



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

INTERIM ORDER M-819

Appeal M_9600104

Lanark County Board of Education



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BACKGROUND:

On August 8, 1995, a requester made a request to the Lanark County Board of Education (the Board) for access to information under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The requester sought access to information about 13 specified items relating to attendance, sick leave, and the Board's policies and practices on various types of expenditures.

On September 13, 1995, the Board responded by providing a fee estimate pursuant to sections 45(1) and (3) of the Act. By letter dated September 29, 1995, the requester asked the Board for a breakdown of the fee estimate. The Board's letter of October 3, 1995 gave an explanation of the amount of time and work expended to process the request. In his letter of October 27, 1995, the requester again questioned the allocation of the fee estimate to each of the 13 items requested. Further written communication transpired between the Board and the requester in November and December, 1996.

Finally, in its letter dated January 30, 1996, the Board advised the requester that subsequent to the receipt of a legal opinion it had received on the fee related issues raised by the requester, the Board's position on its fee estimate was unchanged. The requester filed an appeal with the Commissioner's office by letter dated February 13, 1996.

NATURE OF THE APPEAL

In his letter of appeal, the requester (now the appellant) asked the Commissioner to review the amount of the fee estimate provided by the Board. This office wrote to the appellant, requesting payment of the appropriate appeal filing fee pursuant to O. Reg. 22/96. The appellant declined to pay the appeal filing fee, stating that while a fee is payable for an appeal, there is no fee payable for a review. The appellant has since submitted payment of the appropriate fee, pending resolution of the issue in this order.

Upon receipt of the letter of appeal and the appropriate appeal filing fee, the Commissioner's office provided the Board and the appellant with a Confirmation of Appeal. In response to the Confirmation of Appeal, the Board advised this office that it was of the view that the appeal was not filed within the mandatory 30-day period required by section 39(2) of the Act and, accordingly, the Commissioner (or his delegate) had no jurisdiction to review the Board's decision.

In order to resolve the issues raised by the parties in an expeditious and timely manner, I determined that these issues should be dealt with as preliminary matters in this interim order.

A Notice of Inquiry was provided to the appellant and the Board, inviting the parties to submit their representations on the following issues:

- (1) Whether the Commissioner has the jurisdiction to review the Board's decision, given that seven months have elapsed between the date of the Board's initial decision and the filing of the appeal.
- (2) Whether the appellant is required to pay a fee to appeal the Board's decision to the Commissioner's office, pursuant to section 5.3 of Regulation 823, R.R.O.1990, as amended.

Representations were received from both parties.

DISCUSSION:

JURISDICTION TO REVIEW THE BOARD'S DECISION

The Board states that the appeal was made outside the mandatory 30-day time limit and, therefore, I lack the jurisdiction to review its decision. The Board relies on section 39(2) of the Act which reads as follows:

An appeal ... shall be made within thirty days after the notice was given of the decision appealed from by filing with the Commissioner written notice of appeal.

The Board points out that section 39(2) sets out a mandatory time limit rather than a discretionary limit.

In Order M-775, Inquiry Officer Laurel Cropley addressed the issue of what is the effective date for making an appeal. The Inquiry Officer found that the 30-day time period begins to run after notice is given, i.e. the institution's decision is received by the requester and that the effective date for making an appeal is the date of mailing by the requester. I agree that receipt of the institution's decision constitutes notice as contemplated by section 39(2) of the Act.

Therefore, in the circumstances of this case, I must determine what constitutes notice of the Board's decision to the appellant in order to make a finding on whether the letter of appeal filed by the appellant is within the statutory requirements of section 39(2) of the Act.

The Board states that seven months have elapsed between the time that the appellant made his request to the Board and the time that he filed his appeal. The Board argues that, therefore, the appellant has no urgent need for the records.

In support of this submission, the Board has included the sworn affidavit of the superintendent of the Board who processed the request (the superintendent). The superintendent states that he conducted the search for responsive records and prepared copies for the appellant. The superintendent explains that at the end of December 1995, the appellant had not paid the requested fee nor had he filed an appeal. The superintendent states that, at that point, he returned the original records to their locations and disposed of the copies prepared for the appellant. The superintendent points out that he will have to conduct another search and retrieve and prepare the records for the appellant which will result in an additional expenditure of time and resources.

The appellant submits that the appeal was filed within the 30-day time period. The appellant points out that there were ongoing discussions, questions and clarification between the parties which extended into January 1996. The appellant states that section 39(2) requires that a notice of the decision be given to a requester. The appellant contends that he did not receive notice of the Board's final decision letter until January 30, 1996 in which the Board reiterated its earlier position based on legal advice that it had received. On this basis, the appellant states that his letter of appeal dated February 13, 1996 was filed within the mandatory 30-day time period.

I have carefully reviewed the evidence before me together with the particular circumstances of this case.

I understand the Board's argument that allowing this appeal could result in additional expenditure of time and resources by the Board, which are not recoverable from the appellant. I am fully aware of the "user-pay" principle underlying the amendments to the legislation and I agree with it.

However, given the ongoing discussions and correspondence between the appellant and the Board, I believe that the Board acted prematurely in returning the original records to their locations, and disposing of the record copies before advising the requester of his rights and ascertaining whether he intended to exercise those rights. Therefore, I do not accept the Board's argument that its interests would be prejudiced if I proceed with this appeal.

In my view, the fact that the Board and the appellant did engage in correspondence and communication over a period of some five months and that the communications related directly to the substance of the fee estimate is material to the circumstances of this case. I note that this correspondence included clarification of the fee estimate quoted by the Board. In my view, it was reasonable for the appellant to conclude, in these circumstances, that the Board's position regarding its fee estimate in its September 13, 1995 letter was not its final position. In my view, the Board's last letter dated January 30, 1996 in which it reiterates that it has received a legal opinion on point and that its position remains unchanged, serves as notice to the appellant as required by section 39(2) of the Act.

The Board acknowledges that it did not advise the requester (now the appellant) of his right to appeal the Board's decision within 30 days. Neither the decision letter of September 13, 1995 nor the ensuing correspondence from the Board, over a period of five months, contained this notice of the requester's right to appeal. In my view, had the Board advised the requester of his right to appeal its decision, the issue of my jurisdiction to consider a "late" appeal might not be before me today.

In the particular circumstances of this appeal, I find that, while the fee estimate was initially set out in the Board's letter dated September 13, 1996, the letters dated October 3, 1995, November 9, 1995, December 14, 1995 and January 30, 1996 all relate directly to the fee estimate and collectively constitute the Board's decision. In my view, in the circumstances of this case, the Board's final letter dated January 30, 1996 constitutes the notice referred to in section 39(2) of the Act. The appellant's letter of appeal was dated February 13, 1996 and was received by the Commissioner's office on February 20, 1996. I find, therefore, that in the

particular circumstances of this appeal, I have the jurisdiction to review the Board's decision and proceed with the appeal.

PAYMENT OF APPEAL FILING FEE TO THE COMMISSIONER'S OFFICE

The appellant has asked the Commissioner to "review" the amount of the fee estimate quoted to him by the Board. The appellant submits that his request is not an "appeal" from the decision of the Board and, therefore, he should not be required to pay the appeal filing fee under O. Reg. 22/96. The appellant submits that the amendments to the legislation contemplate a different treatment for "appeals" and "reviews" and that under the amendments, no fee is payable for a "review" by the Commissioner. The appellant contends that the newly imposed fees have a serious impact on individual users and that this is contrary to the purposes of the Act.

The Board states that the appellant is obliged to pay the fee prescribed by the regulations on an appeal of the institution's decision. The Board submits that "a review is an act of the Commissioner which is consequent on an appeal by the requester". The Board states further that "the two terms are part of one process". The Board submits that statutory language should be given its plain meaning in the context of the legislation and that it should not be interpreted in a way to create an absurd result. The Board argues that on this basis, the fee assessment review is subject to the provisions of the appeals process within the Act, including the appeal fee provisions of section 39(1).

The relevant sections of the legislation relating to the payment of fees to the Commissioner are set out below.

Section 39(1.1) of the Act reads as follows:

A person who appeals under subsection (1) shall pay the fee prescribed by the regulations for that purpose.

Section 5.3 of Regulation 823, R.R.O. 1990, as amended, reads:

- (1) For the purposes of subsection 39(1.1) of the Act, the fee payable for appealing a decision of a head to the Commissioner shall be,
 - (a) \$25, if the person appealing has made a request for access to a record under subsection 17(1);
 - (b) \$10, if the person appealing has made a request for access to personal information under subsection 37(1);
 - (c) \$10, if the person appealing has made a request for correction of personal information under subsection 36(2).

Section 45 of the Act reads, in part, as follows:

- (1) A head shall require the person who makes a request for access to a record to pay fees in the amounts prescribed by the regulations for, ...

- (5) A person who is required to pay a fee under subsection (1) may ask the Commissioner to review the amount of the fee or the head's decision not to waive the fee.

The words "review" and "appeal" both appear in several provisions of the statute, in addition to sections 39 and 45. For example, the term "review" is found in the definition section of the Act and in section 41(1):

1. The purposes of this Act are,
- (a) to provide a right of access to information under the control of institutions in accordance with the principles that,
...
 - (iii) decisions on the disclosure of information should be **reviewed** independently of the institution controlling the information; and
- 41(1) The Commissioner may conduct an inquiry to **review** the head's decision if,
- (a) the Commissioner has not authorized a mediator to conduct an investigation under section 40; or
 - (b) the Commissioner has authorized a mediator to conduct an investigation under section 40 but no settlement has been effected. [Emphasis added]

Uses of the word "appeal" include:

- 40 The Commissioner may authorize a mediator to investigate the circumstances of any **appeal** and to try to effect a settlement of the matter under **appeal**.
- 43(1) After all of the evidence for an inquiry has been received, the Commissioner shall make an order disposing of the issues raised by the **appeal**. [Emphasis added]

In examining the terms "appeal" and "review" as they are defined in Black's Law Dictionary, I note that the two words overlap considerably in meaning to the extent that one is often used to describe the other:

Appeal: resort to a superior court to **review** the decision of an inferior court or administrative agency.

Review: to re-examine judicially or administratively; ... used especially of the examination of a cause by an **appellate** court or **appellate** administrative body.

I have carefully considered the evidence before me together with the representations of the parties.

In my view, the ordinary meanings of the words “appeal” and “review” support the interpretation that the words have the same meaning and are used interchangeably in the Act. These words are used in the Act to describe the type of process undertaken by the Commissioner in the context of access to information matters.

In my view, the legislature did not intend the words “appeal” and “review” to have different meanings in the Act. It is evident that the various sections of the Act which contain the words “appeal” or “review” are connected and contemplate one type of process. To attribute different meanings to these words would lead to an inappropriate and arguably absurd result in the interpretation of the provisions of the Act. Accordingly, I find that, in the context of the Act, the words “appeal” and “review” refer to the same type of process utilized by the Commissioner.

Finally, it is also my view that this interpretation is in accord with the general “user-pay” principle which underlies the recent amendments to the Act. The purpose of section 39(1) was to ensure the members of the public, who wish to avail themselves of the right to a review or appeal of the head’s decision by the Commissioner, should cover some of the administrative costs associated with an appeal and review. Like substantive appeals, an appeal of a fee estimate, while often straightforward, can at times be a complex matter. Therefore, in my view, it was not the intention of the Legislature that the public pay no fee in relation to a fee estimate review, while having to pay a fee with respect to most other types of appeals, given that the administrative costs are more or less equivalent.

Accordingly, I find that a “review” of a fee estimate under section 45(5) is the equivalent of an “appeal” under section 39(1) and, therefore, the appeal fee provision in section 39(1.1) normally applies in the case of a “review” of a fee estimate.

The appellant has also raised the consideration that no fee is payable because his request was made prior to the enactment of amendments to the legislation which now requires payment of a fee upon appeal to this office. I have previously found that the effective date of notice given by the Board to the appellant was by letter dated January 30, 1996. Therefore, the fee estimate was finalized on that date, giving rise to the right to appeal on the same day.

The amendments to the legislation (Bill 26, the Savings and Restructuring Act) received Royal Assent on January 30, 1996. Bill 26 provides that an appellant must pay the fee “prescribed by the regulations”. The regulation prescribing the appeal fee is dated January 31, 1996 and was filed on February 2, 1996. Therefore, in my view, the amount of the prescribed fee on January 30, 1996 when the right of appeal arose, was nil.

The amendments to the legislation cover both substantive vested rights and procedural rights. In my view, the right to appeal without a fee is a substantive right, modified by the imposition of new fees, and therefore, the new fees should not apply retroactively or retrospectively. Since the

fee payable when the right of appeal arose or became vested (i.e. when the fee estimate was finalized on January 30, 1996) was nil, the appellant, in this case, is not required to pay the appeal filing fee and his fee will therefore be refunded in full.

This interim order disposes of the preliminary issues raised by the parties.

ORDER:

I order the appellant to contact the Appeals Officer assigned to this appeal, within two weeks of the date of this order, to confirm that he does wish to proceed with the substantive issue of the amount of the fee estimate. If confirmation is not received within two weeks of the date of this interim order, this appeal will be deemed to have been abandoned.

Original signed by: _____ August 15, 1996
Mumtaz Jiwan
Inquiry Officer