding light on a matter that has been reasonably called into question, and contributing to open, transparent and accountable government. There are also a sufficient number of members of the public who are or would be interested, namely the residents of an entire school division.

[para 56] The Public Body notes that the burden of proof to show that records are a matter of public interest, with the consequence that the normal fee schedule is set aside, is a difficult burden to discharge (Order F2007-023 at para. 19), and that this burden is an onerous one that will neither be frequently nor easily met (External Adjudication Order No. 2 (2002) at para 73). I nonetheless find that the burden has been met in this case.

[para 57] I conclude that that the Applicant has raised a matter of public interest. I now turn to whether all or only some of the records requested by him relate to that matter of public interest.

4. Whether a full or partial fee waiver is warranted

[para 58] The Public Body argued that, in the event that I were to determine that the Applicant has established a matter of public interest, only a partial fee waiver should be granted because, in the Public Body's view, not all of the records relate to that matter. It notes that a fee waiver may be granted only with respect to that portion of an access request that involves records relating to the public interest (see, e.g., Order 2001-023 at paras. 37-38).

[para 59] To paraphrase the Applicant's access request as set out in his letters of October 28 and November 4, 2010, he seeks information relating to the former Superintendent's employment, remuneration, leaves of absence, the reasons for the end of his employment, any severance, any investigations of him and any complaints about him, including e-mail and other correspondence relevant to the foregoing.

[para 60] I find that not all of the records requested by the Applicant relate to the matter of public interest established by him. I have explained that there is a public interest in knowing the details of the alleged misconduct of the former Superintendent, whether and when the Public Body became aware of it, and the manner in which the Public Body dealt with it. However, only a portion of the requested records, which I estimate to be 50%, will contain the foregoing information. I suspect that much of the requested correspondence, although it may be connected or tangential to the matters raised by the Applicant, will not really shed any light on the former Superintendent's alleged misconduct or the Public Body response to it. I suspect that there will be a lot of relatively mundane or insignificant correspondence.

[para 61] I acknowledge that the Applicant narrowed the time period associated with his access request, but his request for all copies of relevant correspondence remains quite broad. The Applicant says that he felt that he had no choice but to request the information so broadly, but that was still his choice. I also note that, in his letter of December 10, 2012, the Applicant writes that he remains open to working with the Public Body to narrow the scope of his request. However, the access request has not been narrowed to my knowledge, so I must continue to consider the extent to which the records originally requested by the Applicant relate to a matter of public interest.

[para 62] I considered whether a fee waiver was unwarranted altogether, on the basis that the matter raised by the Applicant is the subject of a police investigation, and moreover, charges have been laid. However, as noted by the Applicant, the fact that the police may have information relating to a particular matter of public interest does not mean that the police will provide any of it to the public. Indeed, the Applicant is entitled to request records from the Public Body, and entitled to request a fee waiver, in accordance with the Act. All that I need to find is that particular records relate to a matter of public interest, making the fact that the matter is currently being addressed by the police essentially irrelevant. I also considered that some of the requested information will become publicly available at a trial, assuming that one takes place. Again, however, the Applicant is entitled to seek access to information from the Public Body, and further, a trial may not ever occur.

[para 63] To conclude, I find that approximately 50% of the records requested by the Applicant relate to a matter of public interest under section 93(4)(b) of the Act, so as to warrant excusing the Applicant from paying that portion of fees. Once the Public Body processes his access request and determines the actual costs, it may require the Applicant to pay only up to 50% of those actual costs.

[para 64] I add that it does not matter whether, after processing the access request, it is actually 50% of the responsive information that relates to the matter of public interest that I have found in this inquiry. In granting a partial fee waiver, one must necessarily estimate the percentage of records that are likely to relate to the matter of public interest, in advance and on the basis of the access request itself, rather than after the fact and on the basis of the results of the search for records.

C. If the Applicant should not be excused from paying all or part of a fee, did the Public Body properly estimate the amount of fees in accordance with section 93 and/or 95(b) of the Act, and the Regulation?

[para 65] When an applicant requests a review of a fee estimate, the public body has the burden of proof, as it is in the best position to explain the processes and standards that it used to calculate the fees for services; at the same time, it is in the applicant's best interest to provide arguments and evidence regarding the appropriateness of the fee estimate (Order 99-014 at paras. 9-11).

[para 66] As set out in its letter of November 12, 2010 to the Applicant, the Public Body estimated the fees to be $3,916.25 in order to process his access request, and it attached a breakdown of those fees. The Applicant submits that fees close to $4,000 are prohibitive. For its part, the Public Body argues that the Applicant's access request was quite broad, and says that it tried to conservatively estimate the fees. At the oral hearing, the Public Body also reduced some of the items in its fee estimate, as noted below.

[para 67] Under section 93(6) of the Act, the fees that an applicant may be charged must not exceed the actual costs of the services. This means that, once a public body actually processes an applicant's access request, he or she can only be required to pay the actual costs incurred for the authorized services – up to certain maximum amounts set out in the Schedule to the Regulation – and may even be entitled to a refund under section 14(4) of the Regulation. While a fee estimate is only an estimate and an applicant must eventually pay only up to the actual costs, there remains a practical implication of a fee estimate in that an applicant may be required to pay half of the estimated amount before the processing of his or her access request continues, as contemplated by section 14(1)(a) of the Regulation. Here, that amount, on the basis of the Public Body's initial fee estimate, would be $1,958.13.

[para 68] The fee estimate that the Public Body provided to the Applicant is comprised of 9 items corresponding to certain of the authorized services set out in section 13(1) of the Regulation and the Schedule to it. The Public Body did not actually estimate any fees for items 4, 5 and 6, so only the other items will be reviewed.

[para 69] I will treat items 1 and 2 together. Item 1 consists of an estimate to search for, locate and retrieve the records requested by the Applicant. The amount is $918.00, calculated as 34 hours at $27.00 per hour. While I suspect that some of the information requested by the Applicant would be readily located in the personnel file of the former Superintendent, the Applicant also requested copies of all correspondence, including

e-mails, relating to the termination of the former Superintendent's employment, any investigations of him and any complaints about him. At the oral hearing, the Applicant confirmed that he wanted the foregoing correspondence, despite the breadth of that aspect of his access request. While he would prefer to get the information that he seeks as easily and efficiently as possible, he does not want to risk having to make another access request if he were to narrow the present one and not receive what he is after.

[para 70] The Public Body explains that it has approximately 830 staff members, but predicts that only a portion of them may have responsive information. Based on an estimate from its IT department that it would take 138 hours to search for responsive e-mail correspondence sent or received by all staff, the Public Body estimates that it would take 30 hours to search for electronic records sent or received by the relevant portion of staff.

[para 71] Item 2 of the Public Body's fee estimate consists of an estimate for producing a record from an electronic record. Specifically, computer processing and related charges are estimated to be $432.00, calculated as 16 hours at $27.00 per hour. At the oral hearing, I tried to clarify whether the Public Body would actually have to create a new record from an electronic record, as contemplated by section 10(2) of the Act. It is possible, for instance, that the Public Body would simply have to search its computer system and database for electronic records, including for archived or deleted ones, which could then be printed without any need to create or re-create the records. The Public Body was not entirely certain of the process that would be required, but the Secretary-Treasurer said that, if it would not be a matter of producing a record from an electronic record as contemplated by item 2, the Public Body would have instead added the 16 hours to the time that it would take to search for electronic records in item 1 of the fee estimate.

[para 72] In short, the Public Body estimates that it would take 46 hours (30 hours plus 16 hours) on the part of its IT department to process the Applicant's access request. Given the breadth of the Applicant's request for electronic records, and the number of employees of the Public Body, I consider this estimate of time to be reasonable. Of course, the amount of time should be adjusted to reflect the actual time spent, once the access request is processed.

[para 73] The Public Body's Assistant Secretary-Treasurer explained, at the oral hearing, that the remaining 4 hours of time in item 1 of the fee estimate was for the purpose of searching for, locating and retrieving responsive paper records. I also consider this estimate of time to be reasonable.

[para 74] Finally, I consider the calculation at $27.00 per hour to be appropriate for the purpose of the estimate, as this is the maximum amount contemplated for items 1 and 2 in the Schedule to the Regulation ($6.75 per ¼ hour). However, because the Applicant cannot be charged any more than the actual costs, the Public Body should adjust the hourly rate downward after processing the access request if, in fact, the hourly rate of the particular IT staff that it engages to process the request is less than $27.00 per hour.

[para 75] Given the foregoing, I find that the Public Body properly estimated its fees for services set out in items 1 and 2 of its fee estimate.

[para 76] Item 3 consists of an estimate for producing paper copies of the requested records. The Public Body estimates that there will be 1,525 pages to copy at a cost of 25 cents per page, for a total estimate of $381.25.

[para 77] I first find the estimate that there will be 1,525 pages to fully or partly copy to be reasonable. Again, the Applicant's access request is quite broad, and while the Public Body believes that it will have to withhold most of the personal information of the former Superintendent requested by the Applicant, it noted that it would not be entitled to withhold non-personal information, such as dates and letterhead, meaning that many pages will be partly copied.

[para 78] I now turn to the estimated fee of 25 cents per photocopied page. The Applicant believes that this is high.

[para 79] Because the fees charged to an applicant for producing paper copies of records cannot exceed the actual cost, Order F2011-015 (at paras. 47-51) explained that a public body must present evidence as to its actual cost, although the calculation need not be exact and may be done periodically rather than at the time of each and every access request. Here, the Public Body's Secretary-Treasurer testified that it actually costs 4.5 cents per photocopied page to account for such things as the paper, leasing costs and power. I consider this to be reasonable.

[para 80] The Public Body added an additional 20 cents per photocopied page (rounding the total of 24.5 cents up to 25 cents) to account for the labour involved in making the photocopies. The Secretary-Treasurer explained that she and the Assistant-Secretary would have to make the copies themselves, given the sensitivity of the requested information, and that their hourly rates are relatively high. She accordingly testified that the labour costs were calculated on the basis of an hourly rate of $50.00. She also predicted that it would take approximately 6 hours to do the photocopying (1,525 pages at 240 pages per hour).

[para 81] In my view, labour costs may not be included in a public body's charge for photocopying. While other items set out in the Schedule to the Regulation are expressed as an hourly rate, the cost for producing a paper copy of a record is not. This suggests to me that the charge to make photocopies is intended to account only for the physical or material costs. I also note that it is very inconsistent, and therefore contrary to the intent of the Schedule, for a public body to charge a maximum of $27.00 per hour for other services, yet charge $50.00 per hour for photocopying.

[para 82] Moreover, in the case of many access requests, it would not take much time to photocopy records, in any event. Once the records have been prepared and handled for disclosure – which includes severing and collating the pages, and which are services for which a public body can charge – it would normally just be a matter of feeding the

bundle into a photocopying machine and making the copy for the applicant in a matter of minutes. If it takes a more significant amount of time, it is my view that the public body must bear the associated labour costs. My interpretation is reinforced by the fact that item 3 of the Schedule to the Regulation authorizes a charge "per page", again without any reference to time, which is comparable to the references to "$5.00 per disk" and "$2.00 per slide" in item 4 of the Schedule. For instance, even if it took a Public Body a lengthy amount of time to download material from a variety of places onto a computer disk, it can only charge a maximum of $5.00, which small amount is surely not intended to cover any of the labour costs. I conclude that the authorized charges in relation to producing a copy of a record – in whatever format or medium – may account for the costs to create the physical or material object only.

[para 83] At the oral hearing, the Public Body argued that Order F2011-015 contemplated that labour costs could be included in the cost for photocopying. I disagree. That Order stated (at paras. 49-51; my underline):

> A reasonable approach to estimating a public body's actual photocopying costs for processing an access request would be to use an amount per page reflective of the cost per page for making photocopies that the Public Body usually incurs, on average, regardless of whether the photocopying is being done in response to an access request. This amount would include consideration of such things as the costs of paper and toner to the Public Body, and any other things that the Public Body usually incorporates into its approximation of its per page photocopying costs when it is budgeting these costs. That approximate cost per page would then be multiplied by the number of records the Public Body anticipates photocopying to satisfy the access request. It may be that this rate will prove to be 25 cents per page; however, that cannot be established in the absence of evidence as to how the Public Body arrived at its estimate of costs.
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> Schedule 2 authorizes a Public Body to charge up to a maximum of $6.75 per quarter hour for both "searching for, locating and retrieving a record" and "preparing and handling a record." The Public Body has selected the rate of $6.75 per quarter hour, or $27.00 per hour, for the time it estimates it will spend conducting these activities. The Public Body's arguments indicate that it selected this rate on the basis that it is the maximum that may be charged. It may be that this rate accurately reflects the actual costs the Public Body will incur for processing the Applicant's access request. However, that cannot be established until the Public Body provides evidence and explanation as to why it anticipates incurring costs at this rate in processing the Applicant's access request. Evidence would include the rates paid to employees to search for, locate, and retrieve records, and for preparing and handling records, and the activities involved. A Public Body must also explain how these rates reflect the Public Body's actual costs for providing the service.
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> In saying this, I do not mean that a public body must conduct a detailed analysis of each and every factor contributing to its actual costs every time it estimates fees. Rather, it is sufficient for a public body to approximate actual costs such as photocopying and the rates of employee time, once, and then incorporate these amounts into subsequent fee estimates. Provided that a public body can demonstrate with evidence or explanation that these approximations are

> reasonable, the fee estimate relying on them will likely also be found to be reasonable.

[para 84] The first paragraph reproduced above refers to the cost of paper and toner, and any other thing that a public body incorporates in its budget for photocopying, as being an appropriate reflection of its actual cost to produce a paper copy of a record. A public body normally does not include, in its budget for photocopying, the predicted amount of staff time spent at the photocopying machine multiplied by staff's hourly rate.

[para 85] The Public Body noted that the third paragraph above refers to "photocopying" immediately followed by "rates of employee time", arguing that this means that employee time may be included in photocopying costs. However, Order F2011-015 was discussing two separate things: (1) the actual charge for photocopying (as discussed in the first paragraph above) and (2) the actual hourly rates in order to search for, locate and retrieve records and to prepare and handle them (as discussed in the second paragraph above). The third paragraph then refers to both things; it does not say that rates of employee time may be included in the cost of photocopying.

[para 86] Given the foregoing, I find that the Public Body improperly estimated the photocopying fees set out in item 3 of its fee estimate. Based on the Public Body's evidence at the oral hearing, the amount should be 4.5 cents per page. A public body should only charge for photocopying at a rate of up to 25 cents per page if, in fact, its material costs, overhead or disbursements actually reflect that amount. For instance, if a public body has sound reason to engage a printing business to make the copies, and the business charges 25 cents per pages, the public body would be justified in passing along that charge to the applicant, as it would be the public body's actual cost.

[para 87] Item 7 of the Public Body's fee estimate consists of an estimate for preparing and handling the records for disclosure. The amount is $2,025.00, calculated as 75 hours at $27.00 per hour.

[para 88] Preparing and handling a record for disclosure includes severing. Order F2011-015 (at paras. 34 and 36) explained that a public body should no longer automatically rely on the "two minute per page" rule set out in an earlier order of this Office, but instead estimate the time that it will take to sever the records by taking a representative page or pages and calculating the average amount of time it takes to blacken or otherwise redact the information. In its initial fee estimate, the Public Body relied on the two-minute rule, and Order F2011-015 was issued subsequently. At the oral hearing, the Secretary-Treasurer explained that, following the release of that Order, she conducted sample severing and found that it would take approximately one minute per page. The Public Body accordingly agreed to adjust its fee estimate set out in item 7 by cutting it in half. Given the Public Body's indication that it will likely decide to sever much of the personal information of the former Superintendent from the records, I consider the estimate for severing at one minute per page to be reasonable. When I asked the Applicant his view, he replied that he had no reason to object.

[para 89] In item 7, the Public Body estimates that there will be 2,250 pages to sever. I find that this is not a proper estimate. In her affidavit (at para. 13), the Secretary-Treasurer states: "…we estimated that that there were approximately 2,250 paper documents [which I take to include hard copies of electronic records] to be reviewed. However, to provide a conservative estimate, we divided the 2,250 in half to produce an estimate of 1,525 copies as it was unlikely that all 2,250 paper documents would be responsive." In other words, the Public Body appears to believe that it will locate 2,250 pages in the course of its search, but that only 1,525 will be responsive. The Applicant obviously wants only the responsive information. I considered whether the Public Body means that it will have to spend time severing the non-responsive information on numerous pages, but its photocopying estimate only included 1,525 pages, meaning that only up to that amount is expected to require severing of whatever nature. The remaining 1,525 pages will presumably be found to be completely non-responsive, or else will be completely withheld, meaning that there will be no need for severing either way.

[para 90] Given this, I find that the Public Body's estimate of the number of pages, and therefore the time that it will take to prepare and handle those pages for disclosure, should be cut by another half (in addition to the reduction by half to account for the reduction from two minutes to one minute for severing). Once again, however, the actual amount eventually charged to the Applicant should reflect the actual time spent.

[para 91] I find that estimating the hourly rate at the maximum amount of $27.00 per hour in item 7 of the fee estimate was proper. As noted earlier, the Secretary-Treasurer indicated that she and the Assistant Secretary-Treasurer would have to process the Applicant's access request personally, due to the sensitivity of the information, and their hourly rates are higher than the $27.00 per hour maximum.

[para 92] While the Public Body in this inquiry is aware of the following, it bears repeating. Under section 11(6) of the Regulation, a public body may not charge a fee for the time spent reviewing a record. The public body itself is responsible for the cost associated with reading records and deciding whether to withhold requested information under particular sections of the Act. Once that decision is made, a public body may then only charge a fee for severing the records and other aspects of preparing and handling them for disclosure. Where the reviewing and severing happen simultaneously, a public body must reasonably apportion the time spent on those two tasks, and charge only for the severing.

[para 93] Item 8 of the Public Body's fee estimate consists of an estimate for supervising the examination of records in the amount of $135.00. At the oral hearing, the Applicant questioned this fee because he understood that he would be taking copies of records, and preferred to receive copies rather than simply examine the records. The Public Body responded that the fee for examining records was set out as an alternative to obtaining paper copies, and agreed that it should not be included. The estimated charge for supervising the examination of records should accordingly be removed from the fee estimate.

[para 94] Item 9 consists of an estimated cost of $25.00 for shipping the records, which the Secretary-Treasurer explains in her affidavit to be by way of courier. This amount is not particularly high, and the Applicant did not take issue with the amount at the oral hearing. I therefore consider the estimate for shipping to be reasonable, although again, the amount must later be adjusted to reflect the actual cost.

[para 95] I conclude that, in certain respects, the Public Body did not properly estimate the amount of fees to process the Applicant's access request in accordance with section 93 of the Act and the Regulation. For the remaining 50% of the fees to process the Applicant's access request – which accounts for the portion of the requested records that do not relate to a matter of public interest – the Public Body should estimate and subsequently charge them, if it chooses to charge them, in accordance with the guidance set out above.

V. ORDER

[para 96] I make this Order under section 72 of the Act.

[para 97] I find that, in order to require an applicant to pay fees under section 93 of the Act, a local public body is not required to have a bylaw or other legal instrument by which it has set fees under section 95(b).

[para 98] I find that, under section 93(4) of the Act, the Applicant should be excused from paying 50% of the fees associated with processing his access request.

[para 99] I find that the Public Body did not properly estimate the amount of fees in accordance with section 93 of the Act and the Regulation. Under section 72(3)(a), I require the Public Body to fulfill its duty under section 93(3) by giving the Applicant a proper estimate of the amount of fees to process his access request. Under section 72(4), I specify as a term of this Order that, in recalculating the fee estimate, the Public Body should follow the guidance set out in this Order.

[para 100] I further order the Public Body to notify me and the Applicant, in writing, within 50 days of receiving a copy of this Order, that it has complied with the Order.

Wade Raaflaub
Adjudicator