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

ORDER M-556

Appeal M-9400578

Scarborough 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 Scarborough 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 advised the requester that possible consultation with third parties would be required. It also advised that it would require a time extension of sixty days "... after confirmation of your willingness to assume the costs associated with the search of the requested records, the preparation of the records for disclosure and copying thereof ...". The Board went on to advise the requester that "[a]n estimate of the costs for responding to your requests is $25,000. Upon receipt of a deposit of $12,500 (50%), we will proceed to comply in accordance with the provisions of the [Act]".

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

Each of the appeals in this series deals with requests which are, in essence, identical to the one at issue here, except for the fact that they have been submitted to different Boards of Education in the Metropolitan Toronto area. The only difference between the requests is that, with respect to trustee expenses, the actual

names of the trustees are included. These names differ as between the several Boards of Education involved.

In response to the questions in the Notice of Inquiry about when an interim (as opposed to final) access decision should be permitted in connection with a fee estimate, the Board's representations state, without elaboration, that "... an interim access decision is appropriate whenever the costs exceed $25 and the head may require the requester to pay a deposit ...". This same position has been advanced by Management Board Secretariat, which submitted a single set of representations to apply to all of the appeals in the related series I have previously referred to.

I considered this issue, and Management Board's submissions in this regard, in considerable detail in Order M-555. That order dealt with another of the related appeals in this series, in which the requests were made to the Toronto Board of Education.

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.

For the same reasons given in Order M-555, I conclude that 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. Therefore 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 view of the Board's description of the efforts required to identify responsive records, I am satisfied that they would be "unduly expensive to produce", and accordingly, this was an appropriate case for the use of an interim access decision.

The Notice of Inquiry also 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. The Board's representations explained its reasons for including a time extension in its initial decision letter, but did not address the more basic issue of when this step should be taken if an interim access decision is being made.

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 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 base this on the summary of steps for responding to a request found on page 13 of that order, 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)

Accordingly, in my view, the Board was not entitled to claim a time extension in its decision letter, since the Board's representations confirm that it intended to issue an interim access decision. If the Board meets the requirements of section 20, it may claim a time extension after it receives the Board'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.

I also found, in Order M-555, that whether or not the record is unduly expensive to produce, there are certain circumstances in which it would 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.

Order 81 lays out certain requirements for interim access decisions which have not been met by the Board's decision letter in this case. These are:

- the "interim" notice should give the requester an indication of whether he or she is likely to be given access to the requested records, together with a reasonable estimate of any proposed fees;

- the Board's notice to the requester should not only include a breakdown of the estimated fees, but also a clear statement as to how the estimate was calculated (i.e. on the basis of either consultations with knowledgeable staff or a representative sample);

- the interim notice must contain a clear statement that a final decision respecting access has not been made, and indicate that the interim access decision is not final and binding on the head;

- the institution's fees estimate and "interim" section 19 notice should contain reference to the fee waiver provisions of subsection 45(4) of the Act, and solicit representations from the requester regarding the head's discretion to waive fees.

To these requirements, I would add that it would be desirable, if possible, to specify under which exemptions access is likely to be denied, and whether it will be denied in whole or in part. This information was also not included in the Board's decision letter.

Because of the findings I will make with respect to the Board's fee estimate, which will require a new decision by the Board, I will also deal with the deficiencies in the Board's decision letter identified here by ordering the Board to issue a new decision letter.

FEE ESTIMATE

Another requirement specified in Order 81 is that, where an interim access decision is being used, the accompanying fee estimate should be arrived at either by representative sampling, or by consulting a knowledgeable employee of the institution. Neither the Board's decision letter nor its representations indicate which method was used. I will order the Board to address this in its new decision letter.

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

Sections 45(1) of the Act provides for the charging of fees, and states 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.

I will also 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.
>
> 5. For developing a computer program or other method of producing a record from a machine readable record, $15 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 Board 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.

Trustee Expenses

The Board's representations identify the following steps for which it intends to levy fees with respect to the "trustee expenses" part of the request:

(1) retrieve general ledgers, microfiche, cheque register from archived storage;

(2) review general ledger, microfiche and cheque registers;

(3) prepare report detailing all direct and indirect expenses;

(4) retrieve all supporting cheque vouchers with documentation from archived storage;

(5) separate cheque vouchers from supporting documentation (receipts, vouchers);

(6) photocopy all documentation;

(7) reattach all documentation to cheque vouchers; and

(8) refile all cheque vouchers, general ledgers, microfiche, cheque registers.

I have not been provided with a breakdown indicating the time required for each of these activities. The estimate indicates that all of this is expected to take 196 hours. Fees are charged at $50 per hour for a total fee of $9,800. In addition, the Board has not indicated which section of the Act or Regulation authorizes fees for the various items.

Of the items listed above, it is clear that items 1, 2 and 4 are properly chargeable as search time under section 6(3) of the Regulation. In my view, preparing a report (item 3), and returning items to their original locations (item 8) are not part of search time as that term is usually understood, nor are they properly referable to any other category for which fees may be charged.

It is not clear whether item 5 is a step required to **locate** responsive records, in which case fees could be charged under section 6(3) of the Regulation, or as part of the preparation of the records for disclosure under section 6(4). In Order P-608, Inquiry Officer Donald Hale found that time spent in removing a record from cerlox binding was a permissible item under preparation time. I agree with this approach, and by analogy, I am prepared to permit the Board to charge for time spent on disassembly of the records under item 5, if this is required in order to prepare the records for disclosure. On this same basis, I would also permit the Board to charge for item 7 (reassembling the documentation) if the disassembly and reassembly of these records are required for the purpose of preparing the records for disclosure.

With respect to item 6, it has been previously established that the charge of $0.20 per page allowed by section 6(1) of the Regulation is the only charge that may be levied for photocopying; no charges may be made for time spent "feeding the machine" (Order 184). It is important to note that, where records are being severed, this charge may only be levied for photocopies which are actually given to the appellant, and not for copies required as part of the severing process which are not ultimately given to the appellant. In other words, if a page has to be copied twice to facilitate severing, only the copy of that page which is given to the appellant may be charged for.

The hourly rate charged in the estimate for all activities is $50, which is at odds with the amounts permitted by the Regulation. Both sections 6(3) and (4) of the Regulation refer to a charge of $7.50 per fifteen

minutes, which in terms of an hourly rate is $30. In addition, there is no reference in the estimate to the two free hours of search time provided for in section 6(3).

Because the Board has not indicated the breakdown of times required for these various items, I am unable to determine how much of a fee to allow with respect to this part of the request. Accordingly, I will order the Board to issue a new estimate, which is to be prepared in accordance with the foregoing discussion.

Alpha Cheque Register

The steps identified by the Board as forming part of the time for which it intends to levy fees with respect to the "alpha cheque register" part of the request are as follows:

(1) have Information Systems retrieve and merge registers where possible;

(2) retrieve all cheque registers from archived storage;

(3) disassemble registers;

(4) copy all register information;

(5) reassemble registers; and

(6) identify and delete names as required due to privacy considerations.

It appears from the Board's representations that item 1 will require 70 hours, which is being charged at $60 per hour, while the other items together will take 210 hours, charged at $50 per hour.

It is not clear whether item 1 is intended to be search time under section 6(3) of the Regulation or development of a computer program or other method of producing a record from a machine readable record under section 6(5) of the Regulation. The former permits a fee of $7.50 per 15 minutes (or $30 per hour), and the latter $15 per 15 minutes (or $60 per hour). If this charge is intended to be for search time, it may only be levied if this activity is required to locate responsive records.

Item 2 is only chargeable as search time if actual searching is required; if the location of the registers containing responsive information is known in advance, search time may not be charged. As noted above, the proper rate for search time under section 6(3) of the Regulation is $7.50 for each fifteen minutes, or $30 per hour.

Items 3 and 5 pertain to the disassembly and reassembly of the registers to permit copying. Based on the findings in Order P-608, which I referred to in my discussion of trustee expenses, above, I am prepared to

permit the Board to charge for time spent on disassembly and reassembly of the registers as preparation time under section 6(4) of the Regulation, to the extent that this is required in order to prepare the records for disclosure. The rate permitted by that section is $7.50 for each fifteen minutes, or $30 per hour.

As noted in my discussion of fees in connection with trustee expenses, photocopies may only be charged at $0.20 per page; no charge may be levied for feeding the machine, and accordingly, item 4 does not refer to chargeable time. Once again, this charge may only be applied for copies which are actually given to the appellant.

With respect to item 6, it has been previously established that time spent reviewing a record to determine whether exemptions apply is not part of "preparation time" under section 6(4) of the Regulation and maynot be charged for (Order 4). In that regard, only time spent **actually severing** the record may be included in preparation time (Order 184). Again, the rate permitted by that section is $7.50 for each fifteen minutes, or $30 per hour.

Because I am unclear as to the nature of the work performed with respect to item 1, and the Board's intentions in that regard, and because the Board has not indicated the breakdown of times required for the other items, I am unable to determine how much of a fee to allow with respect to this part of the request. Accordingly, I will order the Board to issue a new estimate, which is to be prepared in accordance with the foregoing discussion.

In this regard, the Board is directed to indicate the precise nature of the work being performed under item 1, and to indicate under what section of the Act and/or Regulation it is charging for this work. In addition, the amount charged for it is to be consistent with the applicable rate permitted by the Regulation.

To summarize, because of the problems with the Board's decision letter, identified under "Interim and Final Access Decisions", above, and the problems in determining how much of a fee to allow with respect to the two parts of the request, I will order the Board to make a new decision with respect to both parts of the request, bearing in mind the directions set out in this order.

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 order the Board to issue a new decision letter to the appellant within twenty-one (21) days after the date of this order. If the Board's new decision letter contains an interim access decision, it shall

conform to the requirements for such decisions specified in the bullet points on page 4 of this order and shall indicate what exemptions are likely to be claimed, if any. If the Board's new decision letter contains a fee estimate, the estimate shall indicate whether it was calculated by representative sample or by consulting an experienced employee of the Board, and shall contain a detailed breakdown of how the fees were calculated, and shall be consistent with the directions contained in this order. Rates charged are to be those authorized by the Regulation.

3. If any of the terms of this order require clarification, the parties may contact me for assistance.

4. To verify compliance with the terms of this order, I order the Board to provide me with a copy of the correspondence referred to in Provision 2 of this order not later than twenty-five (25) days after the date of this order. This should be sent to my attention c/o Information and Privacy Commissioner/Ontario, Suite 1700, 80 Bloor Street West, Toronto, Ontario, M5S 2V1.

Original signed by: June 30, 1995
John Higgins
Inquiry Officer