



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER M-417

Appeals M-9400353 and M-9400354

Fort Frances-Rainy River Board of Education



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NATURE OF THE APPEALS:

These are appeals under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The Fort Frances-Rainy River Board of Education (the Board) received two requests for access to expense account records as well as salary and other payments made by the Board to two trustees during the period 1989 to 1994. The Board provided the requester with a fee estimate of the cost of the searches required to locate records responsive to both requests. Pursuant to section 45(1) of the Act, the Board estimated its fee to be \$2,440 and indicated that complete access would be granted to the requested records with the exception of certain personal information which relate to individuals other than the trustees, who consented to the disclosure of the information which related to them to the requester.

The requester also asked the Board to consider a waiver of the fee under section 45(4) of the Act on the basis that payment of the amount estimated would cause him financial hardship. The Board decided not to grant a fee waiver. The requester appealed both the amount of the Board's fee estimate and its refusal to grant a fee waiver.

The issues to be decided in this order are whether the fee estimate was calculated in accordance with the terms of the Act and the applicable Regulation, and whether the Board's decision to deny a fee waiver was fair and equitable in the circumstances. The issue of access to personal information which may be severed from the responsive records is not the subject of these appeals.

A Notice of Inquiry was sent to the Board and the appellant. Representations were received from both parties.

DISCUSSION:

FEE ESTIMATE

Section 45(1) of the Act reads as follows:

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, processing and copying a record; and
- (d) shipping costs.

Section 6 of Regulation 823, R.R.O. 1990 (the Regulation), reads, in part:

[IPC Order M-417/November 4,1994]

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.
...
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.
...
6. For any costs, including computer costs, incurred by the institution in locating, retrieving, processing and copying the record if those costs are specified in an invoice received by the institution.

In its decision letter, the Board indicated that its fee estimate was comprised of 78 hours of search time (\$2,340) and 500 photocopies (\$100 at \$0.20 per page). The fee for search time was arrived at by determining that the search for records for the years 1989 to 1992 would entail manually examining each of 100 shannon files (which each contain 200 cheques and vouchers) for records which relate to the two trustees. This portion of the search would require 70 hours. Included in the estimate for this portion of the search is the time required to photocopy each responsive record and sever any personal information contained therein.

The Board further explained that records relating to the years 1993 and 1994 may be obtained through the Board's computer system and would require five hours search time. In addition, the Board indicated that it would take three hours to locate records relating to the trustees' salary and other payments received over this period.

The Board's representations essentially repeat this information. In its representations, however, the Board has not described in any detail the location or extent of the search which would be required to determine the trustees' base salary and other payments received.

In his representations, the appellant indicates that, in his view, the amount of the fee estimate is excessive. He argues that the search may be performed more efficiently by first referring to a master cheque register maintained by the Board for the location in the shannon files of those cheques and vouchers which relate to the two trustees. The appellant maintains that there is, accordingly, no need to manually search all 100 shannon files to locate the responsive records.

The appellant also maintains that he was able to determine by telephone the base trustee salary and that three hours of search time to locate such information is inappropriate.

In reviewing the Board's fee estimate, my responsibility under section 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. This burden will be discharged when the Board provides detailed information as to how the fee estimate has been calculated, and if it produces sufficient evidence to support its claim.

I find that the method described by the Board to conduct the search for responsive records relating to the years 1989 to 1992 is inefficient and unnecessarily time-consuming. The appellant has suggested a more economical method of conducting the search which I find to be more in keeping with the Board's responsibilities under the Act. In my view, the search could be conducted in much less time by consulting first the master cheque register and then the appropriate shannon file for the actual cheque and voucher which relate to either trustee. While some 20,000 cheque entries must be examined in the master cheque register, it can reasonably be assumed that the search time required will be enormously reduced. Accordingly, I find that the Board is entitled to charge the appellant for 20 hours of search time for this portion of the requests.

Following my review of the representations of the Board, I find that the fee estimate of five hours search time using the Board's computer records for expense account documents relating to the years 1993 and 1994 to be reasonable in the circumstances. Accordingly, I will not vary this portion of the fee estimate.

The Board has not, however, provided sufficient evidence to substantiate its claim that three hours of search time is required to determine the amount of the trustees' base salary and honoraria. I find that any charge for such information would not be reasonable in the circumstances of these appeals.

Accordingly, I will allow a total of 25 hours for the search for responsive records. The fee payable is, therefore, to be calculated as follows:

- 23 hours (25 hours less two hours of free search time) x \$30 per hour
= \$690.

In addition, the Board may charge the appellant a maximum rate of \$0.20 per page (as set out in the Regulation) for the photocopying of the responsive records. Since not all of the records have yet been located, I am unable to determine the precise amount of the copying charges. It should be noted that photocopying charges also include the time spent performing the actual copying of the responsive records and may not be included in the charges for search and preparation time.

FEE WAIVER

The provisions of the Act relating to fee waiver appear in section 45(4) of the Act, which states as follows:

A head shall 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 considering,

- (a) the extent to which the actual cost of processing, collecting and

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copying the record varies from the amount of the payment required by subsection (1);

- (b) whether the payment will cause a financial hardship for the person requesting the record;
- (c) whether dissemination of the record will benefit public health or safety; and
- (d) any other matter prescribed in the regulations.

In Order P-474, Assistant Commissioner Irwin Glasberg found that the appropriate standard of review for decisions under section 57(4) of the provincial Freedom of Information and Protection of Privacy Act (which is the equivalent of section 45(4) of the Act) is one of correctness. In that same order, Assistant Commissioner Glasberg also found that the phrase "in the head's opinion" means only that the head of an institution has a duty to determine whether it is fair and equitable in a particular case to waive a fee, and this wording does not affect the statutory authority of the Commissioner and his delegates to review the correctness of that decision. I agree with these conclusions and adopt them for the purposes of these appeals.

In his letter to the Board requesting a fee waiver, the appellant makes reference to his financial circumstances in support of his argument that payment of the fee estimate will cause him financial hardship [section 45(4)(b)]. In his representations, the appellant also refers to the concern expressed by himself and a number of other taxpayers in the local media about the spending practices of the Board, although much of the concern is focused on the Board's plans for capital, rather than operational, expenditure. The appellant argues that the disclosure of the information contained in the subject records will benefit public health or safety within the meaning of section 45(2)(c) of the Act.

I will deal with the public health and safety issue first. In Order P-474, referred to above, Assistant Commissioner Glasberg found that the following factors are relevant in determining whether dissemination of a record will benefit public health or safety under the section 57(4)(c) of the provincial Freedom of Information and Protection of Privacy Act, which is the equivalent of section 45(4)(c) of the Act:

1. Whether the subject matter of the record is a matter of public rather than private interest;
2. Whether the subject matter of the record relates directly to a public health or safety issue;
3. Whether the dissemination of the record would yield a public benefit by (a) disclosing a public health or safety concern or (b) contributing meaningfully to the development of understanding of an important public health or safety issue; and
4. The probability that the requester will disseminate the contents of the record.

I agree with Assistant Commissioner Glasberg's interpretation and I adopt these factors for the purposes of these appeals.

While I agree that the Board's spending practices are the subject of some public interest, I am not satisfied that the disclosure of the records requested will benefit public health or safety within the meaning of section 45(4)(c).

I will now deal with the application of section 45(4)(b) of the Act. As noted above, the appellant provided some details of his current financial situation to the Board at the time of his request for a fee waiver. I accept that payment of the fee estimate provided to him could cause the appellant financial hardship. However, I must go on to consider whether it would be fair or equitable for the fee to be waived in this particular case.

Previous orders have set out a number of factors to be considered to determine whether a denial of a fee waiver is "fair and equitable". These factors are:

- (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;
- (3) whether the institution provided any documentation to the appellant free of charge;
- (4) whether the appellant worked constructively with the institution to narrow the scope of the request;
- (5) whether the request involves a large number of records;
- (6) whether or not the appellant has advanced a compromise solution which would reduce costs; and
- (7) whether the waiver of the fee would shift an unreasonable burden of the cost from the appellant to the institution.

I find that factors 1, 2, 4, 5, 6 and 7 weigh in favour of the Board's decision to deny the appellant a fee waiver. I find particularly compelling the fact that the waiver of the fee would shift an unreasonable burden of the cost of processing the appeal from the appellant to the institution. It is well established that the Act was designed to operate on a user-pay principle whereby requesters are expected to pay the cost of searching for information being sought. I find, accordingly, that the Board's decision to deny a fee waiver in the circumstances of these appeals to be fair and equitable.

ORDER:

1. I allow the Board to charge \$690 for search time.
2. I uphold the authority of the Board to charge fees for the photocopying of the requested records at a maximum rate of \$0.20 per page.
3. I uphold the decision of the Board not to grant the appellant a fee waiver.

Original signed by: _____

Donald Hale
Inquiry Officer

_____ November 4, 1994