



Order P23-03

FEDERATION OF POST-SECONDARY EDUCATORS OF BC

Elizabeth Vranjkovic
Adjudicator

April 19, 2023

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Summary: This inquiry is about whether the organization's fee estimate in response to the complainant's access requests is minimal. The adjudicator found that the fee estimate was not minimal and ordered the organization to revise the fee estimate and provide the revised fee estimate to the complainant in writing.

Statutes Considered: *Personal Information Protection Act*, SBC 2003, c 63, s. 32, 32(2), 32(3), 36(2)(c), 52(3)(c), 52(4), 53(1).

INTRODUCTION

[1] The complainant made five access requests to the Federation of Post-Secondary Educators of BC (Federation) under the *Personal Information Protection Act* (PIPA). In each request, the complainant requested all documents including emails that mention him that the Federation exchanged with one of five named individuals.

[2] The Federation provided a fee estimate of \$2,999.60 for an estimated 1,000 pages of documents in relation to all of the access requests and asked the complainant to pay half that amount as a deposit. The complainant complained to the Office of the Information and Privacy Commissioner (OIPC) about the fee. Mediation did not resolve the fee dispute and it proceeded to inquiry.

[3] At some point before or during the inquiry, three Federation staff representatives reviewed their files and located 666 pages of documents. As a result, in its inquiry submission, the Federation provided a revised fee estimate of \$1,886.17. My analysis and decision below are based on the revised fee estimate of \$1,886.17.

PRELIMINARY MATTERS

New issues

[4] In his inquiry submission, the complainant raises new issues not set out in the investigator's fact report or notice of inquiry. For example, the complainant says that the Federation has not complied with the duty under s. 28 to assist him and respond as accurately and completely as reasonably possible.¹ The complainant also says that the Federation is attempting to impose fees retroactively and says that I should decide whether retroactive fees are permitted under PIPA to create clarity for the future.²

[5] In general, the OIPC will only consider new issues at the inquiry stage in exceptional circumstances where the OIPC grants permission.³ To allow otherwise would undermine the effectiveness of the mediation process which exists, in part, to assist the parties in identifying, defining and crystallizing the issues prior to inquiry.⁴

[6] I do not see any exceptional circumstances that would warrant considering new issues here. Accordingly, I decline to consider any new issues. I have focused my discussion below only on the evidence and submissions relevant to deciding the fee estimate issue.

Number of pages

[7] I can see that the complainant does not agree with the number of pages of records the Federation says respond to his requests and upon which the fee estimate is based.⁵ Here, I will consider the fee estimate in relation to the 666 pages that the Federation says it has located. The complainant is free to revise, clarify or narrow the scope of his access requests directly with the Federation, which could reduce the fee for access, and I encourage the parties to cooperate in that regard.

ISSUE

[8] The notice and fact report state that the issue to be decided in this inquiry is whether the organization should reduce or waive the fee pursuant to s. 32 of

¹ Whenever I refer to sections in this order, unless otherwise specified, I am referring to sections of PIPA.

² Complainant's initial submission at pages 4 and 9.

³ See, e.g., Order P18-01, 2018 BCIPC 6 at para 7.

⁴ Order F15-15, 2015 BCIPC 16 at para 10; Decision F08-02, 2008 CanLII 1647 at paras 28-30.

⁵ Complainant's initial submission at page 6.

PIPA. In my view, considering the relevant sections of PIPA, the issue is more appropriately stated as whether the \$1,866.17 fee complies with s. 32 of PIPA.⁶

[9] PIPA does not establish who has the burden of proof for this kind of inquiry, so the parties must provide evidence and argument to support their respective positions.⁷

DISCUSSION

Background

[10] The Federation is a federation of trade unions representing workers in the post-secondary education sector in BC. The Federation employs staff representatives to service its member trade unions. The Federation also employs administrative staff, including an administrative coordinator. The staff representatives and the administrative coordinator are employed pursuant to a collective agreement.

[11] One of the Federation's member trade unions is the Thompson Rivers University Faculty Association (TRUFA). Each of the individuals named in the complainant's access requests is or has been a member or officer of TRUFA.⁸

Fees for access

[12] The relevant parts of s. 32 say:

32(2) An organization may charge an individual who makes a request under section 23 a minimal fee for access to the individual's personal information that is not employee personal information concerning the individual.

(3) If an individual is required by an organization to pay a fee for services provided to the individual to enable the organization to respond to a request under section 23, the organization

(a) must give the applicant a written estimate of the fee before providing the service, and

(b) may require the applicant to pay a deposit for all or part of the fee.

⁶ Section 52(3)(c) allows the Commissioner to confirm, excuse or reduce a fee, or order a refund, in the appropriate circumstances. Section 32 does not say anything about reducing or excusing a fee.

⁷ Order P10-03, 2010 BCIPC 48 at para 5.

⁸ The information in this background section is from the statutory declaration of the organization's Secretary-Treasurer at paras 1-3.

[13] Thus, if the organization chooses to charge an individual a fee for access, it must only charge a minimal fee and it must give the individual a written estimate of the fee.

[14] A complaint can be brought to the Commissioner under s. 36(2)(c) that a fee required by an organization “is not reasonable.” The use of the term “reasonable” rather than minimal in s. 36(2)(c) indicates that the scope of the commissioner’s powers to review fees is broader than simply determining whether the fee charged complies with the statutory requirement that it be “minimal.”

[15] Past orders establish the proper analytical approach.⁹ The first step is to determine whether the fee is “minimal” under s. 32(2). If the fee is minimal, I must still consider if imposing that fee on the complainant is reasonable in the circumstances.

Fee estimate and parties’ positions

[16] The Federation provided the following breakdown of its fee estimate:

- 16 hours at \$61.48/hour, totaling \$983.68, for staff representatives “reviewing their files and identifying the documents exchanged with the [five] named individuals that mention [the complainant].”¹⁰
- One minute per page at \$61.48/hour, totaling \$682.43, for the staff representatives to “determine whether any of the personal information requested should be withheld because it is privileged or for some other reason.”¹¹
- 0.5 minute per page at \$39.65/hour, totaling \$220.06, for the administrative coordinator to prepare the documents for disclosure, “excluding time spent severing the personal information and indexing the documents, but including the time spent reviewing the records to determine which pages include the personal information of third parties.”¹²

[17] The Federation says that the rates charged represent the employees’ rates under the relevant collective agreements.¹³ The Federation submits that \$1,886.17 represents a minimal fee and should be upheld by the OIPC.¹⁴

⁹ Order P08-02, 2008 CanLII 30215 at paras 33-37; Order P21-04, 2021 BCIPC 20 at para 20.

¹⁰ Organization’s response submission at para 11.

¹¹ Organization’s response submission at para 18.

¹² Organization’s response submission at para 15. While the organization and previous orders refers to “third parties”, this is not a defined term in PIPA. I take references to “third parties” to be references to individuals other than the complainant. For consistency, I will refer to “other individuals” instead of “third parties” throughout this order.

¹³ Organization’s response submission at paras 7 and 15.

¹⁴ Organization’s response submission at para 20.

[18] The complainant says that the estimated fees are not minimal and include time and work that are not required to respond to his access requests.¹⁵ The complainant says that the Federation is attempting to charge for severing information when it is not entitled to do so.¹⁶ The complainant also questions why the Federation is charging per page rather than per record.¹⁷

Is the \$1,886.17 fee “minimal”?

[19] PIPA does not define the term “minimal” nor does it provide a fee schedule or guidance about what fees may be charged.¹⁸ Previous PIPA orders have said that a minimal fee is based on the actual, necessary costs that would be incurred to respond to the request.¹⁹ A fee that generates revenue is not a minimal fee.²⁰

[20] This is not to say, however, that a “minimal” fee will always cover all of the costs associated with responding to an access request.²¹ While PIPA does not explicitly exclude charges for activities such as severing, the phrase “minimal fee for access” in s. 32(2) suggests that fees are limited to costs incurred in providing access, not costs for severing, which is an activity that denies access.²²

[21] I will consider each component of the Federation’s fee estimate in turn below.

Reviewing files and identifying documents that mention the complainant

[22] The Federation says that three staff representatives spent a total of 16 hours at \$61.48/hour, totaling \$983.68, reviewing their files and identifying documents exchanged with the named individuals that mention the complainant. The Federation says that those staff representatives were in the best position to undertake the review because they were responsible at various times for the TRUFA files.²³ The Federation also says that the OIPC has accepted charging the hourly rate of employees required to review their files and identify the

¹⁵ Complainant’s initial submission at page 6.

¹⁶ Complainant’s initial submission at page 7.

¹⁷ Complainant’s reply submission at page 8.

¹⁸ Unlike s. 75 of the *Freedom of Information and Protection of Privacy Act* (FIPPA) which says how fees under FIPPA are to be calculated, and the *Freedom of Information and Protection of Privacy Regulation*, BC Reg 323/93, which provides a schedule of “maximum” fees.

¹⁹ Order P08-02, *supra* note 9 at paras 38-39; Order P08-03, 2009 CanLII 65712.

²⁰ Order P21-03, 2021 BCIPC 11 at para 61.

²¹ Order P08-02, *supra* note 9 at para 39.

²² Order P21-04, *supra* note 9 at para 31. This approach is consistent with s. 75(2)(b) of FIPPA which prohibits charging a fee for severing information from a record.

²³ Organization’s response submission at para 6; statutory declaration of the organization’s Secretary-Treasurer at paras 7 and 9.

requested documents for disclosure as a “minimal fee” for the purposes of s. 32.²⁴

[23] The Federation is charging a relatively high hourly rate of \$61.48/hour for this work. However, I accept that because the staff representatives were responsible for the TRUFA files, they likely know the subject matter of those files best and were in the best position to review the files and identify responsive documents. Accordingly, I am satisfied that the hourly rates of the staff representatives are “minimal” in the sense that they are the rates required to provide access at the lowest overall cost.

[24] In the particular circumstances before me, I find that charging for 16 hours to review files and identify responsive documents is minimal. I have considered that this time was spent in response to five broadly worded access requests. I am also mindful that 16 hours is not an estimate but is the time the staff representatives actually spent reviewing files and identifying responsive documents. For these reasons, I am satisfied that the \$983.68 fee is minimal.

Determining whether any of the information should be withheld because it is privileged or for some other reason

[25] The Federation estimates that it will take the staff representatives one minute per page at \$61.48/hour, totaling \$682.43, to “determine whether any of the personal information requested should be withheld because it is privileged or for some other reason.”²⁵

[26] The Federation does not explain why it believes it is entitled to charge for “determining whether any of the personal information should be withheld because it is privileged or for some other reason” and I do not see why it should be.

[27] In my view, “determining whether any of the personal information should be withheld because it is privileged or for some other reason” means deciding what information in the responsive documents will or will not be disclosed. That time spent deciding what will and will not be disclosed is time spent deciding what to sever. I agree with past orders that have said that the phrase “minimal fee for access” in s. 32(2) does not include costs for severing, which is an activity that denies access.²⁶

[28] For these reasons, I am not satisfied that a minimal fee estimate properly includes time spent determining whether any of the information should be

²⁴ Organization’s response submission at para 11.

²⁵ Organization’s response submission at para 18.

²⁶ Order P21-04, *supra* note 9 at para 31. This approach is consistent with s. 75(2)(b) of FIPPA which prohibits charging a fee for severing information from a record.

withheld because it is privileged or for some other reason. Therefore, I find that the \$682.43 fee is not minimal.

Preparing the documents for disclosure

[29] The Federation estimates that it will take the administrative coordinator 0.5 minute per page at \$39.65/hour, totaling \$220.06, to prepare the documents for disclosure, “excluding time spent severing the personal information and indexing the documents, but including the time spent reviewing the records to determine which pages include the personal information of third parties.”

[30] I find that the administrative coordinator’s hourly rate is a minimal rate for preparing the documents for disclosure. I have considered that the administrative coordinator has a lower hourly rate than the staff representatives. There is no evidence that there are any other employees available to prepare the documents for disclosure at a lower hourly rate. Therefore, I accept that the administrative coordinator’s hourly rate is a minimal rate for preparing the documents for disclosure.

[31] However, I am not satisfied that a minimal fee for preparing documents for disclosure includes reviewing records to determine which pages include the personal information of other individuals.

[32] The Federation says, relying on Order P10-03, that the OIPC has allowed organizations to charge for time spent reviewing records to determine which pages are responsive to the request and which pages include the personal information of other individuals.²⁷ I see no reason why the Federation should be able to charge for the administrative coordinator to determine which pages are responsive for the request when I have already allowed a fee of \$968.38 for the staff representatives to identify 666 pages of responsive documents.

[33] The Federation has not adequately explained how Order P10-03 applies; what it means by “reviewing the records to determine which pages include the personal information of third parties”; or why it should be able to charge for doing so as part of a minimal fee for preparing the documents for disclosure. It seems to me that determining which pages include the personal information of other individuals means deciding what information cannot be disclosed because it is the personal information of other individuals. In other words, it means deciding what information must be severed. As previously discussed, the phrase “minimal fee for access” in s. 32(2) does not include costs for severing.

[34] For these reasons, I am not satisfied that the Federation may charge for the administrative coordinator to review the records to determine which pages

²⁷ Organization’s response submission at para 14.

include the personal information of other individuals. As a result, I find that the \$220.06 fee is not minimal.

[35] The Federation has not described any other activities as part of preparing the documents for disclosure. However, considering previous orders, I am satisfied that the Federation may charge a minimal fee for preparing the complainant's copy of the documents for disclosure.

[36] For example, in Order F22-28, Adjudicator Fedorak described preparing records for disclosure as follows:

This activity involves the actions of preparing the applicant's copy of the records that the public body delivers. This includes the actions of creating the copy that the public body will disclose to the applicant.²⁸

[37] Additionally, in Order F09-05, Senior Adjudicator Francis found that preparing records for disclosure includes packaging records for disclosure in an orderly manner by numbering records, stapling and collating them in chronological order.²⁹

[38] Following these orders, I find that the Federation may charge a minimal fee based on the actual, necessary costs that would be incurred to prepare the complainant's copy of the documents for disclosure. This may include compiling all of the documents in chronological order in one document for disclosure to the complainant.

[39] To summarize, I find that the \$220.06 fee for preparing the documents for disclosure is not minimal because it includes a fee for time spent reviewing the records to determine which pages include the personal information of other individuals. However, I find that the Federation may charge a minimal fee for preparing the complainant's copy of the documents for disclosure.

Conclusion

[40] Overall, I find that the estimated fee of \$1,866.17 is not minimal. Specifically, I find that:

- The \$983.68 fee to review files and identify documents that mention the complainant is minimal;
- The \$682.43 fee to determine whether any of the personal information should be withheld because it is privileged or for some other reason is not minimal; and

²⁸ Order F22-28, 2022 BCIPC 31 at para 31.

²⁹ Order F09-05, 2009 CanLII 21404 (BC IPC) at para 49.

- The \$220.06 fee to prepare the documents for disclosure is not minimal because it includes a charge for time spent severing the personal information.

[41] The Federation must therefore revise its fee estimate, guided by my findings in this order. In calculating the revised total allowable fee, the Federation may require the complainant to pay:

- \$983.68 to review files and identify documents exchanged with the named individuals that mention the complainant and contain his personal information; and
- The actual, necessary costs that would be incurred, at the administrative coordinator's hourly rate, to prepare the complainant's copy of the documents for disclosure.

[42] In calculating the revised total allowable fee, the Federation must not charge for determining if any of the information should be withheld because an exception to the complainant's right of access applies. The resulting revised total fee, in my view, will be a minimal fee.

Is the fee reasonable?

[43] In most situations, a minimal fee will also be a reasonable fee. However, that may not always be the case and it may be appropriate to further reduce or excuse a minimal fee. The factors to consider when deciding to reduce or excuse a minimal fee vary, but generally include the following:³⁰

- If the complainant argues that they are genuinely unable to pay the fee, then there must be evidence to support the assertion.
- It is appropriate to consider whether reducing or excusing the fee will cause a hardship to the organization. If an organization cannot afford the resources to provide the requested access, it should not be forced to expend them.
- A complainant may be required to demonstrate that they could not have obtained the personal information by some other practical or reasonable means that do not impose costs on the organization.
- The complainant's purpose for seeking access to the personal information may also be relevant. Consideration should only be given to excusing a minimal fee if the complainant seeks the personal information

³⁰ Order P08-02, *supra* note 9 at para 51.

in order to protect their real legal or financial interests or rights, for instance, or if there is a clear public benefit to providing access.

- Before a minimal fee will be waived, the complainant should demonstrate that they have tailored their request to ensure that the organization is required to provide only those documents which are necessary for the complainant's purposes.

[44] In this case, I have found that the estimated fee of \$1,886.17 is not minimal and that it should be revised and reduced. Neither party has raised any of the factors above. Applying those factors, I find that there is no reason to further reduce or excuse the fee on the basis that it is not reasonable.

CONCLUSION

[45] For the reasons given above, I make the following order under s. 52 of PIPA:

1. Under s. 52(3)(a), I require the organization to perform its duty under s. 32 by:
 - a. revising the fee estimate in accordance with my directions set out in paragraphs 41 and 42 above so that it is a minimal fee estimate; and
 - b. providing a written estimate of the revised fee to the complainant.
2. As a condition under s. 52(4), I require the organization to provide the OIPC Registrar of Inquiries with written evidence of its compliance with the above order.

Pursuant to s. 53(1) of PIPA, the organization is required to comply with this order by June 1, 2023.

April 19, 2023

ORIGINAL SIGNED BY

Elizabeth Vranjkovic, Adjudicator

OIPC File No.: P22-91613