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

ORDER M-372

Appeals M-9400120, M-9400126, M-9400127, M-9400128, M-9400129, M-9400130 and M-9400131

Metropolitan Separate School Board
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NATURE OF THE APPEALS:

These are fee appeals under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The Metropolitan Separate School Board (the Board) initially received seven separate requests for access to the expense account sheets (including attachments and receipts) as well as the credit card expenditures of seven Board employees. Each request related to a separate employee. The time periods of the requests ranged from seven to 18 months.

The Board indicated that there were many responsive records and that these would be expensive to retrieve. On this basis, the Board assembled a sample of records which it considered to be representative of the entire group of documents. The Board then denied access to these sample records under section 14 of the Act (invasion of privacy). The requester then filed seven separate appeals with the Commissioner's office.

The appeals were adjudicated in Order M-262 where Inquiry Officer Holly Big Canoe directed the Board to disclose a series of computer print-outs, bills and receipts (with the exception of credit card numbers) within 20 days of the date of the order.

Prior to the expiration of the 20-day period, the Board issued seven separate fee estimates to the appellant. In the letter which accompanied these estimates, the Board took the position that section 45(1) of the Act authorized it to charge fees prior to disclosing these records. The appellant then indicated that he wished to appeal these decisions.

A Notice of Inquiry was provided to the appellant and the Board. In addition, owing to the novelty of the issues raised in these appeals and the importance of these matters to institutions generally, the Commissioner's office also invited the Freedom of Information and Privacy Branch of Management Board of Cabinet (Management Board) to make submissions on these subjects. Representations were received from all parties. Subsequently, the Board agreed to provide the appellant with 11 pages of records in one appeal free of charge.

DISCUSSION:

METHOD BY WHICH THE APPELLANT MUST REVIEW THE RECORDS

The appellant originally requested the opportunity to physically examine the records at issue in these appeals in order to identify those pages which were of interest to him. Portions of these records, however, contain personal information which the Board intends to withhold from disclosure. Previous orders issued by the Commissioner's office have held that, in situations such as these, it is not reasonably practicable under section 23(2) of the Act to allow the appellant to examine the original non-severed version of a document (Order 2). The only alternative which is available in these types of cases is for the appellant to pay the applicable photocopy costs for all of the records which he or she has requested.

WHETHER THE BOARD CAN ISSUE A FEE ESTIMATE FOR RECORDS WHOSE DISCLOSURE HAS PREVIOUSLY BEEN ORDERED BY THE COMMISSIONER'S OFFICE

As indicated previously, the fees which the Board purported to charge in these appeals were levied following the issuance of Order M-262 where the Board was ordered to release the records at issue with the exception of individual credit card numbers. This chronology of events represents a departure from the ordinary situation contemplated under the Act where a fee estimate is provided to a requester at an early stage in the access process. In the six years that freedom of information legislation has been in place in the province, this is the first occasion where this type of fact situation has come before the Commissioner's office.

Before considering the representations of the parties regarding the resolution of these appeals, it would be useful to summarize the relevant provisions of the Act which authorize government organizations to charge fees for the processing of access requests. First, there is section 45(1) of the Act which specifies, in part, that:

> 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;
>
> ...
>
> (d) shipping costs.

Section 45(3) of the Act goes on to stipulate that, before access to a record is provided, the head of a government organization shall give the person requesting access a reasonable estimate of any amount over $25 that must be paid.

In its representations, the Board submits that it is fully entitled to charge a fee for access to the credit card expenditures despite the fact that these records are being released pursuant to an order of the Commissioner's office. The Board bases this position on the following arguments:

(1) The fee charging provisions contained in section 45 of the Act are mandatory.

(2) The legislation contemplates a user pay principle.

(3) It would be inappropriate to require that a government organization issue a fee estimate in situations where it reasonably believes that one or more of the

exemptions contained in the Act will apply to the records to which the fee relates.

(4) It was never the intention of the Board to conceal the fact that it planned to charge a fee if the Commissioner's office ordered that the records be released. (In this respect, the Board points out that, when it received the Notice of Inquiry, it advised the Appeals Officer assigned to these files of this intention. The Board further indicates that, had the Appeals Officer recommended that the Board provide a fee estimate to the appellant at that time, it would have done so).

In its representations, Management Board submits that, while the Act contemplates a user pay principle and while the duty to charge fees is mandatory, it is silent on the question of whether fees may be charged after an order has been issued. Management Board takes the position, however, that it would be contrary to the intent of the Legislature to, in effect, penalize an institution for claiming an exemption in good faith simply because the Commissioner's office subsequently orders that the record be released.

The appellant, for his part, contends that in processing his requests, the Board has not acted in good faith. In particular, the appellant states that the Board did not intend to respond to his requests in a fair, reasonable and timely manner. The appellant then submits that the magnitude of the fee which the Board has applied for processing these requests would make it virtually impossible for a member of the public to scrutinize the spending habits of Board officials. Finally, the appellant notes that another school board in the Metropolitan Toronto area makes similar information available free of charge.

As I have indicated previously, the issue of whether a government organization is entitled under the Act to charge a fee for the processing of records after an order has been issued by the Commissioner's office respecting the same records, is a matter of first impression. In considering this issue, I have carefully reviewed the representations of the Board, Management Board and the appellant as well as the provisions of the Act which relate to the charging of fees.

At the outset, I accept the Board's position that section 45(1) of the Act requires that a government organization charge a fee for processing an access request where the criteria set out in this provision and the accompanying regulations have been met. I also agree that the Act contemplates a user pay principle unless the organization decides (or is ordered) to waive all or part of the fees which it would otherwise be entitled to charge.

I also believe that, from the perspective of the access system as a whole, a decision that a government organization must issue a fee estimate in situations where it reasonably believes that the records to which the request relates will be withheld from disclosure would not facilitate the efficient processing of access requests.

Finally, I have not been directed to any provisions contained in the Act which specifically prohibit an institution from charging a fee following the issuance of an order.

Based on this analysis, it follows that, where a government organization has decided not to disclose records that are subject to an access request and the Commissioner's office subsequently orders that these records be disclosed, the institution has the right to require that the appellant pay the requisite fee before releasing the records. In these situations, the institution would not be required to disclose the records until the payment was received or the reasonableness of the amount charged is resolved in a subsequent appeal.

At the same time, however, I can appreciate why an appellant would react negatively to a situation where the fee issue was raised so late in the access process. I would address this concern in the following fashion. First, it must be noted that cases such as the one that is before me are extremely rare. Second, it is clearly in the best interests of government organizations to raise fee issues at the request stage to avoid proceeding through the labour intensive appeals process. Finally, should a requester believe that a government organization has deferred the issuance of a fee to delay the processing of the appeal, the requester would then be entitled to apply for a fee waiver. I would like to explore this latter point in greater detail.

The fee waiver provision in the Act is set out in section 45(4) of the legislation. Under this provision, the head of a government organization is required to waive the payment of all or any part of an amount required to be paid under this Act if, in the head's opinion, it is fair and equitable to do so after examining a series of listed factors.

In Order P-463, I set out a number of factors to be considered in determining whether it was fair and equitable for an institution not to have waived a fee under the provincial equivalent of section 45(4) of the Act. These factors were (1) the manner in which the institution attempted to respond to the appellant's request, (2) whether the institution worked with the appellant to narrow and/or clarify the request and (3) whether the institution provided any documentation to the requester free of charge. In Order P-474, I added a fourth consideration, which is whether the appellant worked constructively with the institution to narrow the scope of the request.

In Order M-166, Inquiry Officer Asfaw Seife added several additional factors to this list. These included (1) whether the request involves a very large volume of records, (2) whether or not the appellant has advanced a compromise solution which would reduce the costs of processing the request and (3) whether the waiver of the fee would shift an unreasonable burden of the cost of access from the appellant to the institution such that there would occur a significant interference with the operations of the institution.

In my view, where an appellant is able to establish that a government organization has applied the fee charging provisions of the Act with a view towards delaying the processing of an appeal, this would represent a strong ground for the Commissioner or his delegate to find that it would be fair and equitable for an institution to waive a fee that would otherwise be applicable. I would note that, in the present appeal, the appellant did not seek a waiver of fees from the Board.

To summarize, therefore, and taking into account all of the above considerations, I conclude that (1) the Board was entitled to charge a fee following the issuance of Order M-262 for the processing of the requests

and (2) the records ordered to be disclosed need not be released until such time as the requisite fee has been paid. I will now consider whether the amount of the fee that was charged was reasonable.

THE REASONABLENESS OF THE FEE CHARGED

As indicated previously, in Order M-262, Inquiry Officer Big Canoe ordered that various expense account records be disclosed to the appellant with the exception of the actual credit card numbers.

Following the issuance of the order and after a further review of the records, the Board determined that these documents also contained certain types of personal information (e.g. the driver's licence numbers of individuals as well as records of personal telephone calls and non-business transactions which the employees paid for individually). The appellant has subsequently indicated that he is not interested in receiving access to this information.

In its letter to the appellant, the Board has indicated that he must pay the sum of $3,213.01 in order to receive access to all of the records which he seeks.

Section 6 of Regulation 823 made under the Act prescribes the fees which an institution is entitled to charge for processing a request. These are $7.50 for each 15 minutes spent in manually searching for a record (beyond the two free hours which the Act allows); $7.50 for each 15 minutes spent in preparing the record for disclosure and 20 cents for each photocopy or computer printout which the institution produces. Previous orders have held that preparation costs include the time spent in making severances to records.

In reviewing the Board's fee estimate, my responsibility under section 45(5) of the Act is to ensure that the amount which it has estimated is reasonable in the circumstances. The burden of establishing the reasonableness of the estimate rests, in turn, with the Board.

To undertake this analysis, I will review the manner in which the Board has calculated the applicable fees in one file (Appeal Number M-9400120) and then extrapolate the results to the remaining six files. In this sample appeal, the records at issue span a period of 11 months and consist of a total of 440 pages. In its correspondence to the appellant, the Board has indicated that the fee for processing this request will be $659.60. This figure is broken down into $22.50 for search time, $549.10 for preparation time and $88 for photocopy charges.

Having reviewed the representations provided by the Board, I have made the following findings regarding the reasonableness of the fee which has been charged:

(1) With respect to search time, the Board is not entitled to charge for the time that it takes an employee to walk from one area in the institution to another to locate responsive records (I have, on this basis, reduced the time necessary to locate one month of records to ten minutes. The result is that the overall search time has been reduced from two hours and 45 minutes to one hour and 50 minutes. When the 120 minutes of free search time is factored into the equation, the outcome is that

the Board is precluded from charging any fee under this category for this particular appeal).

(2) With respect to preparation charges, I find that the $549.10 figure is excessive. I have arrived at this conclusion because:

(a) The Board has not established to my satisfaction that each of the responsive records contains information which must be deleted.

(b) The information which the Board has designated as personal information was only characterized in this fashion after Order M-262 was issued. Since that order only required that the Board withhold the credit card numbers of its senior officials, I do not consider it appropriate for the appellant to bear the costs of making any additional deletions to the records which the Board now considers appropriate. (As I have indicated previously, the appellant has also indicated that he is not interested in this information).

(c) The Board has included in this figure an undisclosed amount to photocopy the original documents. As the Board has now agreed, such costs do not fall within the category of preparation charges and are already incorporated into the 20 cents per page figure allocated for photocopying.

(3) Taking into account the Board's representations, I would be prepared to allow the Board two hours of preparation time to make the severances to those pages of the records which requires such deletions. (The permissible fee which may be charged under this category is, therefore, reduced from $549.10 to $60.)

(4) With respect to photocopy charges, I find that the Board is entitled to charge 20 cents for copying each page of the record which is disclosed. Since there are 440 pages of documents in this file, this translates into a total cost for copying of $88.

(5) As the Board has now acknowledged, it is not entitled to levy the Goods and Services Tax for the processing of this request (Order M-236).

To summarize, I find that the Board is entitled to charge a fee of $148 for the processing of this sample access request ($60 for preparation charges and $88 for copying costs). The fees for the remaining six files have been calculated in an analogous fashion and, for ease of reference, I have set out the relevant figures in

Appendix "A" which is attached to this order. The global fee which the Board can obtain for providing the records in the seven files to the appellant has, therefore, been reduced from $3,213.01 to $710.80.

ADEQUACY OF THE BOARD'S RECORDS MANAGEMENT SYSTEM

There is one further issue which I would like to address in these appeals. In his representations, the appellant submits that the Board's accounting procedures and records management system are inefficient and have added to the cost of processing his requests. He then puts forward a number of proposals which would allow the Board to better organize its expenditure related records in order to facilitate access to these materials by the public. In Order M-166, Inquiry Office Asfaw Seife was called upon to address a similar argument. He there stated that:

> While I sympathize with the appellant's position, that the Board's filing system may not be the most efficient, in my view, the Act does not require an institution to keep records in such a way as to accommodate the various ways in which a request for information might be framed.

While I accept the general thrust of this statement, the Board should be aware that government organizations across the province are now regularly receiving access requests regarding the expense accounts of senior officials. This is part of a trend where members of the public are seeking to hold institutions of all types more accountable for the expenditure of tax dollars. That being the case, I would strongly encourage the Board to reassess the manner in which it maintains its expenditure related records so that these documents can be retrieved more easily and at a minimal cost to requesters.

ORDER:

1. I uphold the authority of the Board to charge fees in these seven separate appeals in accordance with the maximum figures which I have set out in Appendix "A" to this order.

2. Once the appellant has paid the appropriate fee for each appeal, I order the Board to disclose the responsive records respecting that appeal to the appellant within ten (10) days of the date that the payment is received.

Original signed by: August 10, 1994
Irwin Glasberg
Assistant Commissioner

APPENDIX "A"

ALLOWABLE FEES FOR APPEALS

APPEAL NUMBER	INSTITUTION'S FILE NUMBER	NUMBER OF MONTHS	TOTAL NUMBER OF PAGES	ALLOWABLE SEARCH FEES	ALLOWABLE PREPARATION FEES*	ALLOWABLE PHOTO-COPYING COSTS	TOTAL ALLOWABLE COSTS
M-9400120	9300013	11	440	NIL	$ 60.00	$ 88.00	$148.00
M-9400126	9300016	18	180	$ 30.00	$ 22.50	$ 36.00	$ 88.50
M-9400127	9300009	18	288	$ 30.00	$ 37.50	$ 57.60	$125.10
M-9400128	9300012	18	234	$ 30.00	$ 30.00	$ 46.80	$106.80
M-9400129	9300015	18	270	$ 30.00	$ 37.50	$ 54.00	$121.50
M-9400130	9300016	7	105	NIL	$ 15.00	$ 21.00	$ 36.00
M-9400131	9300020	18	162	$ 30.00	$ 22.50	$ 32.40	$ 84.90
TOTALS	-	108	1,679	$150.00	$225.00	$335.80	$710.80