



**Information and Privacy  
Commissioner/Ontario**  
**Commissaire à l'information  
et à la protection de la vie privée/Ontario**

# **ORDER M-103**

**Appeal M-9200147**

**The Norfolk Board of Education**



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# ORDER

## BACKGROUND:

The Norfolk Board of Education (the Board) received a ten-part request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to records relating to certain personnel and financial matters of the Board. The Board's Director of Education responded to the request as follows:

The information which you requested ... would require in excess of two hours time to search and prepare. The estimated time to retrieve the information would be five hours at \$20.00 per hour for a total of \$100.00. My preliminary review of your request indicates that items 7, 8 and 9 might involve the disclosure of personal information which is likely protected from disclosure under the act.

The requester appealed the Board's decision to charge a fee as well as the contemplated denial of access to parts of the requested records.

During mediation, the Appeals Officer processing the appeal sent a letter to the Board asking for clarification of its decision. The Board was provided with a copy of Order 81, issued under the provincial Freedom of Information and Protection of Privacy Act, which sets out the obligations of an institution when responding to a request and preparing a fee estimate.

The Board's Director of Education issued a revised decision and informed the appellant as follows:

In order to obtain the records which I must peruse before I can make a decision as to whether access will be granted or denied, I am advised by the Board's Accountant that the time required to retrieve the relevant records would be in excess of two hours time to search and prepare. It is the Accountant's best estimate that the search would require not less than five hours which at a cost of \$20.00 per hour excluding the first 2 hours would total \$60.00. The Accountant has also estimated reproduction costs @ \$20.00 being \$10.00 for labour and \$10.00 for materials.

In this decision, the Board also informed the appellant as to the fee waiver provisions of the Act, and advised that "records dealing with items 7, 8 and 9 may be exempt from release on grounds that the records may contain personal information the disclosure of which is presumed under section 14(3) of the Act to constitute an unjustified invasion of personal privacy." The appellant submitted to the Board a request for a fee waiver, which was subsequently denied by the Board. The appellant was dissatisfied with the Board's

revised decision and its refusal to waive the fees.

Mediation of the appeal was not successful, and notice that an inquiry was being conducted to review the Board's decision was sent to the Board and the appellant. Written representations were received from both parties.

## **ISSUES:**

The issues arising in this appeal are:

- A. Whether the Board's decision to charge a fee under section 45(1) of the Act is in accordance with the terms of the Act.
- B. Whether the Board's decision not to waive the fee under section 45(4) of the Act is in accordance with the terms of the Act.
- C. Whether the Board's decision regarding access to the requested records is in accordance with the Act.

## **SUBMISSIONS/CONCLUSIONS:**

**ISSUE A: Whether the Board's decision to charge a fee under section 45(1) of the Act is in accordance with the terms of the Act.**

Section 45(1) of the Act reads:

If no provision is made for a charge or fee under any other Act, a head shall require the person who makes a request for access to a record to pay,

- (a) a search charge for every hour of manual search required in excess of two hours to locate a record;
- (b) the costs of preparing the record for disclosure;
- (c) computer and other costs incurred in locating, retrieving,  
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processing and copying a record; and

- (d) shipping costs.

Sections 6 of Regulation 823 under the Act reads:

The following are the fees that shall be charged for the purposes of subsection 45(1) of the Act:

1. For photocopies and computer printouts, 20 cents per page.
2. For floppy disks, \$10 for each disk.
3. For manually searching for a record after two hours have been spent searching, \$7.50 for each fifteen minutes spent by any person.
4. For preparing a record for disclosure, including severing a part of the record, \$7.50 for each fifteen 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 fifteen minutes spent by any person.
6. For any costs, including computer costs, incurred by the institution in locating, retrieving , processing and copying of the record if those costs are specified in an invoice received by the institution.

The Board claims that it would take five hours of manual search to locate the records responsive to the request. It indicates that this estimate is based on the advice of its Chief Accountant "who is familiar with the type and content of the various records that would have to be examined by the head in order to make a final decision as to their release." The Board provided no explanation as to why it would take five hours to locate and retrieve the records. It has provided no details as to the volume and location of the records, the nature and extent of the search or whether a search is required to respond to all parts of the request. While an affidavit was provided by the Board's Director of Education, it contains no more than generalized assertions that the estimate was based on the provisions of the Act. In its representations, the Board states: "[s]imply by looking at the number of items ... on which information was requested, anyone would readily come to the conclusion that the estimated search time of 5 hours was a conservative estimate."

In reviewing the Board's fee estimate, my responsibility under subsection 45(5) of the Act is to ensure that the amount estimated is reasonable in the circumstances. In this regard, the burden of establishing the reasonableness of the estimate rests with the Board. In my view, the Board discharges this burden by providing me with detailed information as to how the fee estimate has been calculated, and by producing sufficient evidence to support its estimate.

In my view, the evidence provided by the Board in support of its search charge is not sufficient to substantiate its estimate. Therefore, I find that the estimated fee does not comply with the requirements of section 45(1)(a) of the Act, and the Board is precluded from charging search fees for processing the appellant's request.

With regard to the \$20.00 "reproduction" fee, the Board has not indicated the reasons for requiring copies to be made, nor has it provided any details as to what the "labour" and "material" costs in its fee estimate refer to. If this estimate relates to copying costs under section 45(1)(c) of the Act, the Board has not identified the estimated pages of the record that are required to be copied, or the rate at which it calculated the fee. Likewise, if the fee pertains to the cost of preparing the record for disclosure, the Board has not indicated the nature of the activities required to prepare the record, the length of time these activities would take and the rates on which the fee is based. Therefore, I am not satisfied that the estimated \$20.00 "reproduction" cost, was calculated in accordance with the provisions of the Act and the Regulation under the Act.

In my view, the Board has not provided sufficient evidence to satisfy me that its fee estimate is reasonable in the circumstances of this appeal.

Since I have determined that the Board has failed to demonstrate the reasonableness of its fee estimate, it is not necessary for me to consider Issue B.

**ISSUE C: Whether the Board's decision regarding access to the records is in accordance with the Act.**

The Board has not made a final decision with respect to access. Although the Board did not specifically indicate the reasons for the lack of a final decision on access, it appears that the Board is under the misapprehension that whenever a fee estimate is issued, the Board may issue an "interim" decision. In Order 81, former Commissioner Sidney B. Linden set out those situations where an "interim" decision was proper, but confined them to cases where the record would be unduly expensive to produce in order to make a decision with respect to access to the record. Although Order 81 was issued under the provisions of the provincial Freedom of Information and Protection of Privacy Act, I believe that it provides valuable guidance in interpreting the corresponding provisions of the municipal Act. In this order, former Commissioner Linden stated:

It is clear that where a record is not large or unduly expensive to produce, and where no complex consultations are necessary, it is a relatively straightforward exercise for the institution to provide the requester with both a detailed fees estimate (if fees are applicable) and a decision under section 26 [of the provincial Freedom of Information and Protection of Privacy Act, which is the equivalent of section 19 of the Act] regarding access in one letter within 30 calendar days.

I agree.

In the Notice of Inquiry in this appeal, the Board was asked to explain why it decided to issue an "interim" decision. The Board's representations did not address this issue. In my view, an estimated search time of five hours to locate a record is not, in itself, sufficient to justify the use of an "interim" decision. It is my view that an "interim" decision was not proper in the circumstances of this appeal, and that the Board has not fulfilled its obligations under the Act in both its initial and revised responses to the appellant's request. In my opinion, the Board should have rendered a final access decision under section 19 of the Act within 30 days after it received the appellant's request.

## **ORDER:**

1. I order the Board to make a final access decision with respect to the appellant's request within 15 days of the date of this order, without charging any fees for responding to the request.
2. In order to verify compliance with this order, I order the Board to provide me with a copy of the access decision which has been issued to the appellant in accordance with Provision 1, **only** upon my request.

Original signed by: \_\_\_\_\_

\_\_\_\_\_ March 11, 1993

Asfaw Seife  
Inquiry Officer