



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

ORDER M-555

Appeal M-9400580

Toronto Board of Education



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NATURE OF THE APPEAL:

This is an appeal under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The Toronto Board of Education (the Board) received a two-part request for access to the following information:

- (1) a breakdown of all expenses incurred by each trustee, including those submitted directly or paid by the Board on behalf of the trustee, during the period of January 1, 1992 to July 31, 1994. The requester indicated that this information was to include the aggregate totals as well as the supporting documentation, including copies of the actual expense claim forms, invoices, receipts, credit card vouchers, credit card statements or any other attachments submitted by the trustees to the Board; and
- (2) a copy of the Board's alpha cheque register for the period of January 1, 1991 until June 30, 1994.

In its response, the Board indicated that it would disclose the requested information, subject to severances required to protect personal privacy and third party interests. Although the Board did not say so explicitly, this appears to be a reference to the potential application of the following exemptions in the Act:

- invasion of privacy - section 14(1)
- third party information - section 10(1).

The Board's response also refers to the time extension provisions in section 19 of the Act, and indicates that a time extension "... for a period which could be as long as six months ..." will be required to respond to this request.

The Board also indicated that fees would be charged, and provided the following estimate:

Re Part 1 of the request:	672 hours @ \$30 per hour	
	less two free hours search time =	\$20,100
Re Part 2 of the request:	70 hours @ \$30 per hour	
	less two free hours search time =	\$2,040
TOTAL		\$22,140.

The Board also indicated that, in addition to these charges, photocopies would be charged at \$0.20 per page, and this fee could not be calculated until the number of responsive records was determined.

The Board also requested a deposit in the amount of \$11,070 (which is 50% of the amount of its estimate).

The requester appealed the Board's decision.

This appeal is one of a series of related appeals which involve interim and final access decisions and fee estimates. One of the issues raised by these appeals is that of the circumstances in which an institution should be permitted to issue an interim as opposed to a final access decision. As the disposition of this issue could have significant implications for both provincial and municipal institutions in Ontario, this office determined that Management Board Secretariat (Management Board) should be afforded an opportunity to provide submissions on the issues raised by these appeals. Accordingly, a Notice of Inquiry was sent to Management Board as well as to the Board and the appellant.

Representations were received from all three parties.

DISCUSSION:

INTERIM AND FINAL ACCESS DECISIONS

As previously mentioned, the parties to this appeal were invited to make submissions concerning the circumstances in which an institution should be permitted to issue an interim as opposed to final access decision in connection with a fee estimate. The submissions presented by Management Board addressed this issue only. The other parties did not make submissions in this regard.

The concept of an "interim" access decision to accompany a fee estimate was first discussed in Order 81. In that order, former Commissioner Sidney B. Linden established that an interim access decision may be issued to accompany a fee estimate "... where the institution is experiencing a problem because a record is unduly expensive to produce for inspection by the head in making a decision." Order 81 goes on to indicate that the undue expense may be caused by "... the size of the record, the number of records or the physical location of the record within the institution". It also sets out guidelines for the contents of interim access decisions and the preparation of fee estimates.

Order 81 was issued July 26, 1989. It is a decision under the provincial Freedom of Information and Protection of Privacy Act (the provincial Act). Since it was issued, institutions and this agency have accumulated a considerable amount of experience in the interpretation and administration of the access scheme created by that Act. Moreover, when Order 81 was first issued, the municipal Act was not even in effect. In addition, the fiscal limitations faced by government organizations have increased in the intervening period. For these reasons, the parties were asked to comment on the issue of the circumstances in which interim access decisions should be permitted in connection with fee estimates.

To begin my analysis of this issue, I will set out the sections of the Act, and of R.R.O. 1990, Reg. 823 (the Regulation), which I will be considering.

The basic requirement for responding to a request is set out in section 19 of the Act, which states:

Where a person requests access to a record, the head of the institution to which the request is made or if a request is forwarded or transferred under section 18, the head of the institution to which it is forwarded or transferred, shall, subject to sections 20 and 21, within thirty days after the request is received,

- (a) give written notice to the person who made the request as to whether or not access to the record or a part of it will be given; and
- (b) if access is to be given, give the person who made the request access to the record or part, and if necessary for the purpose cause the record to be produced.

Section 20 of the Act indicates that in certain circumstances, an institution may extend the time for issuing a response. It states as follows:

- (1) A head may extend the time limit set out in section 19 for a period of time that is reasonable in the circumstances, if,
 - (a) the request is for a large number of records or necessitates a search through a large number of records and meeting the time limit would unreasonably interfere with the operations of the institution; or
 - (b) consultations with a person outside the institution are necessary to comply with the request and cannot reasonably be completed within the time limit.
- (2) A head who extends the time limit under subsection (1) shall give the person who made the request written notice of the extension setting out,
 - (a) the length of the extension;
 - (b) the reason for the extension; and
 - (c) that the person who made the request may ask the Commissioner to review the extension.

Sections 45(1), (2) and (3) of the Act specify the circumstances in which fees may be charged, and when estimates must be given. These sections state:

- (1) 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.
- (2) Despite subsection (1), a head shall not require an individual to pay a fee for access to his or her own personal information.
- (3) The head of an institution shall, before giving access to a record, give the person requesting access a reasonable estimate of any amount that will be required to be paid under this Act that is over \$25.

Section 7(1) of Regulation 823, made pursuant to the Act, contains further provisions relating to fee estimates. It states as follows:

If a head gives a person an estimate of an amount payable under the Act and that estimate is \$25 or more, the head may require the person to pay a deposit equal to 50 per cent of the estimate before completing the request.

Management Board submits that an institution should be permitted to issue an interim access decision whenever the cost exceeds \$25 and the head is entitled to require the requester to pay a deposit.

In support of this view, Management Board submits that:

- (1) This view is consistent with the "user pay" principle reflected in the Act's fee provisions.
- (2) This interpretation is consistent with the mandatory requirement in section 45(3) to the effect that where a fee will exceed \$25, an estimate "shall" be given.

- (3) Logic dictates that "completing" the request in section 7(1) of the Regulation means "issuing a final decision letter regarding access", and therefore this provision should be interpreted to mean that the final access decision may be delayed until after the deposit is received in any case where a deposit is required.
- (4) Where a deposit is requested, this stops the clock on the thirty day time for a final access decision and the institution can issue that decision any time after the clock is re-started by payment of the deposit.
- (5) While the provision for an interim access decision in Order 81 is not inconsistent with the Regulation, the occasions when an interim access decision are permitted are not restricted to those contemplated in Order 81.

Management Board's submissions also refer, on a number of occasions, to the view that the "statutory process" set out in the Act and Regulation is unambiguous, and dictates the result advocated by Management Board as summarized above.

I do not agree that any statutory process created by the Act dictates the conclusion that an institution should be permitted to issue an interim access decision whenever the cost exceeds \$25 and the head may require the requester to submit a deposit. Nor, in my view, do any of the other submissions summarized above dictate such a conclusion.

In particular, I do not agree that the words "before completing the request" in section 7(1) of the Regulation must have the meaning ascribed to them in submission (3) above. In my view, "completing the request" could also be interpreted as a reference to the act of giving access to records which are to be disclosed.

In contrast to the position taken by Management Board, I am of the view that the provisions of the Act and Regulation I have referred to could just as easily be interpreted to mean that a final access decision must be rendered within thirty days (subject to authorized time extensions) and that, where a fee estimate is required, it must accompany the final access decision contemplated in section 19.

Order 81 attempts to strike a balance between these two competing interpretations by permitting a non-appealable interim access decision to accompany a fee estimate in circumstances where a time extension is not available and producing the record for a final access decision would be unduly expensive. The submissions provided by Management Board have not persuaded me that the balance struck in Order 81 is wrong. In my view, the threshold established by Order 81 for interim access decisions, and the guidelines it sets out for the contents of such decisions, strike a reasonable and appropriate balance between the requirements imposed by the provincial equivalents of section 19 and the fee estimate provisions of the Act and Regulation.

Moreover, accepting the approach advocated by Management Board would increase the number of cases in which interim access decisions can be issued. Interim access decisions are not appealable. In this situation, the only options open to a requester dissatisfied with such a decision are to pay the fee or requested deposit (thus forcing the institution to issue a final access decision, which could then be appealed), or to appeal the fee estimate. If the requester chooses to appeal the fee estimate, a final (and appealable) access decision would only be issued after that appeal is resolved, and any fee upheld in that appeal is paid.

In effect, then, an increased number of interim access decisions would impede the ability of requesters to object to access decisions which they consider inappropriate. In addition, this approach would tend to divert attention away from access issues, which are central to the Act, and onto issues related to fees. In my view, fiscal considerations justify this approach in cases where the record is "unduly expensive to produce", but it should not be expanded to a broader category of requests.

For all these reasons, I affirm the approach taken in Order 81 with respect to interim access decisions and fee estimates, and I will apply it in this order.

In the present appeal, the Board has chosen to issue an interim access decision. The Board's representations (described in more detail below, under the heading "The Board's Fee Estimate") indicate that the time required to locate responsive records would be extensive. Based upon these representations, I am satisfied that the threshold for issuing an interim access decision established by Order 81 and affirmed in this order (i.e. the records must be unduly expensive for the Board to produce for review in order to make an access decision) has been met. Accordingly, this was an appropriate occasion for the use of an interim access decision.

Final Access Decisions and Review of the Records

There is one aspect of Order 81 which, in my view, requires clarification. This is the issue of whether all records must be reviewed by an institution prior to rendering a final access decision. In its summary of steps to be taken in responding to an access request, Order 81 requires that all records be reviewed by the institution when preparing a final access decision (see steps 3A and 5, which appear on pages 12 and 13 of Order 81).

In my view, whether or not the record is unduly expensive to produce, there are certain circumstances in which it may be appropriate for an institution, should it choose to do so, to issue a final access decision **without** inspecting each record. This would apply where the records consist of a number of copies of the same generic form, completed by different persons. It would also apply where the institution is certain that the records are very similar to each other and all contain the same types of information. It is possible that the responsive records in this appeal might have met one of these criteria, and this approach could have been followed.

However, I am not suggesting that institutions are required to follow this approach, only that it is an option available to them. In this order, then, I will not use this reasoning as a basis for finding that the Board ought to have issued a final access decision.

This approach to final access decisions was implicitly affirmed in Orders M-538, M-546 and M-549 (all of which dealt with the same request under consideration here, submitted to other school boards). In those orders, Inquiry Officer Anita Fineberg accepted that decisions to grant access to the requested information were final despite the fact that these school boards had not inspected all the records prior to making their decisions.

Time Extensions and Interim Access Decisions

The Notice of Inquiry asked the parties to comment on whether the finding in Order 81, that a time extension cannot be claimed in connection with an interim access decision, is correct. No submissions directly addressed this issue.

Order 81 states that "[s]ection 27 [the provincial Act's equivalent of section 20 of the Act] is not applicable to a situation where the institution is experiencing a problem because a record is unduly expensive to produce for inspection by the head in making a decision". In other words, where an interim decision is being made to accompany a fee estimate, it is inappropriate for an institution to claim a time extension under section 20. I agree with that interpretation.

In my view, Order 81 also stands for the proposition that, once the question of fees is settled and any requested deposit has been paid, if the institution finds that it faces one of the situations described in section 20, it may claim a time extension at that point (subject to the requester's right to appeal that time extension in the usual way). I agree with this interpretation, which is set out in the summary of steps for responding to a request found on page 13 of Order 81, and particularly step 5, which states:

receipt of deposit or decision to waive fees reactivates the 30-day time limit, **subject to extensions under sections 27 and 28** [the provincial Act's equivalents of sections 20 and 21 of the Act], and ...

- if an "interim" section 26 [the provincial Act's equivalent of section 19 of the Act] notice was sent, head reviews all of the records covered by the request and issues a final decision under section 26. (emphasis added)

Applying this reasoning to the facts of the present case, the Board was not entitled to claim a time extension in its decision letter, since it was clearly issuing an interim access decision. If the Board meets the requirements of section 20, it may claim a time extension **after** it receives the appellant's deposit in connection with any fees upheld in this order. Such a time extension would be subject to an appeal should

the appellant choose to submit one within the time allowed for by the Act, after the Board has communicated its decision in that regard to the appellant.

THE BOARD'S FEE ESTIMATE

With regard to the method of calculation to be used in preparing a fee estimate, Order 81 provides that, where an interim access decision is issued, the fee estimate may be prepared by representative sampling, or by consulting a knowledgeable employee. In this case, the affidavits indicate that representative sampling of a very detailed kind was done, and I am satisfied that it represents a fair way of estimating the costs of the particular components reflected in the estimate.

I will now consider whether the items and amounts included in the estimate are in keeping with the provisions of the Act and Regulation.

In this regard, I will consider the provisions of section 45 of the Act which I have reproduced above. In addition, I will consider the following provisions of section 6 of Regulation 823, made under the Act:

The following are the fees that shall be charged for the purposes of section 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.
- ...

In reviewing the Board's fee estimate, my responsibility under section 45(5) of the Act is to ensure that the amount estimated by the institution 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 claim.

In its representations, the Board indicates that, since preparing its original estimate, it has consulted with the appellant and determined that trustee and trustee assistant payroll documentation was not included in the scope of the request. In addition, the Board consulted legal counsel concerning its estimate. As a result of

these consultations, the Board's representations indicate that the original fee estimate has been revised and considerably reduced. It is the revised estimate which I will review in this order.

The new estimate, which includes both parts of the request, breaks down the fees as follows:

Search time:

Employee A - 260 hours less 2 free hours = 258 hours @ \$30 per hour	\$7,740.00
Employee B - 2.3 hours rounded to 2 hours @ \$29.20 per hour	58.40

Preparation time:

83.3 hours severing time @ \$30 per hour	2,499.00
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Photocopies:

Estimated 2,997 pages @ \$0.20 per page	599.40
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TOTAL ESTIMATE **\$10,896.80**

The basis for this estimate is explained in three affidavits executed by Board staff. With the exception of photocopying charges, I will conduct a separate analysis for the charges pertaining to the two parts of the request.

Alpha Cheque Register

The Supervisor of Special Payments (Employee B) describes how the search time for the alpha cheque register was calculated. She explains that this cheque register is maintained in two sections - one group of register books records all cheques issued by the computer and another group of register books records all cheques issued manually. All of the 2.3 hours of search time charged for Employee B relates to "transportation time" spent carrying the register books from the building where they are stored (which has no photocopier) to the Board office for photocopying. The charge of \$58.40 for search time in the summary above relates to this activity.

In my view, search time ought reasonably to be interpreted as time actually spent locating responsive records. Accordingly, time spent transporting the record from one area to another, after it has been located, cannot properly be included in search time, and I disallow this part of the Board's estimate.

The Supervisor of Special Payments also indicates that, for the purposes of calculating severing time, she counted the number of pages in each register for four sample months, and extrapolated this to the number of months (42) specified in this part of the request. This resulted in an estimated 1,441 responsive pages in the computer cheque register and 1,060 pages in the manual cheque register, for an estimated total of 2,501 pages.

The Board's Freedom of Information and Privacy Co-ordinator calculated the necessary severing time for these records. She examined a sample of thirty pages each from the manual and computer registers. The manual sample required an average of 2.1 severances per page, and the computer register required an average of 3.4 severances per page. Based on this sample, she estimated that severing these records would require an average of two minutes per page.

Properly calculated severing time qualifies as "preparation time" pursuant to section 6(4) of the Regulation. In this regard, the Board relies on Order P-565, in which former Inquiry Officer Asfaw Seife found that two minutes severing time per page was a reasonable estimate even where only a few severances were necessary on each page. I agree with this analysis. Based upon 2,501 pages, the required severing time would be 5,002 minutes (or 83.3 hours, exactly as calculated by the Board). At \$7.50 per 15 minutes as permitted in section 6(4) of the Regulation, I uphold a fee estimate of \$2,499 for preparing the alpha cheque register information for disclosure.

Trustee expenses

The Board's Supervisor of Payables (Employee A) describes how the search time for the trustee expenses was calculated. He indicates that the trustee expense information is not stored by trustee but by vendor (ie. the person or company to whom funds were paid). Thus it would be necessary to review all the expense categories assigned to "trustee expenses", record the cheque numbers of allocations to each trustee in both registers, and pull the supporting documentation from the "vendor" files. In addition, to ensure completeness, cross-referencing would be required.

The estimate for search time was prepared by representative sample. The initial sampling, pertaining to location of cheque numbers and computer cheque reference numbers, was based on information for November 1993 and August 1994. Smaller representative samples were used for the subsequent steps of locating computer cheque numbers from computer reference numbers (an extra step required for computer cheques only), and pulling the actual records.

The particulars of the fee estimate, as extrapolated from the samples, are as follows:

- | | | |
|-----|--|---------------|
| (1) | Locate all accounts payable registers | 465 minutes |
| (2) | Locate all manual cheque numbers and computer cheque reference numbers | 1,550 minutes |

(3)	Locate cheque numbers from computer cheque reference numbers	3,092 minutes
(4)	Locate and pull supporting documentation	4,687 minutes
(5)	Return documents to files	3,971 minutes
(6)	Cross-referencing to ensure completeness	1,830 minutes

TOTAL **15,595 MINUTES (260 HOURS)**

I am satisfied that the estimated times for items (1), (2), (3) and (4) above are properly referable to "search time" as that term is used in the Act, and that they have been calculated on a reasonable basis. The total time for these items is 9,794 minutes or 163.2 hours. Deducting 2 free hours (since this is the first search time I have upheld in this order) leaves chargeable time of 161.2 hours. Charged at the rate permitted by section 6(3) of the Regulation, namely \$7.50 per 15 minutes or \$30 per hour, I uphold an estimated fee of \$4,836 for these items.

With respect to item (5), I am unclear as to how time spent returning documents to their files is in any way referable to "search" as that term is normally understood, nor to any of the other categories for which charges are authorized by the Act and Regulation. Accordingly, I do not allow any estimated fee for the time referable to this activity.

With respect to item (6), in my view since it could locate additional records it is reasonably referable to "searching"; however, since its aim is only to ensure accuracy and completeness, and since the amount of time to be devoted to it is very significant, I am only prepared to uphold this item if the appellant advises the Board that it wishes this activity to be undertaken. I will give detailed directions in this regard in the order provisions found at the end of this order. In the event that the appellant does wish this cross-referencing carried out, I uphold an estimated fee for it based on 1,830.5 minutes (or 30.5 hours). Charged at the rate permitted by section 6(3) of the Regulation, this would amount to \$915.

The Board's representations indicate that the Board would like to charge for severing time with respect to records pertaining to this part of the request, since it has provided detailed information in that regard. However, no charges for severing the trustee expense records have been included in the Board's revised estimate (which is set out in detail above). Rather, the total preparation time of 83.3 hours included in the revised estimate is entirely taken up by the severing time estimated for the alpha cheque register. In the circumstances of this appeal, where this revised (and considerably reduced) estimate is set out in the Board's representations, I am not prepared to penalize the Board for this oversight. For this reason, I will consider whether this part of the estimate should be upheld.

As a basis for calculating the time required to sever the trustee expense records, the Board's Freedom of Information and Privacy Co-ordinator carried out severances on a number of the records of this type located as a result of the sample search referred to above. In my view, this was a reasonable way to estimate this time. 30 sample bundles were reviewed, of which a total of 7, or 23.3%, required severances. Extrapolated to the estimated number of 2,130 responsive bundles (which I find to be a reasonable estimate of the total number of bundles), 496 would require severances. In the Board's analysis in this regard, only one minute is indicated to sever each bundle for which severances are required, for a total of 496 minutes. The Board does not explain why it requires less time in this regard than the two minutes per page I have allowed for the alpha cheque register, but I accept this calculation as reasonable in the circumstances. Based upon 496 minutes (or 8.3 hours), at the rate permitted by section 6(4) of the Regulation (\$7.50 for each 15 minutes or \$30 per hour) I uphold an estimate in the amount of \$249 for preparing the trustee expense information for disclosure.

Photocopies

With respect to the estimated number of responsive records regarding both the alpha registers and the trustee expense information, the Board's estimate also includes a charge for photocopies. Based upon an estimated 2,997 pages @ \$0.20 per page, the estimated charge in this regard is \$599.40. I am satisfied that the estimated number of responsive pages was arrived at in a reasonable manner, and the amount being charged is consistent with section 6(1) of the Regulation. Accordingly I uphold this part of the estimate.

The Appellant's Submissions

The appellant has submitted that, in response to a prior request for expense account information of the Directors of Education, the Board eventually disclosed the requested information without charging a fee. He also indicates that he should not in effect be "penalized" by excessive fee estimates because of the inefficiency of the Board in its record keeping practices. He also states that the disclosure of their expenses is desirable for subjecting the activities of trustees to public scrutiny and should be provided with no fees.

The intention of the Legislature to include a "user pay" principle is clear from section 45(1) of the Act. Thus the fact that the Board has not previously charged for similar information does not have a bearing on its decision to charge fees in this case.

With respect to the Board's record keeping practices, 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. However, it is clear that the Board's record keeping practices with respect to this type of information are not consistent with making it readily available to members of the public who may be interested in reviewing it.

In this regard, I believe that the comments of Assistant Commissioner Irwin Glasberg in Order M-372 are equally applicable to this appeal. When commenting on the records management system of another school board, he stated:

... 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 minimal cost to requesters.

If, as it appears, the appellant objects to the paying of **any** fees for this information, he could have applied for a fee waiver, and he did not do so. Even if I were to take the appellant's comments in his representations as an application for a fee waiver, he has provided no information to support such an application and I would be unable to uphold it.

Summary

The following are the portions of the Board' fee estimate which I have upheld:

Alpha Cheque Register

Preparation time	\$2,499.00
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Trustee expenses

Search time	4,836.00
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Preparation time	249.00
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<u>Photocopies</u>	599.40
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SUBTOTAL	\$8,183.40
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Optional charge re trustee expenses

Search time (cross-indexing)	915.00
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TOTAL (INCLUDING OPTIONAL CHARGE)	\$9,098.40
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The Board may require the appellant to pay a deposit in the amount of 50% of these amounts (including the optional charge if the appellant indicates that he wishes cross-referencing to be done) before proceeding further with the request.

If the actual amount of any of the estimated items is less than the amount reflected in this estimate, any excess payment which may have been made in that regard is to be refunded to the appellant.

ORDER:

1. Without prejudice to the Board's right to claim a time extension at the appropriate time (i.e. after any deposit to be paid has been received), I do not uphold the time extension claimed in the Board's decision letter.
2. I uphold the Board's fee estimate in the amount of \$8,183.40.
3. In the event that, within fourteen (14) days after the date of this order, the appellant advises the Board that it wishes the cross-checking of trustee expense information to be undertaken, I uphold a further fee estimate of \$915 in that regard.
4. I do not uphold the other estimated fees referred to in the Board's representations.
5. In the event that further directions are required to implement any aspect of this order, either of the parties may contact me for assistance.

Original signed by: _____
John Higgins
Inquiry Officer

_____ June 30, 1995