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

INTERIM ORDER MO-1558-I

Appeal MA-010103-3

Le Conseil Scolaire de District du Centre-Sud-Ouest

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BACKGROUND AND NATURE OF THE APPEAL:

MA-010103-1

The appellant entered into a contract with Le Conseil – scolaire public de district du Centre-Sud-Ouest (the Board) in December 1998 to act as general contractor for the construction of a school. According to the appellant, construction of the school was completed in November 1999. It appears that disputes arose regarding interpretation of and payment under the contract and the appellant commenced litigation against the Board. The statement of claim was issued on December 15, 2000.

On October 10, 2000, the appellant submitted a request to the Board under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) (similar to a later request which will be described in greater detail below). On November 14, 2000, the Board indicated that it would be extending the 30-day response time to January 16, 2001, as it needed time to consult with its lawyers and as the request involved a detailed and lengthy search through a large number of records. On January 15, 2001, the Board issued a decision to the appellant (similar to the decision that is at issue in the current appeal and which will also be described in greater detail below). On January 18, 2001, the appellant sought further information from the Board relating to its January 15, 2001 decision (index of records denied, breakdown of fee estimate, basis for solicitor client privilege, for example). It is not clear whether the Board responded to his request for clarification or not. On March 28, 2001, the appellant submitted an appeal to this office (the IPC). An appeal file number was assigned - MA-010103-1. The appeal did not proceed, however, as the Board objected to the appeal on the basis that it had been filed outside the 30-day appeal period. In closing the appeal file, an Intake Analyst at the IPC wrote to the appellant confirming her conversation with him. In this letter, she indicated that she "advised" him that his appeal was not filed within the 30 day statutory limit and, as a result, it would be necessary for him to re-submit his access request. She then outlined the requirements of the *Act*, stating:

> The school board has 30 days in which to reply. If the board does not issue a decision in this time period, or the board advises you that it will require a time extension, you have the right to appeal this decision to the IPC.

MA-010103-2

On April 10, 2001, the appellant re-submitted his request under the *Act* to the Board. The request was for the following information:

> 1. (a) All correspondence (letters, memos, e-mail) exchanges between Conseil and [a named architect] from Oct. 1, 1998 to October 10, 2000,
>
> (b) including those sent by solicitors acting for Conseil, excluding only those documents already copied to [the appellant];
>
> 2. All internal memos, notes, messages, e-mail referring in any way to [the appellant's company], excluding only those copied to [the appellant]

3. All third party memos, notes, messages, e-mail referring in any way to [the appellant's company], excluding only those copied to [the appellant]

4. All minutes of board meetings in which [the appellant's company] was discussed [in responding to this request, as noted below, the Board divided item 4 into two parts: item 4(a) dealt with the minutes for public Board sessions; and item 4(b) concerned the minutes of "private" or *in camera* Board sessions.]

The appellant also indicated in his request that if both English and French versions of documents exist, that the Board should provide both versions.

On April 24, 2001, the appellant filed an appeal, apparently anticipating that the Board would not respond to his request within 30 days. It appeared that the appellant was concerned that he not miss the deadline for submitting an appeal as he had with respect to his previous request. Although the appeal was premature, an appeal file number was assigned - MA-010103-2. Appeal MA-010103-2 was then closed when the Board issued a decision on May 8, 2001 (within the 30 day time frame as set out in section 19 of the *Act*).

MA-010103-3 – the current appeal

In its May 8, 2001 decision, the Board stated that it was denying access to certain documents on the basis of sections 12 (solicitor-client privilege), 15 (information published or available) and 6(1)(b) (closed meeting) of the *Act*. In particular, the Board indicated it was denying access to:

- *correspondence between the Board and the named architect, on the basis of section 12* (item 1(b)), stating that any such document was prepared by the Board's solicitors for use in giving the Board legal advice and/or in contemplation of, or for use in, litigation

- *minutes of private Board sessions, on the basis of section 6(1)(b)*(item 4(b) as determined by the Board) stating that these records would reveal the substance of the deliberations of the Board, which is authorized under the *Education Act* to hold meetings on certain matters in the absence of the public

- *minutes of public meetings of the Board, on the basis of section 15* (item 4(a) as determined by the Board), stating that these minutes have already been made public or are currently accessible to the public

The Board also indicated that "with respect to the balance of the request" it was charging an estimated fee of $5,400 pursuant to the fee provisions in section 45(1) of the *Act*. In particular, the Board indicated that the $5,400 fee estimate was applicable to the following documents and calculated as follows:

- *all correspondence exchanges between the Board and the named architect from October 1, 1998 to date* (item 1(a)): $2400 to search, locate, process and copy

- *copy of all internal memos, notes, messages, emails referring in any way to the appellant's company* (item 2) - $2000 to search, locate, process and copy

- *copy of all third party memos, notes, messages, emails referring in any way to the appellant's company* (item 3) - $1,000 to search, locate, process and copy.

On May 18, 2001, the appellant appealed the Board's May 8, 2001 denial of access and fee estimate. The current appeal, Appeal MA-010103-3 was opened to address the issues arising in relation to the Board's May 8, 2001 decision.

During mediation of this appeal, a number of issues were resolved and/or clarified:

1) Public Meeting Minutes

The issue of the minutes of the public meeting minutes was resolved (item 4(a) of the request). The Board confirmed that the minutes of public meetings held by the Board are available at the Board's office. The Board provided the appellant with the location and a contact name.

2) Fee Estimate and Interim Decision

The Board issued an interim decision, indicating that access would likely be provided to those documents that are subject to the fee estimate. In addition, the Board further itemized the search and photocopy charges for the three categories of information:

- *correspondence (letters, memos, emails) exchanges between the Board and the named architect from October 1, 1998 to October 10, 2000:*

    - $1500 to manually search and prepare for disclosure (50 hours @ $30/hr)

    - $900 for photocopies (4500 pages @ 20 cents)

- *internal memos, notes, messages, emails referring to the appellant's company:*

    - $1200 to manually search and prepare for disclosure (40 hours @$30/hr)

- $800 for photocopies (4000 pages @ 20 cents)

- *all third party memos, notes, messages, emails referring to the appellant's company:*

  - $600 to manually search and prepare for disclosure (20 hours @ $30/hour)

  - $400 for photocopies (2000 pages x 20 cents)

The appellant is of the view that the search time should be about eight hours and that the number of pages to be copied should not exceed 500. In this regard, the appellant indicated that his request was specific in that he is only seeking access to letters, memoranda and e-mails. He indicated further that he does not want copies of attachments to any of these above referenced documents unless they also fall into one of the three categories (i.e., letters, memoranda and e-mails). He also confirmed that he does not want copies of records that had been copied to him. Further, he noted that the requested records all relate to one project and assumed that they are likely all in one place.

The Board indicated that the records are voluminous and that while it was willing to consult again with the employee who had provided the original estimate, it was certain that any revised estimate would still far exceed eight hours and 500 pages.

The Board subsequently revised its fee estimate:

- *correspondence (letters, memos, emails) exchanges between the Board and the named architect from October 1, 1998 to October 10, 2000:*

  - $1200 to manually search and prepare for disclosure

  - $730 for photocopies

- *internal memos, notes, messages, emails referring to the appellant's company:*

  - $1000 to manually search and prepare for disclosure

  - $600 for photocopies

- *all third party memos, notes, messages, emails referring to the appellant's company:*
    - $500 to manually search and prepare for disclosure
    - $300 for photocopies

Based on the above, the Board's revised fee estimate is $4,330.

3) Minutes of *in camera* Board Sessions

During mediation, the Board confirmed that it was relying on section 207(2) of the *Education Act*, as its authority for holding these meetings in private. According to the Board, all provisions of section 207(4) apply to the minutes at issue.

4) Correspondence from the Board's Solicitor to the named architect

During mediation, the Board confirmed that it was claiming the section 12 exemption for all 13 letters from the Board's solicitor to the named architect, on the basis that the documents were either prepared by the Board's solicitors for use in giving the Board legal advice and/or in contemplation of, or for use in litigation.

The Board clarified that this individual was the architect on the school construction project involving the Board and the appellant's company, and that he acted as the Board's agent in respect of a number of matters pertaining to the project.

As I noted above, the appellant and the Board are currently involved in litigation arising out of the school construction project. The Board indicated that the named architect's firm is named as a defendant in the action, together with the Board.

The appellant has asserted that solicitor-client privilege should not apply, as the Board's lawyer acted as project manager and/or contract administrator, rather than as the Board's solicitor during the project.

5) Additional Matters

As an additional matter during mediation, the appellant submitted that once litigation is concluded, the litigation privilege should not apply. He submits that for those documents that are found to be subject to the litigation privilege under section 12, the adjudicator should require the Board to retain these documents past the conclusion of the litigation, so that he can have access once the litigation is concluded.

As well, during mediation, the mediator advised the Board that one of the records at issue, a letter dated April 25, 2000 from the Board's solicitor to the named architect, referenced an

attachment which was not included in the records package. The Board subsequently provided a copy of this attachment to this office.

Further mediation could not be effected and the appeal was moved into inquiry. I decided to seek representations from the Board, initially. In addition to those raised by the parties, I included the possible application of sections 2(1) (definition of personal information) and 38(a) (discretion to refuse requester's own information) as issues in this appeal. The Board indicated that the named architect passed away in August 2000. Consequently, it was not possible to obtain his views regarding the circumstances relating to the creation of some of the records responsive to this request.

The Board submitted representations in response in which it addressed the issues set out in the Notice of Inquiry and added a number of additional issues. Upon review, I decided to seek representations from the appellant only with respect to certain issues. I decided that it was not necessary for the appellant to address the additional issues raised by the Board. I attached the non-confidential portions of the Board's submissions to the copy of the Notice of Inquiry that I sent to the appellant.

The appellant provided representations in response and after reviewing them, I decided that the Board should be provided with an opportunity to address some of the issues raised in them. I sent the Board a letter outlining the outstanding issues and attached the relevant portions of the appellant's representations. The Board submitted representations in reply.

RECORDS:

The records at issue relate to items 1(b) and 4(b) of the request and consist of the following:

1(b) Letters from the Board's Solicitors to the named architect from November 10, 1998 to May 4, 2000 (13 letters in total):

- November 10, 1998
- May 14, 1999
- November 18, 1999
- December 3, 1999
- January 11, 2000
- January 14, 2000
- January 27, 2000
- February 4, 2000
- February 8, 2000
- February 14, 2000
- March 6, 2000
- April 25, 2000
- May 4, 2000

4(b) Minutes of In camera Sessions of the Board:

These minutes are in French only and have the following session dates:

- Dec.11 and 12, 1998 (Article 5.3a)
- Oct. 22, 1999 (Article 4.3.2)
- Jan. 21, 2000 (Article 5.4.3)
- March 30, 2000 (Article 2)
- April 13 and 14, 2000 (Article 5.4.1)
- May 25, 26 and 27, 2000 (Article 5.4.3)
- June 23 and 24, 2000 (Article 5.4.5)
- July 24, 2000 (Article 3)
- Aug. 24, 2000 (Article 5.2.10
- Sept.21 and 22, 2000 (Article 5.4.2)
- Oct. 5. 2000 (Article 4)
- Oct. 19 and 20, 2000 (Article 6.3.1)
- Oct. 25, 2000 (Article 5)
- Nov. 23 and 24, 2000 (Article 6.4.2)
- Jan.18 and 19, 2000 (Article 6.4.3)
- Feb. 22 and 23, 2001 (Article 7.4.5)
- March 8, 2001 (Article 4)

PRELIMINARY MATTERS

PROCEDURAL FAIRNESS ISSUES RELATING TO THE PROCESSING AND ADJUDICATION OF THE APPELLANT'S THREE APPEALS:

Processing of the appeals

Referring to the background to this appeal as described above, the Board points out that the subject matter of Appeal MA-010103-3 (the current appeal) was initially raised in the request that resulted in Appeal MA-010103-1. The Board indicates that it provided a response to the request and that "no appeal was made within the timelines for appeal". The Board takes issue with the fact that the IPC "apparently advised [the appellant] to re-submit his access request to [the Board], being told ' …*if the Board did not issue a decision letter within 30 days, he could file an appeal"* [emphasis in the original].

Further, the Board notes that the current appeal is actually the second appeal file opened with respect to the appellant's re-submitted request; the first appeal filed in anticipation that "*the Board would not respond to his request within 30 days"*. The Board observes:

> Incredibly, despite the fact that this appeal was anticipatory, the Commissioner's office opened an appeal file and then closed it (apparently without notice to [the Board]) when a response was provided by [the Board]. It then opened the current

> appeal file, apparently with out consideration of the legal effect of, in essence, disposing of the "first appeal" without notice to, or opportunity being given to [the Board] to respond in this first go-round on this issue.

Adjudication of Appeal MA-010103-3

With respect to the adjudication stage of this appeal, the Board interprets certain comments I made in the Notice of Inquiry as raising significant fairness issues. In the Notice of Inquiry, I included the following statement:

> NOTE:
>
> The Board's decision appears to indicate that it's fee estimate is intended only to relate to items 1(a), 2 and 3. The Board has indicated, initially that full access should be granted to any responsive records falling within these three categories. The Board has searched for and identified a number of records responsive to items 1(b), 4(a) and 4(b), however, its fee estimate does not appear to include any time or cost in relation to them. The Board is asked to confirm whether any portion of the search times referred to above was spent searching for records responsive to the latter three categories.
>
> At this point in time, in the event that the Board has not charged any fee for responding to items 1(b), 4(a) or 4(b), its decision will be deemed to be a final decision on fees with respect to these items. Accordingly, the Board will not be permitted to charge the appellant for any costs associated with these three items in or as a result of these proceedings.

The Board's position

With respect to these alleged procedural "irregularities", the Board states:

> 1. [P]roviding "advice" to … the Appellant (without timely notice to the institution) "*... to re-submit his access request and that if the Board did not issue a decision letter within 30 days, he could file an appeal …".* In [the Board's] submission, this action raises the problematic issue of bias by the body which ostensibly acts as both a neutral statutory entity in receiving and responding to privacy inquiries and appeals on the one hand, and as the adjudicator of privacy appeals on the other. While [the Board] appreciates the ostensible separation between the adjudication and other functions of the Commissioner's office, it submits that in being consulted in its capacity as the adjudicative body in privacy matters (with an obligation of neutrality in receiving and deciding ongoing appeals or potential appeals) the Commissioner has an obligation to both:

- Refrain from "advising" an Appellant what to do in respect to pursuing a request and potential appeal (particularly where a potential appeal is raised by the answer from the Commissioner's office);
- Give notice to [the Board] that the "advice" was sought by the requester and give it the opportunity to respond on the issue of the inquiry before "advice" is given by the Commissioner's office;
- In the alternative, give [the Board] immediate notice after its occurrence that "advice" was given to [the appellant], and provide it with the opportunity to make submissions on the question asked and the advice given.

2. [F]ailing to consider the legal effect of opening a first appeal file and closing it in this matter currently under adjudication, without notice to or submissions being received by [the Board] on this earlier appeal, particularly in the context where the appeal was accepted in "anticipation" that no response to the request was going to be made by [the Board]. The principles of basic procedural fairness require that a respondent be accorded the opportunity to respond to issues which impact on its interest. In this case, no such opportunity was provided. Rather, a file was opened and closed, and a new one opened on the same subject matter, without giving [the Board] an opportunity to speak to a) why an appeal file was opened "*anticipating that the board would not respond"* b) the potential prejudice in recording for the purposes of this appeal, that a file has been opened in anticipation of no response from [the Board], (when in fact a response had actually been made); c) why the Commissioner's office should not open a new file on the same subject matter as a closed appeal file when a file on identical subject matter has been opened and closed. At very least, [the Board] should have been accorded the opportunity to make submissions, immediately after the decision was made to open and close the initial file and before a new file was opened (and before the current appeal was processed), as to why the Commissioner should rescind its decision to open a new appeal file on such grounds as the legality or tenability of the new appeal in law, and res judicata.

3. Inserting in the body of the Notice of Inquiry a bolded "note" which indicates that [the Board] will not be able to charge fees with respect to the items under adjudication which have been **refused** in the letter of response (i.e., items 1(b), 4(a) and 4(b) (which are under adjudication in this appeal). Prior to the appeal being decided, under [the *Act*}, the refusal of access is under adjudication. Therefore, no fees or fee estimates are due with respect to "refused" items, because no access is to be provided to them. While this might change if after submissions are received and an order made overturning the institution's refusal decision, the bolded note appears to pre-judge the issue of the refused items before even receiving submissions from the institution. It forecasts, before submissions are received on any of the refused items, that when the institution's

> decision is not upheld, no fees will be chargeable when it is required to provide access. This is at worst, a decision anticipating an order in the Appellant's favour before submissions are even received and at very least, a premature and unnecessary decision by the Commission.

Decision regarding preliminary issues

With respect to the comments I made in the Notice of Inquiry, in my view, the Board's submissions reflect a fundamental failure on the Board's part in understanding the fee provisions under the *Act* as these provisions have been interpreted by orders of this office. As I will discuss in greater detail below, the *Act* contemplates a user pay principle. In particular, section 45(1) of the *Act* prescribes the activities for which a fee shall be charged, including "(a) the costs of every hour of manual search required to locate a record".

The *Act* does not provide that fees shall only be permitted where access is granted to records. The *Act* contemplates, rather, that fees shall be applied in "responding to a request for access to a record". For example, an institution may determine that in order to respond to an access request it is necessary to conduct an extensive search through its records holdings, perhaps only to find that no records exist that are responsive to the request, or that those records which are located may be subject to an exemption under the *Act*. In these cases, the provision of an estimate of the costs for searching for responsive records serves both parties. By providing an estimate and requiring half of the payment up front, an institution is able to recoup much of the costs associated with responding to the request (even where it appears access may be denied to any or all of the responsive records). In addition, by providing this information early in the request process, the appellant is placed in a position to make an informed decision as to whether or not to pursue that request at all, or whether to modify it.

This second reason for providing a complete fee estimate at the request stage underlies the requirements established in Order 81 for the provision of an interim fee estimate and interim decision in cases where records are unduly expensive for the institution to produce for review. In that Order, former Commissioner Sidney B. Linden stated:

> In my view, the *Act* allows the head to provide the requester with a fees estimate pursuant to subsection 57(2) of the *Act*. This estimate should be accompanied by an "interim" notice pursuant to section 26. This "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. **In my view, a requester must be provided with sufficient information to make an informed decision regarding payment of fees, and it is the responsibility of the head to take whatever steps are necessary to ensure that the fees estimate is based on a reasonable understanding of the costs involved in providing access.** Anything less, in my view, would compromise and undermine the underlying principles of the *Act*. [my emphasis]

In Order M-372, former Assistant Commissioner Irwin Glasberg addressed the unusual situation of an institution charging a fee for records after an order had been issued ordering their disclosure. In concluding that a fee could still be charged in these circumstances, he stated:

> 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.
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> 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.

Order M-372 represents one approach to take, and provides considerable flexibility for an adjudicator to address concerns relating to delay. This is not the only way to approach fee issues, however. In the circumstances of the current appeal, the Board has clearly turned its mind to the charging of fees. The Board issued an interim fee estimate and fee decision for those records which had not yet been compiled. The Board was silent, however, on the issue of fees for records which had been compiled. In my view, the Board was in a clear position to identify those costs which it had already borne in order to search for and locate responsive records; costs which it was entitled to claim under the *Act* (unless disputed). On this basis, I was prepared to deem its silence on the issue of fees as a final decision.

It is also noteworthy that this request was first initiated in October, 2000. The file went through extensive mediation. After considering the background to the current appeal, I was of the opinion that, to permit the Board an opportunity to raise, for the first time, fee issues relating to the records responsive to items 1(b), 4(a) and 4(b), either in its representations, or in the event that my decision is not favourable to the Board and records are ordered disclosed, would further delay the ultimate resolution of the appellant's request. Therefore, in setting out the issues that I would consider on adjudication, I put the Board on notice that, if it has not already done so, it would not be entitled, at this late stage in the process, to introduce a new basis for charging a fee, that is, for records which had already been identified.

I do not accept the Board's contention, generally, that taking such an approach is necessarily unfair to the Board, or that it is anticipatory of any decision on the substantive access issues to be adjudicated. That being said, I recognize that my comments should have been identified as "preliminary" and the Board should have been provided with a clearer opportunity to address any prejudice to it as a result of my intended approach. Moreover, as the above discussion would indicate, the Board has apparently misapprehended the fee provisions under the *Act*, believing that it was not able to charge a fee for records to which access was denied, and that it was, therefore, not necessary to claim any costs at this time.

I will, therefore, defer my decision on whether or not the Board is entitled to charge the appellant for records responsive to items 1(b) and 4(a) and (b). Following the issuance of this interim order, the parties will be provided with an opportunity to address this issue.

As far as the processing of the appeals, generally, is concerned, I note that the *Act* specifies that a mediator may be assigned to a file in an attempt to resolve the dispute informally (section 40 of the *Act*). As part of mediation, there is no "right" which permits one party to know the substance of discussions that are held with other parties. While a mediated solution may require the agreement of both parties, barring exceptional circumstances, a decision by the appellant to withdraw or to remove certain categories of information from the dispute may be made without input from the other parties.

Similarly, as per the IPC Code of Procedure (sections 5.01, 5.02, 5.03 and section 7), an appeal may be closed by an Intake Officer or Adjudicator without input from a party (including an institution) where it is decided that there is no merit in proceeding with the matter or the party bearing the onus fails to satisfy its burden.

The Board has expressed some concern about the use of the word "advise" in the Notice of Inquiry. The terms "advise" and "advice" have different meanings. In the context of the section 7 exemption under section 7 of the *Act* (advice or recommendations), for example, it has been given a specific and narrow interpretation (see, for example: Order PO-2028), that being; "a suggested course of action that will ultimately be accepted or rejected by its recipient during the deliberative process of government policy-making and decision-making (Orders P-118, P-348, P-883, P-1398 and PO-1993).

Advice is also a commonly used term used to describe various types of communications, for example, "*she advised me that it was two o-clock*". In the Notice of Inquiry, I indicated that, in closing the first appeal file, the Intake Analyst wrote a "closing letter" to the appellant in which she confirmed their oral discussions relating to his appeal. In that letter she used the term "advise". In the context in which this term was used, it appears that she was giving the appellant notice of a defect in his appeal and informing him of his rights under the *Act*. Her use of the word "advise" was not dissimilar to the Board's use of this term in its decision letter to the appellant, wherein the Board stated:

> …The Board advises that if copies are requested, extra time will be required to prepare same.

> …
>
> Please be advised that in this case …
>
> Please be advised, as an interim decision, the Board indicates that the requester is likely to be granted access …

In the Notice of Inquiry, I provided the Board with a complete background of the events surrounding the processing of the appellant's appeals. The Board has had full opportunity to address any issues relating to the processing of the appeal, and it has clearly done so. In my view, the Board has not provided any basis for concluding that it has been prejudiced in any way through the manner in which the appeals were processed.

Finally, with respect to the opening (and closing) of three related appeal files to address the issues raised by the appellant's request and appeals, I would point out that unlike the courts, where there are formalized processes for initiating and proceeding through actions or applications, the intent of administrative tribunals such as the IPC is to provide an informal process for the resolution of disputes. There is no requirement that a party be represented by counsel and indeed, the experience levels of those asserting their rights under the *Act* vary considerably across appellants, and institutions as well.

A decision of this office to "open" a file is as much administrative as it is a procedural step in the processing of the appeal. In most cases, the "rights" of the parties are not determined or triggered by the opening of a file (unless the appeal is filed "out of time"), but rather by the fact that the parties have met the requirements of the *Act*.

As I indicated above, once the appeal was moved to adjudication, the Board was apprised of its history with the IPC. If the Board felt that it had been prejudiced, it had full opportunity to address its concerns to the adjudicator. While the Board contends that the IPC processes, in effect, create opportunities for prejudice, it has not made submissions that it was actually prejudiced by or as a result of them.

In conclusion, I am not persuaded, based on the Board's submissions, that procedural fairness has been compromised through the processing of the appellant's appeals to date.

RECORDS RETENTION

As I noted above, the appellant has requested that I order the Board to retain all of the documents which might be subject to solicitor-client privilege beyond the conclusion of the current litigation in which the parties are involved, so that he may access them at that time. In responding to this issue, the Board states:

> Simply put, there is no need for such an order in this case. While the institution does not have a "records retention schedule" with respect to the documents, there is no danger, other than [the appellant's] conjecture, that the documents will be

> destroyed before the conclusion of the litigation … the information in the custody or control of the institution with respect to the appellant is information pertaining to … an incorporated entity. Accordingly, there is no issue of "personal information" extant in this appeal.
>
> While there is not a shred of evidence to support the appellant's conjecture about destruction, there is also good reason for the institution to retain the records for a long time …

The Board notes that the records will be retained for an extended period of time because the litigation in which it is involved is still at its early stages and because of the general practice of the Board's solicitors of retaining correspondence "well beyond the currency of the file, either on premises or in storage".

It would appear that the basis for the appellant's request is essentially the animosity between the parties and the lack of trust that has developed between them, and in this regard, on the appellant's part, as he states:

> Abuses are evident by Le Conseil's conduct in each and every access request made by [the appellant]. In fact, [the appellant] has never received any records under [the *Act*] from this institution to this date. Adverse inferences should be made where it is proper to do so based on the conduct of the parties as evidenced in the … submissions.

Considering this issue from a distance, I am not persuaded that there is sufficient basis to include a condition in the order provisions that the Board retain responsive records for an indefinite period of time (or at least for a period of time beyond the conclusion of litigation between the parties). The evidence indicates that the Board not only has good reason to maintain the records, but that the general practice of its lawyers is to retain any records of this nature for an extended period of time.

DISCUSSION:

PERSONAL INFORMATION

The issue of whether the records contain the personal information of the appellant is relevant to a number of other issues on appeal. For example, it will dictate whether my analysis of the application of the exemptions is conducted under Part I or Part II of the *Act*. If the records do not contain the appellant's personal information, then my analysis will consider only Part I. The analysis is conducted under Part II, however, where the records contain the appellant's personal information. This issue is also relevant in assessing the quantum of fees since certain fees are not allowable for requests for one's own personal information.

Personal information is defined, in part, as recorded information about an identifiable individual. Section 2(1) of the *Act* sets out a non-exhaustive list of the types of information that qualify as

"personal" which provides some guidance in determining whether the information at issue is "personal information":

> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except if they relate to another individual,
>
> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

Previous decisions of this office have drawn a distinction between an individual's personal, and professional or official government capacity, and found that in some circumstances, information associated with a person in his or her professional or official government capacity will not be considered to be "about the individual" within the meaning of section 2(1) definition of "personal information" [Orders P-257, P-427, P-1412, P-1621].

The Commissioner's orders dealing with non-government employees, professional or corporate officers treat the issue of "personal information" in much the same way as those dealing with government employees. The seminal order in this respect is Order 80. In that case, the institution had invoked section 21 to exempt from disclosure the names of officers of the Council on Mind Abuse (COMA) appearing on correspondence with the Ministry concerning COMA funding procedures. Former Commissioner Linden rejected the institution's submission:

> The institution submits that "...the name of the individual, where it is linked with another identifier, in this case the title of the individual and the organization of

> which that individual is either executive director, or president, is personal information defined in section of the *FIO/PPA*...." All pieces of correspondence concern corporate, as opposed to personal, matters (i.e., funding procedures for COMA), as evidenced by the following: the letters from COMA to the institution are on official corporate letterhead and are signed by an individual in his capacity as corporate representative of COMA; and the letter of response from the institution is sent to an individual in his corporate capacity. In my view, the names of these officers should properly be categorized as "corporate information" rather than "personal information" under the circumstances.

In Reconsideration Order R-980015, Adjudicator Donald Hale reviewed the history of the Commissioner's approach to this issue and the rationale for taking such an approach. He also extensively examined the approaches taken by other jurisdictions and considered the effect of the decision of the Supreme Court of Canada in *Dagg v. Canada (Minister of Finance)* (1997), 148 D.L.R. (4th) 385 on the approach which this office has taken to the definition of personal information. In applying the principles which he described in that order, Adjudicator Hale came to the following conclusions:

> I find that the information associated with the names of the affected persons which is contained in the records at issue relates to them only in their capacities as officials with the organizations which employ them. Their involvement in the issues addressed in the correspondence with the Ministry is not personal to them but, rather, relates to their employment or association with the organizations whose interests they are representing. This information is not personal in nature but may be more appropriately described as being related to the employment or professional responsibilities of each of the individuals who are identified therein. Essentially, the information is not about these individuals and, therefore, does not qualify as their "personal information" within the meaning of the opening words of the definition.
>
> In order for an organization, public or private, to give voice to its views on a subject of interest to it, individuals must be given responsibility for speaking on its behalf. I find that the views which these individuals express take place in the context of their employment responsibilities and are not, accordingly, their personal opinions within the definition of personal information contained in section 2(1)(e) of the Act. Nor is the information "about" the individual, for the reasons described above. In my view, the individuals expressing the position of an organization, in the context of a public or private organization, act simply as a conduit between the intended recipient of the communication and the organization which they represent. The voice is that of the organization, expressed through its spokesperson, rather than that of the individual delivering the message [emphasis in original].
>
> In the present situation, I find that the records do not contain the personal opinions of the affected persons. Rather, as evidenced by the contents of the

> records themselves, each of these individuals is giving voice to the views of the organization which he/she represents. In my view, it cannot be said that the affected persons are communicating their personal opinions on the subjects addressed in the records. Accordingly, I find that this information cannot properly be characterized as falling within the ambit of the term "personal opinions or views" within the meaning of section 2(1)(e).

Previous orders have also recognized that even though information may pertain to an individual in that person's professional capacity, where that information relates to an investigation into or assessment of the performance or improper conduct of an individual, the characterization of the information changes and becomes personal information (Orders 165, P-447, M-122, P-1124, P-1344 and MO-1285). In these cases, the records must be viewed contextually (see, for example: Orders MO-1524-I and PO-1983).

In Order MO-1285, for example, I addressed records relating to the appellant in that case, which related to him as "president" of a named organization:

> From my review of the records it is apparent that the focus of the creation of the majority of them was the general review of the management of the Centre. However, within that framework, it is equally apparent that the references to the appellant in the records at issue are very critical and are directed at him personally, as opposed to being directed at the position and/or role of President. In my view, they go beyond the "professional" and pertain more to his personal attributes. In this context, I find that the information contained in the records is recorded information "about" the appellant, personally, and thus qualifies as his personal information.

By way of contrast, however, in Order P-1124, although acknowledging that in some cases, comments about (in that case, a training program provided by a consulting firm) may reflect personally on the individual providing the program, thus qualifying as personal information, I concluded:

> In this case, however, the consulting firm was retained to provide the program and the letter suspending the program is directed at the firm rather than the individual. In these circumstances, I find that the information in Record 14 does not qualify as personal information.

I agree with the analyses and conclusions in this line of orders and adopt them for the purposes of this appeal.

The Board submits:

> First, one thing is clear: the information in question is not the "personal information" of the Appellant, as the Appellant is a corporation … which has put in the request on corporate letterhead and in a corporate capacity. This is clear

> from how the request is signed "Yours truly, [named company]". Further, while the request itself refers to [the name of the appellant alone], it makes no reference to a given name other than in the signature. The fact that corporations do not have "personal information" was made clear in the early decision in Order 80 … bolstered by Order 113 …
>
> The decision on this issue must be made in contemplation that the relationship between the Appellant and the institution is one of contract, and a contract in respect to a commercial construction enterprise, rather than any dealings of a personal nature, pertaining to any principal of the company. Apart from this project, [the Board] has had no other contact with [the appellant]. Therefore, it naturally follows that the documents under [the Board's] control in relation to [the named company], an incorporated company, spring from this commercial arrangement. While there may be incidental reference to information about individuals, it will primarily and predominantly be in their representative capacity on behalf of incorporated entities.
>
> It is submitted that the information in the custody of [the Board] which makes reference to a specific individual, does so solely and exclusively in that individual's capacity in representing an organization, in this case an incorporating commercial entity …

The appellant does not specifically address this issue, stating that "[the *Act*] has sufficient clarity in this regard from prior cases".

The difficulty in deciding this issue stems from the apparent acrimony between the Board and the appellant. What began as a commercial contract has essentially dissolved into a dispute with very personal undertones. The animosity between the parties is reflected in their representations.

On reviewing the records at issue in this appeal (those relating to parts 1(b) and 4(b) of the request), I am satisfied that they pertain to the commercial contract between the Board and the appellant's construction company. Moreover, any references to the appellant in them are in his representative capacity as president of the company. These records reflect the type of information that one would likely find in connection with a commercial transaction of this nature, including any dispute with respect to it. In addition, there is nothing overtly "personal" in them, either in terms of content or in terms of implication. Accordingly, I find that none of the records that have been identified to date contain the appellant's personal information, or the personal information of any other individual. On this basis, I will consider the application of the exemptions in sections 6(1)(b) and 12 under Part I of the *Act*.

That being said, none of the records that might be responsive to the remaining parts of the request have been provided to me. If I were to assess this issue based on the representations submitted by the parties, I might be inclined to assess them differently. It is abundantly clear from the Board's representations, in particular, that they are directed at the "person" behind the

president and his company. I find that these circumstances are analogous to those in Order MO-1285.

The records that would be responsive to parts 1(a), 2 and 3, while ostensibly pertaining to the company and/or the appellant as president, could conceivably be much broader in nature. Without seeing the responsive records, I am unable to make this determination. In my view, however, in order to resolve this issue, the Board would be placed in the position of completing the search for responsive records before determining the appropriate fee. If I determine that these costs are, in fact, allowable, and the appellant chooses not to pay, the Board would have expended time and money for naught; a situation not contemplated under the fee provisions of the *Act*.

Therefore, in order to move this appeal forward, I will consider the intent of the request to be for records pertaining to the appellant in his capacity as president of the company and to the company itself and proceed on the assumption that the responsive records can be similarly characterized. My assessment of the fees estimated by the Board will, therefore, be conducted as if the appellant were requesting general records as opposed to his own personal information.

If, in the end, after the appellant pays the fees that are due (as determined below) and the records are disclosed to him, he disputes my assessment on the grounds that the records contain his personal information, the matter may be returned to this office for further adjudication on this issue.

SOLICITOR-CLIENT PRIVILEGE

The Board claims that the 13 letters identified above are exempt under section 12 of the *Act*. This section reads:

> A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.

Section 12 encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. The Board submits that the records are exempt under both heads of privilege.

Solicitor-client communication privilege

Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining professional legal advice. The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Order P-1551].

This privilege has been described by the Supreme Court of Canada as follows:

> ... all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attaching to confidentiality. This confidentiality attaches to all communications made within the framework of the solicitor-client relationship ... [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 at 618, cited in Order P-1409]

The privilege has been found to apply to "a continuum of communications" between a solicitor and client:

> . . . the test is whether the communication or document was made confidentially for the purposes of legal advice. Those purposes have to be construed broadly. Privilege obviously attaches to a document conveying legal advice from solicitor to client and to a specific request from the client for such advice. But it does not follow that all other communications between them lack privilege. In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or appropriate on matters great or small at various stages. There will be a continuum of communications and meetings between the solicitor and client ... Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach. A letter from the client containing information may end with such words as "please advise me what I should do." But, even if it does not, there will usually be implied in the relationship an overall expectation that the solicitor will at each stage, whether asked specifically or not, tender appropriate advice. Moreover, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.), cited in Order P-1409].

Solicitor-client communication privilege has been found to apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice [*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27, cited in Order M-729].

The appellant takes the position that the Board's solicitors were employed by the Board as "contract administrators" on the project rather than in their legal capacity. Relying on the reasoning in Order P-1014, he states:

> The mere fact that an individual acting in some other capacity also happens to be a lawyer is not sufficient to raise the application of this privilege.
>
> …

> …their solicitors would make representations to [the appellant] on behalf of [the Board] as to the interpretation of contractual documents, namely the "specs and plans", and would approve or disapprove of "extras" and payment certificates to [the appellant] on behalf of [the Board]. Therefore, no solicitor-client privilege attaches to advice and correspondence on purely business matters even where it is provided by a lawyer.

With respect to this position, the Board states:

> … this is not a situation, as in the cases cited in the Notice of Inquiry that the creator of the records "*...happened to be a lawyer*", this was a situation where a lawyer acting on behalf of one of the parties to a contract was creating correspondence to advance or attempt to gain information to advance his client's interests. It is respectfully submitted that the solicitors for [the Board] had no role in "contract administration", rather its involvement came solely and exclusively in acting in a legal capacity on behalf of its client.

Based on my review of the records at issue, I am satisfied that the Board's solicitors were acting in a legal capacity insofar as these communications are concerned. Accordingly, I find that all of the records at issue in this discussion comprise communications written by the Board's solicitors in their capacity as legal advisors to the Board and that they were made for the purpose of seeking and giving legal advice.

All of the records at issue in this discussion consist of correspondence from the Board's solicitor to a named architect; that is, a third party. The purpose and scope of the exemption in section 12 was discussed by Senior Adjudicator David Goodis in Order MO-1338:

> In my view, the solicitor-client privilege exemption is designed to protect the interests of a government institution in obtaining legal advice and having legal representation in the context of litigation, not the interests of other parties outside government. Had the Legislature intended for the privilege to apply to non-government parties, it could have done so through express language such as that used in the third party information and personal privacy exemptions at sections 10 and 14 of the *Act*. This interpretation is consistent with statements made by the Honourable Ian Scott, then Attorney General of Ontario, in hearings on Bill 34, the precursor to the *Act*'s provincial counterpart:
>
> > Section 19 is a traditional, permissive exemption in favour of the solicitor-client privilege. The theory here is that in the event the **government** either commences litigation or is obliged to defend litigation, it should be able to count on the fullest accuracy and disclosure from its employees.
> >
> > . . . . .
> >
> > If you do things to discourage the client from telling the lawyer the true story, then the **government** does not get good legal advice.

> Again, the judgement is, "Yes, we exclude the information, but because we are protecting this value that is important." It is important that the **government**, which is spending taxpayers' money, should be able to be certain that **public servants** tell our lawyers the truth. We do not want to discourage **public servants** from telling our lawyers the truth by saying to them, "Everything you say is going to be open in a couple of days in the newspapers." [emphasis added]
>
> [Ontario, Standing Committee on the Legislative Assembly, "Freedom of Information and Protection of Privacy Act" in *Hansard: Official Report of Debates*, Monday, March 23, 1987, Morning Sitting, p. M-9, Monday March 30, 1987, Morning Sitting, p. M-4]

Thus, where the client in respect of a particular communication relating to legal advice is not an institution under the *Act*, the exemption cannot apply…

That being said, previous orders have considered whether the exemption in section 12 applies to communications between an institution's solicitors and third parties in circumstances where the third party's services had been engaged by the institution. For example, in Order MO-1316, I concluded:

> Records 5 and 8 are communications from an engineering firm to the Township's solicitor. The engineering firm is not "employed" by the Township. In Order M-1112, Adjudicator Donald Hale had occasion to consider a similar situation. In that case, the Township in question engaged the services of a Planner employed by another jurisdiction. In finding that solicitor-client privilege attached to communications between the Planner and legal counsel, Adjudicator Hale commented as follows:
>
> > The Township engaged the services of the Planner employed by the County (the Planner) to provide it with advice respecting the zoning issue. The Planner, in the course of his duties as the Township's expert, communicated on behalf of the Township with the solicitors for both the Township and the Township's insurers. The Planner is not an employee of the Township. However, this does not necessarily mean that documents flowing to and from the Planner are not privileged.
> >
> > In *Canadian Pacific v. Canada (Competition Act, Director of Investigations)*, [1995] O.J. No. 67 (June 2, 1995) (Ontario Court General Division), Mr. Justice Farley held that:

> If a third party is truly an agent of the client seeking professional advice from the lawyer, not merely in the sense of being an agent of the client, but also being the agent who actually seeks the advice then there has been no waiver of disclosure to that third party.

I find that the Planner's involvement was an essential conduit on behalf of the Township for legal advice and instructions to counsel, and that he was "playing an indispensable role which cannot be performed reasonably by the client in the client's affairs, and for this role to be carried out, the party must be part of the process in seeking and obtaining legal advice." (*Canadian Pacific*, supra). Since the Planner was an essential part of the client Township's team, I find that any privileged document communicated to or by the Planner on behalf of the Township maintains its privileged status.

In the circumstances of the current appeal, I am satisfied that the engineering firm was engaged by the Township to fulfill a technical role in assessing the viability of specific development issues and that it was in the best position to communicate with the Township's solicitor on the Township's behalf on matters falling within its technical expertise. Similar to the findings in Order M-1112, I am satisfied that the engineering firm was an essential part of the Township's team and that the communications between it and the Township's solicitor were made on behalf of the Township for the purpose of seeking or giving legal advice relating to development matters. Therefore, I find that Records 5 and 8 also qualify for exemption under section 12.

The Board submits:

> The records in question were generated by the law office of the solicitors for [the Board], during a construction project. On a construction project, the Architect is the "consultant". The letters in question were written to get input from the Architect for use in providing legal advice to the client. A representative of the client was copied on most, if not all, of the correspondence, adding to the nexus between the communications from the solicitor to the Architect.
>
> The Architect's agency relationship is one established by contract, in which the Architect is referred to as the "Consultant" (see definitions, paragraph 7). Clause 2.1.1 of the construction contract with the appellant reads:
>
> > *"The Consultant will have authority to act on behalf of the owner only to the extent as authorized by the Contract Documents, unless*

> *otherwise modified by written agreement as provided in paragraph 2.1.2".*

The Board attached a copy of the construction contract to its submissions. Section 2.2 of this document sets out the role of the consultant in providing administration of the contract and includes activities such as review of the progress of construction, determination of the amounts owing to the contractor under the contract, interpretation of the requirements of the contract and making findings as to the performance thereunder and determination of the date of substantial performance.

In Order MO-1251, Senior Adjudicator Goodis noted that:

> "Agency" is the relationship between one party (the principal) and another (the agent) whereby the latter is empowered to act on behalf of and represent the former. Agency can emerge from the express or implied consent of principal and agent [*Royal Securities Corp. v. Montreal Trust Co.*, [1967] 1 O.R. 137 (H.C.), affirmed [1967] 2 O.R. 200 (C.A.)]. Anyone doing something for another person can be an agent for that limited purpose [*Penderville Apartments Development Partnership v. Cressey Developments Corp.* (1990), 43 B.C.L.R. (2d) 57 (C.A.)]. An agent, though bound to exercise authority in accordance with all lawful instructions that may be given from time to time by the principal, is not subject in its exercise to the direct control or supervision of the principal. However, there must be some degree of control or direction of the agent by the principal *[Royal Securities Corp.*, above]. Among other things, an agent has a general duty to produce to the principal all documents in the agent's hands relating to the principal's affairs [F.M.B. Reynolds, *Bowstead on Agency*, 15th ed., (London: Sweet and Maxwell, 1985), Article 51 at p. 191; *Tim v. Lai*, [1986] B.C.J. No. 3171 at pp. 10-11 (S.C.)].

In the circumstances of the current appeal, I am satisfied that the architect was engaged by the Board through contract to stand in the place of the Board with respect to administration of the construction contract, and that it was in the best position to communicate with the Board's solicitor on matters relating to the performance of the contract. Similar to the findings in Order M-1112, I am satisfied that the architect was an essential part of the Board's team and that the communications between it and the Board's solicitor were made on behalf of the Board for the purpose of seeking or giving legal advice relating to construction matters. Therefore, I find that the records at issue in this discussion qualify for exemption under section 12.

CLOSED MEETING

The Board has withheld the minutes of 17 Board meetings held in "private" session on the basis of section 6(1)(b) of the *Act*.

Sections 6(1)(b) and 6(2)(b) provide:

> (1) A head may refuse to disclose a record,
>
> > (b) that reveals the substance of deliberations of a meeting of a council, board, commission or other body or a committee of one of them if a statute authorizes holding that meeting in the absence of the public.
>
> (2) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record if,
>
> > (b) in the case of a record under clause (1)(b), the subject-matter of the deliberations has been considered in a meeting open to the public;

In order to qualify for exemption under section 6(1)(b), the Board must establish that:

1. a meeting of a council, board, commission or other body or a committee of one of them took place; and

2. that a statute authorizes the holding of this meeting in the absence of the public; and

3. that disclosure of the record at issue would reveal the actual substance of the deliberations of this meeting.

[Orders M-64, M-98, M-102, M-219 and MO-1248]

Requirements one and two – *in camera* meeting

The first and second parts of the test for exemption under section 6(1)(b) require the Board to establish that a meeting was held and that it was properly held *in camera* (Order M-102).

With respect to the first requirement, the Board states:

> It is self-evident from the records submitted (private session minutes) that meetings took place. These meetings were held in the absence of the public, as noted on the heading running at the top of every record "séance a huis clos" ie. private session.

Based on my review of the records, I am satisfied that Board meetings took place on the dates specified in each record and that they were held in closed session (i.e., *in camera*). As far as the legislative authority for holding these meetings *in camera* is concerned, the Board states:

> Section 207(2) of the *Education Act*, permits [the Board], a school board, to hold meetings of a committee of the whole board in the absence of the public. It reads as follows:
>
> > *A meeting of a committee of a board, including a committee of the whole board, may be closed to the public when a subject under consideration involves,*
> >
> > *(a) the security of the property of the board;*
> >
> > *(b) the disclosure of intimate, personal or financial information in respect of a member of the board or committee, an employee or prospective employee of the board or a pupil or his parent or guardian;*
> >
> > *(c) the acquisition or disposition of a school site;*
> >
> > *(d) decisions in respect of negotiations with employees of the board; or*
> >
> > *(e) litigation affecting the board.*
>
> In this matter, the overarching reason for any discussion with respect to [the appellant], a general contractor, was to get a school built. Therefore, subsection 207(c) applies to the first two documents in the category. An examination of the documents after the first two documents reveals …

The Board explains that litigation in the matter involving the appellant "was on the horizon in this matter as early as the Autumn of 2000". The Board submits that the subject matter under consideration in the remaining 15 documents all related either to prospective or actual litigation affecting the Board.

On review, I am satisfied that the subject matter under consideration as reflected in the Minutes of *in camera* Board Meetings contained in documents 3-17 pertain to anticipated or actual litigation affecting the Board (section 207(2)(e) of the *Education Act*) and thus meet the second part of the test.

The first two documents in this group reflect *in camera* discussions relating to the construction of the school. Section 207(2)(c) of the *Education Act* permits meetings to be held in the absence of the public when the discussions relate to the "acquisition" or "disposition" of a "school site".

School site is defined in the *Education Act* as:

> "school site" means land or premises or an interest in land or premises required by a board for a school, school playground, school garden, teacher's residence, care

> taker's residence, gymnasium, school offices, parking areas or for any other school purpose

The terms "acquisition" and "disposition" are not defined in the *Education Act*. However, assistance in determining the meaning to be given to these terms is found in O. Reg. 444/98 (as am.) (enacted pursuant to the *Education Act*), concerning the "Disposition of Surplus Real Property". In this regulation, the term "disposition" is used in the context of sale, lease or "other disposition", such as the granting of an easement. In essence, this term is used to denote some form of transfer of ownership or use of the property. In my view, both terms should be similarly characterized to relate to the purchase, sale, lease or other similar transfer of rights of use of the property (land and/or premises). Such an interpretation is not sufficiently broad to include other activities such as construction on the land, once obtained. Accordingly, I find that Records 1 and 2 do not fall within the intent of section 207(2)(c) of the *Education Act*. As the Board has not shown that a statute authorizes holding a meeting relevant to these records in the absence of the public, I find that section 6(1)(b) does not apply. As no other exemptions have been claimed for them, Records 1 and 2 (which are responsive to part 4(b) of the appellant's request) should be disclosed to the appellant.

Requirement three – substance of deliberations

In Order M-184, former Assistant Commissioner Irwin Glasberg made the following comments on the term "deliberations":

> In my view, deliberations, in the context of section 6(1)(b), refer to discussions which were conducted with a view towards making a decision. Having carefully reviewed the contents of the Minutes of Settlement, I am satisfied that the disclosure of this document would reveal the actual substance of the discussions conducted by the Board, hence its deliberations, or would permit the drawing of accurate inferences about the substance of those discussions. On this basis, I find that the institution has established that the third part of the section 6(1)(b) test applies in this case.

The former Assistant Commissioner expanded on his analysis of the interpretation of section 6(1)(b) in Order M-196 as follows:

> The Concise Oxford Dictionary, 8th edition, defines "substance" as the "theme or subject" of a thing. Having reviewed the contents of the agreement and the representations provided to me, it is my view that the "theme or subject" of the in-camera meeting was whether the terms of the retirement agreement were appropriate and whether they should be endorsed.

Having reviewed the remaining records at issue in this discussion, I am satisfied that their disclosure would reveal the actual substance of the discussions conducted by the Board, hence its deliberations, or would permit the drawing of accurate inferences about the substance of those

discussions relating to litigation matters affecting the Board. On this basis, I find that the remaining records qualify for exemption under section 6(1)(b).

The appellant takes the position that the exception in section 6(2)(b) applies in the circumstances:

> The discretionary exemption provided by section 6(1)(b) of the *Act* does not apply for the reason that **no** distinction can be made between the general subject matter of [the appellant] and the construction project. The nexus between the two are intertwined so that discussion of one cannot proceed without the subject matter of the other. Therefore, any discussions held by [the Board] regarding the construction project in public necessarily waive's [the Board's] exemption privilege to discussions held in private. [emphasis in the original]

Although some of the details of the construction project were no doubt discussed at public meetings of the Board, I have been provided with no evidence that the subject matter of the *in camera* meetings at issue was discussed at a public meeting of the Board, as required in order to fall within the scope of this exception. Accordingly, I find that section 6(2)(b) has no application in the circumstances of this appeal.

FEES

The charging of a fee is authorized by section 45(1) of the *Act*, which states:

> 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,
>
> (a) the costs of every hour of manual search required 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;
>
> (d) shipping costs; and
>
> (e) any other costs incurred in responding to a request for access to a record.

Section 6 of Regulation 823 (as amended by O. Reg. 22/96) states:

> The following are the fees that shall be charged for the purposes of subsection 45(1) of the Act for access to a record:

1. For photocopies and computer printouts, 20 cents per page.

2. For floppy disks, $10 for each disk.

3. For manually searching a record, $7.50 for each 15 minutes spent by any person.

4. For preparing a record for disclosure, including severing a part of the record, $7.50 for each 15 minutes spent by any person.

5. For developing a computer program or other method of producing a record from machine readable record, $15 for each 15 minutes spent by any person.

6. The costs, including computer costs, that the institution incurs in locating, retrieving, processing and copying the record if those costs are specified in an invoice that the institution has received.

Preliminary matters

Is this one request or three separate requests?

The Board introduces its submissions on this issue as follows:

> With the greatest of respect, [the Board] would like to re-state this issue. The statement of this issue that [the Board] gave a fee estimate of "$4,330" is somewhat misleading as it leaves the reader with the impression that it estimated a single fee amount in response to a single, simple request. This is not the case: the estimate is the sum or total of 3 individual fee estimates in response to three separate categories of request …
>
> - all correspondence …between the Board and [the architect] from October 1, 1998 to date …
> - copies of all internal memos, notes, message, emails referring in any way to [the appellant's company] …
> - copies of all third party memos, notes, messages, emails referring in any way to [the appellant's company] …
>
> …
>
> The records are maintained for the most part in chronological order rather than by topic. Accordingly, the estimate was made in consideration of the fact that a search will have to be undertaken by wading through all types of technical and other information, stored in chronological order, for items which are responsive to

> the requests. Further, this time-intensive undertaking has to be repeated 3 times for each location of the records in question, including the computer system.

In other words, the Board contends that because the appellant has broadly identified specific types of records, it should be able to break the request down in order to conduct separate searches for each category of records identified by him and charge the appellant accordingly.

Essentially, it appears that the appellant is seeking **all** records (of the nature specified, i.e., letters, memo, e-mail) relating to him and his construction company. He has broken his request down into different sources of records, presumably to assist the Board in processing his request, consistent with section 17(1)(b) of the *Act*, which states:

> A person seeking access to a record shall,
>
> > provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;

It should be noted that the Board has, in numerous appeals involving this appellant, attempted to argue this position generally in support of its contention that the appellant's requests are frivolous and vexatious (Orders MO-1477, MO-1505 and MO-1509). In Order MO-1477, echoed throughout the other orders in this series, Assistant Commissioner Tom Mitchinson rejected this argument, stating:

> I do not accept the Conseil's characterization of the request in this appeal. The appellant's letter represents a single request for records concerning the hiring and appointment of three identified individuals. The appellant goes on to specify the type of information that would be covered by this request which, although helpful in bringing a level of specificity to the request, simply consists of examples of the types of records that would otherwise be covered by the general wording of the request.
>
> In Order P-1267, Adjudicator Holly Big Canoe reviewed this issue in the context of a request that specified 51 separate items. She found that, with the exception of four items which were distinct from the nature of the general information requested, all the other items were covered in the main request. The relevant portion of that Order reads as follows:
>
> > Finally, in the circumstances of this appeal, I am satisfied that the requester could have submitted a broadly worded request which would have encompassed everything responsive to his request, with the exception of the last four items. Such a broadly worded request would have been, in my opinion, much more onerous for the Ministry to process, and would have resulted in the appellant being provided access to more records than he was interested in. In my view, the appellant has actually aided the Ministry's

> processing of his request by being specific about particular records he is interested in and the location of the information he is seeking. While the Ministry has indicated that the information will have to be collected from a number of different locations, these locations are, with one exception, all offices within the appellant's former work location (the only exception is noted as an alternate location to one within the appellant's former work location) or its storage facility.
>
> Similarly, as far as the request in this appeal is concerned, I am satisfied that the types of specific information identified by the requester are directly related to the general request made by the appellant, and that it is properly considered a single request for information.

These comments are equally applicable in the current appeal. Accordingly, I will only entertain the Board's estimates of the costs associated with a single search for responsive records.

Should the Board have issued an interim or final decision on access?

The Board's original decision in response to the appellant's re-submitted request did not indicate whether access would be granted to those records for which the fee estimate had been provided. During mediation of the current appeal, the Board issued an interim access decision in which it indicated that "the requester is likely to be granted access to the records in Items 1a, 2 and 3".

In the Notice of Inquiry that I sent to the Board, I asked it to explain why it had issued an interim decision on access. In responding to this issue, the Board states:

> [The Board] is unclear as to why submissions on this aspect are being requested, in that this question seems to result in the following tautology: in essence, submissions are being asked for on why [the Board] complied with the requirements under the [*Act*] and caselaw. Order 81 found that where an institution provides a fees estimate (in that case under the provincial counterpart legislation), it must provide an interim notice. Simply put, in this case, [the Board] provided a fee estimate (as it is required to do under subsection 45(3) of [the *Act*] where costs of access will be over $25). There is no issue raised by the Appellant on this appeal that the cost to the institution will be under $25 … Accordingly, it follows there is no dispute that [the Board] had to provide a fee estimate pursuant to subsection 45(3). When a fee estimate is provided, Order 81 states the requirements that result:
>
> > ***In my view, the Act allows the head to provide the requester with a fees estimate pursuant to subsection 57(2) of the Act*** [Provincial *Act*]. ***This estimate should be accompanied by an "interim notice" pursuant to section 26 …***

> The simple answer to this request for submissions is that [the Board] provided a fee estimate because it was required to do so, and did so in accordance with Order 81. [emphasis in the original]

Again, the Board has apparently misconstrued the fee provisions of the *Act* as they have been interpreted by this office, and in particular, the relationship between fee estimates and interim access decisions.

The issue of interim decisions was first raised by former Commissioner Sidney B. Linden in Order 81. In that order, former Commissioner 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.

This decision was subsequently reviewed and confirmed in Order M-555. In this order, former Adjudicator John Higgins considered the circumstances under 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, Management Board Secretariat (Management Board) was afforded an opportunity to provide submissions on this issue. In arriving at his decision, former Adjudicator Higgins considered the submissions made by Management Board as well as the parties. Commenting on the submissions made by Management Board, the former adjudicator concluded:

> 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 my view, these comments are similarly applicable to the current appeal. The mere fact that the Board has issued a fee estimate (for an amount over $25) is not sufficient to justify its decision to issue an interim decision on access. Rather, the Board has the onus to satisfy me that the records were "unduly expensive to produce for inspection by the head in making a decision." As noted in Order 81, 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.

Despite its apparent position as discussed above, the Board has provided additional representations on this issue. In this regard, the Board states that in responding to the request, the head sought the advice of the Executive Assistant of the Director of Education, who is not only familiar with the type and contents of the requested records, but who is also the staff member responsible for freedom of information matters and records management. The Board indicates that the Executive Assistant, in turn, sought assistance from the former Director of the Plant Department and his assistant, both of whom made regular use of the records in question as this department was responsible for the construction project. The Board indicates further that the Executive Assistant, in consultation with the Director of Education, "made a brief review of some of the records prior to generating the estimate …".

The Board indicates that the records are located either on shelves or in drawers in its Planning and Plant Services Department or within the Board's computer network. The Board indicates further that none of the records would be found in a discrete location within these areas, but rather would be interspersed among other records relating to the project. The Board states that the e-mail records of all employees of the Planning and Plant Services Department would have to be searched to locate relevant e-mails.

Based on these submissions, I am not persuaded that the Board would be faced with an "undue" expense in locating the responsive records. It appears that all records pertaining to the "project" are maintained together. Physically, the paper records all appear to be located in the same general area. The Board has not explained how many staff would have to check their e-mails, how many e-mails they maintain on their computers, whether e-mails are maintained randomly or in folders relating to the project, how many e-mails they might anticipate finding or why it would be unduly expensive to undertake this task.

That being said, the Board has provided additional information throughout its representations, which, in my view, are relevant to this issue. The Board states:

> … there is the non-quantifiable cost on a small board of education which will be incurred in responding to this request. [The Board] has a geographic jurisdiction which is two times the size of Belgium, stretching from Penetanguishene to Niagara Falls and from Trenton to Windsor (68,140 square km.). Throughout this wide expanse, it runs 35 schools. To support its educational services to the Charter-protected rights of minority-language children, [the Board] maintains a skeletal support staff, all of whom are already multi-tasked to their maximum capacity. This minimal support staff includes …
>
> This skeleton support staff will have to be mobilized to respond to these requests, to the detriment of the operations of the Board. But there is no provision in [the *Act*] or the regulations thereunder to charge a fee for the displacement caused to the organization caused by re-deployment of its finite human resources to FOI requests.

In Order MO-1505 (referred to previously), the Board made similar comments in support of its position that the appellant's request in that appeal was frivolous and vexatious in that responding to it would interfere with the Board's operations. I responded to this argument as follows:

> Le Conseil takes the position that it exists and operates to serve the needs of French-language children. Noting that it has limited staff and resources allocated to deal with matters pertaining to the *Act*, that it serves "a jurisdiction twice the size of Belgium", and that the appellant's requests do not relate to its primary mandate, Le Conseil submits that to respond to the appellant's requests would unreasonably interfere with its operation.
>
> In Order M-850, Assistant Commissioner Mitchinson stated:
>
> > ... in my view, a pattern of conduct that would interfere with the operations of an institution is one that would obstruct or hinder the range of effectiveness of the institution's activities.
> >
> > It is not possible to establish a finite set of criteria that will demonstrate "interference with the operations" as used in section

> 5.1(a). It is important to bear in mind that interference is a relative concept which must be judged on the basis of the circumstances a particular institution faces. For example, it may take less of a pattern of conduct to interfere with the operations of a small municipality than with the operations of a large provincial government Ministry, and the evidentiary onus on the institution would vary accordingly.

Recently, Adjudicator Liang had occasion to comment on an institution's assertions that responding to the appellant's request would interfere with its operations (Order MO-1427):

> The District states that this request is a "major interference" with its operations. It states that it is a relatively small municipality engaged in the provision of a variety of services, and that its resources are stretched to the limit. It is concerned about the resources which will be required to deal with this request.
>
> …
>
> [I]t should be noted that the *Act* provides for certain measures which relieve the burden on an institution faced with an apparently onerous request. These are found in section 45 of the *Act* (fees) and the related provisions in the Regulations, and the interim access decision and fee estimate scheme described in Order 81 (which permit, in certain cases, the postponement of the majority of the work required to respond to a request until a deposit has been received). In some circumstances, a time extension under section 20(1) may also provide relief, although where the process described in Order 81 is adopted, such a time extension may only be claimed once the appellant pays any deposit which may be required: see Order M-906.
>
> In this case, I conclude that the District cannot rely on "interference with operations" as a ground for finding the request "frivolous or vexatious". The request is in reality much narrower than the District asserts and, in any event, I am satisfied that the *Act* would provide meaningful relief from the burden of responding to the request.

In Order M-1071, former Adjudicator Marianne Miller, also referring to comments made by former Adjudicator Higgins in Order M-906 relating to alternative measures that are available under the *Act* to relieve an institution faced with a request which may, on the surface, appear likely to interfere with its operations noted that:

> Denying a requester his right of access under the *Act* is a serious matter. In my view, the interference complained of must not be of a nature for which the *Act* or the jurisprudence (Order 81) provides relief.

With respect to the "massive" nature of the appellant's request, Le Conseil states that "the requester, seeks, in effect, records of every financial and payment record of [Le Conseil] since its start-up".

In my view, the comments from previous orders referred to above are equally applicable in the circumstances of this appeal. I am not persuaded that the relief provided by the *Act* would not be sufficient to address Le Conseil's concerns in this regard, and I conclude that Le Conseil has not established that this request constitutes a pattern of conduct that would interfere with its operations.

In other words, these orders recognize that the fee provisions of the *Act*, including the application of the principles underlying Order 81 can provide relief to an institution in circumstances where the impact of responding to a request places an undue burden on it. In this regard, the comments made by Assistant Commissioner Mitchinson in Order M-850 (referred to above) are pertinent. Just as "interference" is a relative concept which must be judged on the basis of the circumstances a particular institution faces, so is "undue expense".

I accept the Board's submissions that, despite the size of its geographical jurisdiction, it is a relatively small organization with few staff able to conduct the tasks required to respond to an access request.

According to the Board's fee estimate, it appears that it anticipates that it will locate between 8100 and 8200 pages of responsive records. Although the appellant initially indicated that he does not believe the Board will locate more than 500 pages, he has not provided representations on this issue in support of his contention. The Board does not indicate the approximate number of records that it must review in order to locate those that are responsive. However, it does note that the responsive records "are to be found mixed in with various invoices, plans, price quotes, designs and preliminary designs, notes to files, photos and estimates from various contractors and consultants on the project", as well as "technical and other data". Based on this, I assume that the number of records that must be reviewed in order to locate those that are responsive is considerably higher than 8200 pages.

Based on the Board's estimate of the number of responsive pages and its relatively small size, I accept that it would be unduly expensive for the Board to locate and retrieve the records for the head's review, and the Board is thus justified in issuing an interim decision on access.

Calculation of the fees

Search and Preparation

As I indicated above, the Board has claimed $1200 to search for and prepare for disclosure records responsive to item 1(a), $1000 for records responsive to item 2 and $500 for records responsive to item 3. At $30 per hour (as permitted by Regulation 823), this would amount to 40 hours, 33 hours and 17 hours respectively. However, in its representations, the Board indicates that it anticipates that it will take 30 hours, 33 hours and 20 hours respectively for each item. In addition, according to the Board's interim access decision letter in which it broke down the fees it was initially charging the appellant, the Board indicates that the fees charged take into account two hours of free search time.

When the fee provisions of the *Act* were first introduced, institutions were required to provide requesters with the first two hours of time spent searching for records at no cost. This provision was subsequently amended in February 1996, and the two hours for free search time was no longer required. Based on the information in the file and the Board's submissions, it is not clear to me exactly how much time went into the calculations claimed by the Board. However, since the time spent forms the basis for all other calculations, I will use the time estimated by the Board as the basis for my discussion on this issue.

On another note, the Board does not distinguish between search time and preparation time in any of its correspondence or in its representations, and I am unable to determine how much time was spent on each activity. It will, therefore, be necessary for me to determine independently whether the Board is entitled to charge the appellant for either or both of the activities, and, if so, the amount the Board may charge.

As I indicated in my discussion above, I will not permit the Board to treat the appellant's request as three separate requests and will consider only the time estimated to conduct one search for all responsive records.

With respect to preparation time, it is noteworthy that in its interim access decision, the Board stated:

> Please be advised, as an interim decision, the Board indicates that the requester is likely to be granted access to the records in Items 1a, 2 and 3.

In its representations on the issue of "preparation time", the Board states:

> Where any severances need to be undertaken, those severances will have to be completed.
> …
>
> If any exceptions to disclosure apply (eg. Personal Information), a minute or so will have to be taken for each document to white out the contents protected from

> disclosure… Again, documents printed from the computer will have to be prepared for disclosure by taking the physical steps to white out. Further, documents responsive will have to be sorted according to the three categories of the requests, which will take time for each page.
>
> …
>
> Any information caught under exemptions to disclosure under [the *Act*] would have to be whited out or severed in some other way from the records to be disclosed.
>
> …
>
> Making the necessary severances will take a considerable period of time, based upon the volume of material to be reviewed, and the very general nature of the requests.

In discussing the Executive Assistant's familiarity with the records and explaining why there will likely be a large number of responsive records, the Board states:

> [The Executive Assistant], in preparing the estimates, not only called on her general familiarity with the documents, but also made appropriate inquiries of others, and surveyed a sample of the records to be in a position to make the estimate.
>
> In short, the response to this request will entail a comprehensive, three-pronged search through a large volume of documents, and a computer search through individual employees systems to determine whether there are responsive records. Since the documents in question concern a construction project, and [the appellant] is the general contractor on the project, many of them will be responsive.

Considering the nature of the records requested by the appellant – primarily records concerning him or his company and/or between the architect and the Board, all in relation to a construction project, combined with the Board's initial decision that the appellant would likely gain access to any responsive records, I am not persuaded that it would be necessary for the Board to make the number of severances it has estimated. In addition, although individuals with familiarity with the types of records requested were involved in responding to this request, no exemptions had been identified or even suggested at the time the estimates were given, including whether it was possible or likely that some or all of the records might contain personal information. The Board's submissions are speculative on this issue and I find that it has not provided sufficient explanation for the charging of preparation time on the basis of anticipated severing.

With respect to other activity in preparing the records for disclosure, the following comments from Order MO-1504 are relevant:

In Order 4, former Commissioner Sidney Linden made the following observations about charges for preparation of records for disclosure:

> The fee estimate for preparation included costs associated with both decision making and severing, and I feel this is an improper interpretation of subsection 45(1)(b). In my view, the time involved in making a decision as to the application of an exemption should not be included when calculating fees related to preparation of a record for disclosure. Nor is it proper to include time spent for such activities as packaging records for shipment, transporting records to the mailroom or arranging for courier service. In my view, "preparing the record for disclosure" under subsection 45(1)(b) should be read narrowly.

In Order M-1083, Adjudicator Holly Big Canoe made the following findings regarding preparation time and photocopying:

> In the circumstances of this appeal, time spent by a person running reports from the personnel system would fall within the meaning of "preparing the record for disclosure" under section 45(1)(b) and, therefore, the rate of $7.50 per 15 minutes established under section 6.4 of the Regulation may be charged. It should be noted, however, that the Board can only charge for the amount of time spent by any person on activities required to generate the reports. The Board cannot charge for the time spent by the computer to compile the data, print the information or for the use of material and/or equipment involved in the process of generating the record.
>
> . . . . .
>
> In my view, "preparing the record for disclosure" under subsection 45(1)(b) should be read narrowly (Order 4). It is not appropriate, in my view, to include time spent to "assemble information, proof data" within what is chargeable under section 45(1)(b).

I adopt the interpretations cited above in support of the proposition that section 45(1)(b) is to be read narrowly. I find that the City is not entitled to charge a fee for the time it spent examining the records in order to determine if they are properly exempt under the *Act*. Fees for preparation of records normally include such charges as the time spent actually severing the documents or creating a record from other sources, as opposed to the decision-making process of determining whether they are exempt under the *Act*.

I also agree with these interpretations of "preparing the record for disclosure". In my view, sorting the records into the relevant categories of information requested is akin to "assembling the record" and is not an allowable charge. The time that staff take to search for e-mails and other records in their computer systems would be allowable under "search time". In my view, the time to punch the print button would be included as part of the search, as such activity would be similar to pulling a responsive paper record from a file. However, the time the computer takes to print any responsive records is not an allowable search or preparation cost.

Based on the Board's submissions, I am not satisfied that the preparation fees charged by it fall within the ambit of section 45(1)(b) of the *Act*. For this reason, I do not uphold the Board's decision to charge a fee for the time spent "preparing the record for disclosure".

As far as the search for responsive records is concerned, the appellant has essentially asked for all "correspondence" records relating to him and his company. Although he does not set out a time frame in his request, it is reasonable to assume that there would be an identifiable start date and possibly end date, most likely in relation to the project. However, if the appellant's request was unclear in this regard, the Board should have contacted him in order to clarify (as per section 17(2)) so that it would not waste time searching over a larger time frame. That being said, it appears that the Board has restricted its search to those records pertaining to the project. In addition to information about himself and his company, the appellant has asked for all correspondence between the architect and the Board sent within a specific time frame.

The search for responsive records would appear to require two steps. First, all of the locations would have to be searched for the specified types of records pertaining to the appellant and/or his company (such as internal memos, third party memos, notes, messages and e-mails, either internal or from outside sources) as well as "correspondence", including letters, memos and e-mails between the Board and the architect. The second step would require a staff member to determine whether the appellant had been copied on any of these records and remove those which he had already received as well as any attachments to the specified records which are not of the same character as the requested records. For example, if an e-mail was attached to a memo, then both pages would be responsive, but an attachment consisting of a technical report would not be responsive.

With respect to the first step, since all of the files/records to be searched are located in the same three discrete locations. I do not accept that it would take any longer to search through the records to locate those that might be responsive to the appellant's request as a whole, that is, those falling within the categories set out in the request that pertain to the appellant and his company and/or consisting of correspondence between the architect and the Board, than it would to undertake a search for any one of the three categories. In terms of the locations to be searched and the types of records contained therein, the Board states:

> The simple fact is that this is a large construction project, which has generated a massive number of documents, many of which are technical in nature or are replete with technical terms. To respond to these requests, a search will have to

> be undertaken, in this case, a manual search of paper records and in addition, a computer search through the computer network of the Board …

The Board indicates that the requests are broad and that there are many diverse types of documents which may be responsive to it:

> On a construction project, the Architect is the consultant, in essence the quarterback of the project team, overseeing all aspects of the work, and making sure that it is built in accordance with the plans and specifications. Accordingly, [the Board] would have contact with [the architect] on all manner of different aspects of construction …
>
> Again, like the Architect, the contractor on a construction project is the quarterback for getting the labour done, including coordinating the involvement of numerous sub-trades …

In addition, the Board submits that many sub-trades, public authorities and others (that is, third parties) may interact with the Board over the course of the project.

The Board indicates that:

> [T]he records are maintained for the most part in chronological order rather than by topic. Accordingly, the estimate was made in consideration of the fact that a search will have to be undertaken by wading through all types of technical and other information, stored in chronological order, for items which are responsive to the requests.

The Board notes that the records would be located in 14 binders (on shelves within the Planning and Plant Services Department) and "in drawers" (although the Board does not indicate how many drawers will have to be searched). As I noted above, the Board also indicates that a search will need to be undertaken of the Board's computer system and e-mail records of all employees of the Planning and Plant Services Department. The Board does not indicate how many employees would be involved at this point in its representations, but as I noted above, elsewhere in its submissions the Board identifies the "skeleton staff" employed by the Board, which includes:

> The Planning and Plant Services Department's one permanent and one temporary support staff, who also provide support to three school administrators who simultaneously are responsible for the operation of 35 schools.

The Board's representations on the number of records that must be searched and the steps necessary to conduct the search of both the paper and computer records are very vague. For example, I have no idea of the approximate number of pages a binder might contain, how many drawers need to be searched and the estimated number of records contained therein or what types of information would be sought on the computer system, other than e-mails.

Although the Board indicates that it expects to locate approximately 8200 pages of responsive records, given the way it has approached this issue, I am not certain that these pages would not contain duplicates, that each page is a separate record or that staff would be required to review the entire page or record in order to determine that it might be responsive. In addition, as the Board noted, because the appellant was the contractor, he would be referred to on a large number of records. It may be that the total number of records relating to the project is not that much greater than the number identified as being responsive to the request. Moreover, it is likely that many "records" would comprise more than one page in which case, once a determination is made that the record is responsive, it may not be necessary to review the other pages in order to determine responsiveness in any event. The Board's representations simply do not assist me in determining how much time to search for paper records is reasonable in the circumstances.

Taking the number of potentially responsive pages into account and the fact that two locations must be searched for paper records, I find that it would not be unreasonable for one knowledgeable staff member to take up to 15 hours to search for and locate responsive paper records.

In addition, as I noted above, the Board has not indicated how many e-mails its Planning Department staff generally maintain or how they are maintained. It is not a difficult matter, nor is it time-consuming to search through e-mails. I would suspect that most responsive records would be easily identifiable by the e-mails' re: lines, or by the sender/receiver lines. On this basis, I would not expect that it would take the two Planning Department staff more than one hour each to conduct a search for responsive records falling within the time frame of the request. Since the Board has provided no details of any other computer searches that might be necessary to locate responsive records, I will not permit it to charge the appellant for this activity.

With respect to the second step, it is a simple matter to review the records to determine whether the appellant had been copied on them or whether they contain attachments that are not responsive. In my view, this additional step would only require seconds of additional time once it is determined that the record meets the initial criteria for responsiveness. Collectively, this would amount to a more significant expenditure of time for which the Board should be compensated. Accordingly, I will permit the Board an additional three hours to complete its search for responsive records.

On the basis of the above, the Board is entitled to charge the appellant for 20 hours of time to search for and locate records responsive to items 1(a), 2 and 3, collectively.

The fee provisions of the *Act* and Regulation permit institutions to charge for photocopies at a rate of $0.20 per page. I find the Board's calculation of this amount to be in accordance with the *Act*. On this basis, the Board is entitled to charge the appellant $1,630 for photocopying 8,150 pages of records, assuming that there is no overlap in the records (i.e., duplicate records). If the Board proceeds to process the appellant's request and it determines that there are fewer pages to be photocopied, this amount shall be reduced accordingly.

Fee Waiver

In his submissions, the appellant indicates that the conduct of the Board throughout the processing of this request warrants a full waiver of the fees it might be entitled to charge him. In this regard, he states:

> Further, [the appellant] does ask the Commission, pursuant to s. 43(3) of the *Act* to consider waiver of [the Board's] fee in light of the prejudice [the appellant] has suffered resulting from its single request for information; and in light of violations resulting from [the Board's actions through [the *Act*] and the IPC.
>
> The fee as stated is without basis nor accompanied by any reasonable calculation, and is incapable of being considered.
>
> …
>
> [The appellant] does submit that there is a residual discretion in the IPCO to make an order waiving any and all fees when shown compelling evidence that violates even the most basic fundamental principles which underlie the community's sense of fair play and decency and to prevent future abuse of the [*Act*] process through oppressive and vexatious proceedings. That this is one of the clearer cases in which society would be offended by the acts of an institution.

In responding to the appellant's allegations, the Board points out that it has responded to the appellant's request for information, and has replied to the appellant's appeal under and in accordance with the provisions of the *Act*.

In essence, I agree with the Board. Although I have been critical in this order of some of the Board's decisions with respect to the processing of the appellant's request, the Board has taken all steps in accordance with the *Act* in responding to the appellant, both at the request stage and during appeal. As a result of this order, the fees that the Board will be allowed to charge the appellant have been considerably reduced and its decision with respect to the records which have been identified has largely been upheld. As I have noted elsewhere in this interim order, it is apparent that there is considerable acrimony between both parties and I have no doubt that this is a factor in the appellant's dissatisfaction with the actions taken by the Board. However, I am not persuaded that the Board's conduct is such that it should be required to bear the entire financial burden of responding to this request.

As I noted above, in Order M-372, former Assistant Commissioner Glasberg found that it is within the discretion of the IPC to apply the fee waiver provisions of the *Act* where it is fair and equitable to do so. Recently, Assistant Commissioner Tom Mitchinson disallowed the charging of fees where an institution's delay in the processing of a request under the *Act* was attributable to a "contentious issues" management process (Order PO-1997).

In the current appeal, the appellant has made a large and broad request for records and the Board has responded to his request in accordance with the *Act*. In turn, the appellant has been able to challenge the Board's position, and has had some success in this regard. As a result of the appellant's appeals, the Board has received considerable direction from the IPC with respect to the application of the *Act*, and I would hope that the Board alters its approach accordingly. However, I am not persuaded that the Board has "violated" the appellant's rights or that he has been unduly prejudiced by the inevitable delays in final resolution associated with an appeal under the *Act*. The *Act* contemplates a user pay principle in the processing of appeals. In the circumstances, I find that it would not be fair and equitable to shift the burden of processing the appellant's request to the Board. Accordingly, I will not accede to the appellant's request that I waive the fees that the Board is entitled to claim.

ORDER:

1. I order the Board to disclose the minutes of the *in camera* sessions of the Board held on December 11 and 12, 1998 and October 22, 1999 by providing the appellant with a copy of these minutes on or before **August 15, 2002**.

2. I uphold the Board's decision to withhold the remaining records responsive to items 1(b) and 4(b) from disclosure.

3. I do not uphold the Board's fee estimate of $4,330.

4. I permit the Board to charge the appellant a total of 20 hours for time to search for records responsive to items 1(a), 2 and 3 of the request at a cost of $30 per hour for a total search fee of $600.

5. I uphold the Board's decision to charge the appellant a fee of $1,630 for photocopying 8150 pages of records.

6. If, upon payment of the fee, the Board discloses records which the appellant believes contain his personal information, he may return the issue of fees to this office for further adjudication on the question of whether the search fees should be calculated in accordance with section 6 or 6.1 of Regulation 823.

7. The Board may submit supplementary representations on whether it should be able to charge the appellant for processing the appellant's request relating to items 1(b) and 4(a) and (b), including any prejudice it might suffer if I disallow it to do so. These representations should be sent to my attention, c/o the IPC, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1 no later than **August 15, 2002**.

8. I remain seized of the issues in this appeal.

9. In order to verify compliance with the terms of Provision 1 above, I reserve the right to require the Board to provide me with a copy of the records disclosed to the appellant.

Original signed by: July 25, 2002
Laurel Cropley
Adjudicator