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

ORDER MO-1588

Appeals MA-010338-2 and MA-010339-2

Toronto District School Board

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BACKGROUND AND NATURE OF THE APPEAL:

The appellant submitted two requests to the Toronto District School Board (the Board) pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*).

Request 2001:08

In this request, the appellant asked for:

> Information on both formal and informal complaints of discrimination, as defined in the Ontario Human Rights Code, brought forward by personnel at [a named school] during the period 1962-1995.

The appellant clarified this request to include:

1. Records involving formal/informal complaints of discrimination brought forward by personnel at the affected school.

2. Notes and reports prepared as well as records gathered in the course of investigating such complaints.

Request 2001:06

In the second request, the appellant asked for:

> Acknowledgement of substantiated or alleged abuse of students at [the named school] by Personnel for the period 1962-1995.

The requester subsequently defined "acknowledgement" as:

1. Records of letters of complaint involving allegations of abuse of students (children) perpetrated by Personnel at the affected school.

2. Informal and/or verbal complaints brought forward involving allegations of abuse of students perpetrated by Personnel at the affected school.

3. Notes and reports prepared as well as records gathered in the course of investigating such complaints, including findings as to whether such allegations have been substantiated.

4. Records of any responses/actions taken by the school board.

5. Records involving any proceedings which arose as a result of the alleged conduct or any actions taken by the school board in response.

The Board did not respond to either request within the prescribed 30 days as set out in section 19 of the *Act*. The appellant appealed on the basis of a "deemed refusal" as described in section

22(4) of the *Act*. This office opened Appeal Numbers MA-010338-1 and MA-010339-1, respectively.

The Board subsequently issued a fee estimate with respect to each request and the two appeals were resolved on this basis.

The Board provided identical fee estimates in responding to the two requests. In each case, the fee estimate was in the amount of $1,200 for "phase one" of the search, which would involve reviewing historical employee files. The Board indicated that once individual staff had been identified (phase one) and the fee paid, the Board would provide a second fee estimate for a search for responsive records in the relevant files (phase two).

In its decisions, the Board stated that alternatively, to avoid the phase one fee, the appellant may wish to conduct the initial phase of the search himself through identified public records.

The appellant was unsuccessful in conducting the phase one search himself. He notified the Board of this and at the same time, requested a fee waiver with respect to both requests. The Board subsequently informed the appellant that it would not waive the fees.

The appellant appealed the Board's decisions. This office opened Appeals MA-010338-2 and MA-010339-2, respectively.

During mediation of these appeals, the Board agreed to combine the fee estimates for both phases one and two. The Board issued a supplementary interim decision/fee estimate informing the appellant that the total fee estimate for locating records responsive to "the request" is $6,984.71. Further, the Board confirmed that it would not waive the fee. Finally, the decision contained an interim access decision informing the appellant that the Board will probably deny access to all records located as a result of its search pursuant to section 52(3) of the *Act*.

In its supplementary decision/fee estimate letter, the Board identified both appeals in the "Re:" line. However, under heading (B) Fee Estimate, the Board stated:

> Please be advised that the search required to comply with both appeals is largely identical. The search is broken down into several components:
>
> i) a staff list search
> ii) staff list creation
> iii) active/inactive status review
> iv) a personnel record search (locate records)
> v) search locations for responsive personnel files
> vi) review responsive personnel files for responsive records

It was not clear whether the Board intended to charge the appellant the total of $6,984.71 for each request, or whether this estimate is intended to combine the two requests under one fee.

The Board was asked to clarify this issue, and confirmed that the fee relates to the combined requests.

I sent a Notice of Inquiry setting out the facts and issues at inquiry to the Board and the appellant. As this inquiry was in the first stage, I requested that the Board respond only to the issues relating to the calculation of the fee, and that the appellant respond only to the issues relating to his request for a fee waiver. Both parties submitted representations. After reviewing them, I decided to take this appeal to stage two as follows:

- The appellant was asked to review the Board's submissions and to provide submissions regarding the Board's calculation of the fees; and

- The Board was asked to comment on an issue raised by the appellant regarding the delay in the processing of his access requests. In this regard, the appellant submits that the Board's delay was undue and that it should be precluded from charging fees as a result.

After receiving representations from both parties, I decided to seek reply representations from each one. I attached the representations of each party to the copy of the other party's Notice. I asked the appellant to respond to the Board's position with respect to the issue of delay, and I posed several questions to the Board arising from the appellant's representations and/or my review of the Board's representations. Again, both parties submitted representations.

DISCUSSION:

CALCULATION OF THE FEES

The first issue I must determine is whether the fees estimated by the Board to respond to the appellant's two access requests were calculated in accordance with the fee provisions of the *Act*, and/or whether they are sustainable.

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.

Search time

Phase one – staff list search and creation

Along with its submissions, the Board attached an affidavit sworn by an Administrative Assistant for the Board who helped to prepare the fee estimate (the Assistant). She states that the Board does not have a compiled staff list for all employees at the named school for the time period requested, and, therefore, it was necessary to first create one in order to locate records responsive to the request. As I noted above, the Board has broken its fee estimate into two phases; phase one involves the creation of the staff list, and phase two encompasses the actual search for responsive records.

The appellant takes issue with the Board's approach to his access request. Comparing the Board's approach in this case to that of a previous access request he made for records relating to grievance files, the appellant submits that the "Board has acted arbitrarily, irresponsibly, and … has shown a lack of respect for the spirit of the [*Act*]".

In response to the appellant's position, I asked the Board the following question:

> The appellant refers to a previous appeal relating to grievance records and appears to suggest that either there may have been a more efficient way to search for responsive records or that there may actually already be a master list. The Board is asked to respond to this suggestion.

The Board replied:

> No master list of all staff employed in the 33 year period between 1962-95 for the affected school exists. It was necessary to create the list in order to address the requests …
>
> … This [previous] request … was for information relating to "all grievance(s) filed by teaching personnel at [the named school] involving discrimination based on enumerated grounds …". This request generated a search through the Board's grievance files *which are wholly separate* from the personnel files. [emphasis in the original]

The Board points out that the grievance files are not sufficiently numerous to necessitate the creation of a master list, but that the current requests are much broader:

> Both requests include teaching and non-teaching personnel. Both requests include matters which did not become the subject of any grievance process. In other words, the subject matter of the current requests necessitated a review beyond the grievance files to a separate set of files; the individual personnel files. The volume of individual personnel files is much greater than that of the grievance files. In order to conduct a sensible review of the vast number of personnel files it was necessary to generate a master staff list for the entire 33 year period in order to focus the search.

I agree that the appellant's requests, collectively, are very broad, primarily because of the time span over which the search is to be conducted. I accept that in order to know where to look for the information requested, the Board must first identify all staff working at the named school over the 33 year period. While a search through each year will no doubt identify a number of the same individuals working at the school over a span of time, it is necessary to complete this exercise to capture new staff arriving at the school either at the beginning of or during the school year. I am satisfied that the creation of a master list of personnel at the school is a necessary first step in locating responsive records.

The Assistant indicates that in order to provide an estimate of the costs associated with the appellant's two requests, the Board conducted a sample search for responsive information. The Assistant indicates further that in order to proceed with the fee estimate, the Board retained the services of a temporary worker to perform the tasks associated with the search under the direction of the Assistant. Moreover, although the Board is entitled under the *Act* to charge the

appellant $30 for every hour spent searching for responsive records, the Assistant points out that it has based the estimate on the actual remuneration paid to the temporary worker for this task (where the temporary worker performed the task) or to her actual remuneration (in respect of the tasks she performed), both of which are lower than the amount prescribed in the *Act*.

The Assistant states that three sources were searched in order to compile a list of the teaching and non-teaching staff who worked at the named school over the 33 year period:

- The school attendance register (one year was searched for the September 1991-December 1995 period). It appears that the Board has not included a fee for searching or reviewing this document for responsive information.

- For the period 1962 – August 1991, the Board yearbooks were searched for three sample years.

- For the same period of time, the Board minutes were also searched for three sample years.

The Assistant indicates that it took 30 minutes to locate three sample yearbooks and another 30 minutes to review them and locate the responsive staff names. On this basis, the Board estimates that it will take approximately five hours to locate and review yearbooks for a 29 year period at a cost of $108.75 for each step (total estimated cost for locating and reviewing yearbooks is $217.50).

Although the Board refers to the Board minutes in its discussion with respect to locating the yearbooks, based on the cost breakdown in the Board's representations, it does not appear that it included a charge for locating the Board minutes.

However, the Board indicates that seven and one half hours were taken to review the Board minutes for the three year period. Applying this time to the 29 years of available records, the Board estimates that it will take approximately 72.5 hours at a cost of $1,631.25 to review the minutes for responsive information.

Board yearbook and Board minutes

In her affidavit, the Assistant states:

> Board yearbooks were quicker to search but provided an incomplete list of staff. For example, the Board yearbooks did not provide information regarding staff who transferred to the school during the school year. Moreover, a significant portion of non-teaching staff were omitted. Board minutes gave the most accurate reflection of school staff for each year but were more time consuming to search since the staff information was not necessarily organized by school.

Following receipt of the parties' submissions relating to these two sources, I asked the Board to respond to the following question pertaining to this part of the search:

> Why did the Board search both the yearbook and Board minutes for each year once it was determined that the Board minutes "gave the most accurate reflection of school staff"? In particular, did the yearbook search provide the same information as the search through the Board minutes (differing only in completeness)?

The Board replied:

> [B]oth sources were investigated in order to perform a complete cheque [*sic*] for accuracy. As indicated the Board Minutes gave the most complete view of the staff at the affected school. Ultimately, the yearbooks provided a less complete picture of the staff at the school. Moreover, within the sample search taken, they yielded no additional names beyond those found within the Board Minutes. However, as indicated by the relative search times, the available yearbooks could be search more expeditiously.

Although both sources would appear to contain information that would assist the Board in completing the first phase of its search, it is apparent that in order for the Board to conduct a full and complete search, it will be necessary for it to review the Board minutes. According to the Board, the sample search did not find the yearbooks to contain any additional information. In my view, a search through the yearbooks in these circumstances is redundant and unnecessary in order to respond to the appellant's request. Therefore, I will not permit the Board to charge the appellant for extending its search of this source beyond the three-year period already searched.

With respect to the initial time spent, I find that it was reasonable for the Board to consider this location in order to determine how best to complete the first phase of its search. Therefore, the Board is entitled to recoup the cost for the 30 minutes spent locating these documents and the 30 minutes reviewing them to determine whether they contained relevant information. On this basis, the Board may charge the appellant $22.50 for this task.

I accept that the review of the Board minutes requires more time. Based on the time actually spent, I find the Board's estimate of the total time to complete this review to be reasonable. Moreover, although the Board's calculation of this cost was not in accordance with the amounts prescribed in the *Act*, the difference favours the appellant. Therefore, I uphold the estimated fee of $1,631.25 for reviewing the Board minutes.

In order to create a master staff list, the Assistant states that the temporary worker copied out the names of personnel as they appeared on the Board minutes and staff register, eliminating any overlap from year to year. The Assistant indicates that this task took two hours to complete. The Assistant does not refer to the use of the yearbook in performing this task, and I therefore assume that it was not used for this purpose. Extending this calculation to the 33-year time span, the Board estimates that it will take approximately eight and one quarter hours to complete the task

at a total cost of $371.25. Based on the steps required to complete this task and the time span covered by the request, I find this estimate to be reasonable. Again, the actual calculated cost is lower than that permitted by the *Act*.

The Assistant indicates that if responsive records exist, they would be located in personnel files housed in four locations: hard copy personnel files in either the human resources or benefits offices; hard copy personnel files in warehouse storage; or microfiche personnel files.

She states:

> In order to determine an order of proceeding, I reviewed the staff list in order to determine the status of the particular employee (actively at work, inactive, no longer working). Normally active employee files were kept in human resources whereas inactive employees may have files transferred to the benefits area. Both active and inactive employees normally also had some portion of their files stored on microfiche.

The Assistant indicates that it took her one and one half hours to identify the status of the employees (for a four year period). Applying this time to the remaining 29 years, the Board estimates that it will take approximately eight and one quarter hours to complete the task at a total cost of $334.13.

I accept that making this determination is a necessary first step to conducting an efficient and effective search through files in the four locations identified by the Board. Accordingly, the Board will be permitted to charge the appellant for the costs associated with this step.

In summary, I find that the Board is entitled to charge the appellant $2,359.13 for Phase one.

Phase two - Physical search for responsive records

The Board indicates that prior to conducting the search of the files at the four locations, a search was conducted at the warehouse site in order to locate the boxes of personnel files which would reasonably contain personnel files of the staff at the named school. The Board indicates further that a search was then conducted through the files at the four locations in order to locate the personnel files in question after which the documents in each of these files were reviewed for responsive records. The Board notes that no responsive records were found as a result of this sample search.

The Assistant indicates that the majority of time involved in this phase was spent locating the files:

> The time taken to locate the boxes in the warehouse which contained personnel files was three hours. The total time taken to locate the files of teaching staff in the four representative years chosen was twenty hours. The total time taken to

> locate the files of non-teaching staff in the representative years chosen was five hours

Extrapolating from this, the Board estimates that it will take approximately 165 hours and 41 and one quarter hours to locate the files and teaching and non-teaching staff respectively for a total cost of $4,640.63. The Board indicates that the search through the warehouse was a one-time search for the personnel files. Based on three hours, the Board has charged $67.50 to complete this task.

As a result of this part of the search, the Assistant indicated that they located 60 separate teaching files and 15 separate non-teaching files (for the four-year period), which the Assistant notes averages out to 15 teacher files per year and approximately four non-teaching files per year. The Assistant estimates that when the yearly file averages are applied to the entire 33-year period, the total number of teacher files would be 495 and the total non-teaching staff would be 132.

The Assistant continues that a separate search of the personnel files was conducted for both microfiche and hard copy records. She adds that each search took one hour, or two hours in total to search through the 75 files located. Based on this search, the Board estimates that it will take approximately 16 and one half hours to review the files at a total cost of $371.26.

Discussion and Findings

As noted at the beginning of this order, the Board has issued an "interim" fee estimate and decision on access with respect to the appellant's two requests. The issue of interim decisions was first raised by former Commissioner Linden in Order 81. In that order Commissioner Linden set out the procedures to be followed where the records are unduly expensive for the institution to produce for review by the head for the purpose of making a decision on access to the records. These procedures contemplate the institution reviewing a representative sample of records, or seeking the advice of knowledgeable staff within the institution who are familiar with the type and content of the records, in order to produce an interim notice containing a fee estimate and an indication of what exemptions might apply. In this regard, former Commissioner 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 [provincial] *Act* [section 45(1) 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*.

> How can a head be satisfied that the fees estimate is reasonable without actually inspecting all of the requested records? Familiarity with the scope of the request can be achieved in either of two ways: **(1) the head can seek the advice of an employee of the institution who is familiar with the type and contents of the requested records; or (2) the head can base the estimate on a representative (as opposed to a random) sample of the records. Admittedly, the institution will have to bear the costs incurred in obtaining the necessary familiarity with the records** … [emphasis added]

Up to this point, I have agreed with the Board's approach to estimating the time required to locate responsive records for the total span of time (insofar as phase one is concerned), primarily because one year would be representative of every other year in terms of producing the names of staff working at the named school. However, I am not persuaded that this approach is appropriate in estimating the number of files that would require review (phase two). The Board's approach assumes a complete staff turnover every year. As I noted above, it is likely that there would be an overlap in staff from year to year, and in many cases, staff may remain at the school for many years. In my view, the Board's approach to phase two (which essentially involves a random sampling of the years encompassed by the requests – the Board searched one year for every ten which would likely overlook any overlap from year to year) has inflated the estimated cost of performing this review such that it cannot be sustained.

There is nothing in the Board's submissions that would assist me in determining a reasonable estimate of this cost, nor am I aware of staff turnover rates, at either this school or the Board generally. I would suspect that the Board would likely have some idea (statistically) of these rates, but without knowing, cannot require the Board to apply this information in calculating the estimated number of teaching and non-teaching staff at the school over the 33-year period.

With respect to familiarity of staff, in previous orders of this office dealing with the reasonableness of an institution's search for responsive records, it has been well established that the search which an institution undertakes must be conducted by knowledgeable staff in locations where the records in question might reasonably be located (see, for example, Order M-624). In other words, the *Act* contemplates that searches for responsive records will be conducted by reasonably informed staff. In my view, the Board's approach to calculating the estimated fee for phase two does not reflect this expected expertise or knowledge on the part of Board staff. Moreover, it would not be reasonable to expect that the requester should be asked to pay for the resultant inflated estimate.

Accordingly, I find that the Board's estimate of the costs associated with conducting phase two of the search was not calculated in accordance with the principles set out in Order 81. I recognize, however, that a significant amount of time will be required to locate and review the files of teaching staff.

As I will discuss further below, the estimated cost of responding to the appellant's request should reflect as much as possible, the actual cost the appellant can expect to be charged. Without a basis for determining or estimating the number of staff at the named school over the 33-year

period requested, I am not in a position to set a reasonable fee for this phase of the search. Therefore, I will require the Board to recalculate the fee for phase two. The basis for this fee must be connected to a "reasonable" estimate of the number of different staff working at the school over the 33-year period, which no doubt will be considerably less than 627.

At a minimum, however, I will permit the Board to recoup the costs of conducting the sample search. Accordingly, the Board may charge the appellant $562.50 for the 25 hours spent searching for and locating the teaching and non-teaching personnel files for the four years in the sample search, $45 for the two hours spent reviewing them, and $67.50 for the three hours spent conducting the search at the warehouse (for a total of $675).

In summary, the Board will, initially, be permitted to charge the appellant $2,359.13 for the actual and estimated costs for phase one and $675 for the actual costs associated with phase two (for a total of $3,034.13). The Board indicates that it is prepared to discount this fee by $648.75 (for a total estimated cost of $2,385.38).

Although the Board will be permitted to charge the appellant a fee for phase two, this fee has yet to be determined. At this time, I will point out that the re-estimated fee is not to exceed the amount originally estimated: $4,404.39, broken down by physical location of files ($4,078.13) and review of files for responsive records ($326.26).

The approach I have taken with respect to these appeals, unfortunately, does not place the appellant in a position to make a fully informed decision regarding the payment of the fees associated with his requests (as contemplated by Order 81, discussed above). However, in my view, the parameters of the estimate have been established, that is, the cost will be no greater than $6,789.81 (and will likely be less than this amount) but will be greater or equal to $2,385.38.

As will be discussed further below, I have found that the circumstances do not support the granting of a fee waiver. Accordingly, in order for the appellant to be in a position to receive records responsive to his requests, he will be required to expend at least $2,385.38. If the appellant is not prepared to proceed on this basis, there is no need for the Board to continue processing these requests. Therefore, an acceptance of the minimum fee by the appellant will be required before the Board proceeds to re-estimate the costs for phase two.

Section 7(1) of Regulation 823 (as amended by O. Reg. 22/96) provides that where a fee estimate exceeds $100, the head may require the requester to pay a deposit of 50% before taking any further steps to respond to the request. This means that based on the fees approved to this point, the Board may require the appellant to pay $1,192.69 before proceeding. In its supplementary interim decision/fee estimate, the Board advised the appellant that it would require the 50% deposit. Accordingly, the Board may require the appellant to signal his acceptance of the minimum fee by paying a deposit of $1,192.69.

FEE WAIVER

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

> A head shall waive the payment of all or any part of an amount required to be paid under subsection (1) if, in the head's opinion, it is fair and equitable to do so after considering,
>
> (a) the extent to which the actual cost of processing, collecting and copying the record varies from the amount of the payment required by subsection (1);
>
> (b) whether the payment will cause a financial hardship for the person requesting the record;
>
> (c) whether dissemination of the record will benefit public health or safety; and
>
> (d) any other matter prescribed in the regulations.

Section 8 of the Regulation then prescribes, in part:

> The following are prescribed as matters for a head to consider in deciding whether to waive all or part of a payment required to be made under the *Act*:
>
> 1. Whether the person requesting access to the record is given access to it.
>
> ...

Under section 45(5), an appellant has the right to ask the Commissioner to review an institution's decision not to waive the fee. The Commissioner may then either confirm or overturn this decision based on a consideration of the criteria set out in section 45(4) of the *Act* (Order P-474).

It has been established in previous orders that the person requesting a fee waiver must justify the waiver request and demonstrate that the criteria for a fee waiver are present in the circumstances (Orders M-429, M-598 and M-914). I am also mindful of the Legislature's intention to include a user pay principle in the *Act*, as evidenced by the provisions of section 45.

In Order P-474, former Assistant Commissioner Irwin Glasberg found that the appropriate standard of review for discussions under section 57(4) of the provincial *Freedom of Information and Protection of Privacy Act* (which is the equivalent of section 45(4) of the *Act*), is one of correctness. In that same order, former Assistant Commissioner Glasberg also found that the phrase "in the head's opinion" means only that the head of an institution has a duty to determine whether it is fair and equitable in a particular case to waive a fee, and this wording does not

affect the statutory authority of the Commissioner and her delegates to review the correctness of that decision.

The appellant submits that he is entitled to a fee waiver on the basis of financial hardship and public health and safety. He also states a number of other reasons why the fee should be waived in the circumstances of this appeal.

In its decision to the appellant denying his request for a fee waiver the Board indicated that there was no evidence that the subject matter of the request is a matter of public interest rather than private interest, and that it does not relate to public health or safety. The Board noted that it has already provided the appellant with a reduction to the fee estimate, that he has not narrowed his request and that he has "chosen not to accept the institution's offer to conduct a portion of the search yourself from the available public records". Finally the Board indicated that the requests involve an immense search on the part of the Board spanning some 33 years and an estimated staff/former staff group in the hundreds. The Board took the position that granting a fee waiver would shift an unreasonable burden of the cost from the appellant to the Board.

Public Health and Safety

In Order P-474, former Assistant Commissioner Irwin Glasberg found that the following factors are relevant in determining whether dissemination of a record will benefit public health or safety under section 57(4)(c) of the *Act*.

1. Whether the subject matter of the records is a matter of public rather than private interest;

2. Whether the subject matter of the records relates directly to a public health or safety issue;

3. Whether the dissemination of the records would yield a public benefit by a) disclosing a public health or safety concern or b) contributing meaningfully to the development of understanding of an important public health or safety issue; and

4. The probability that the requester will disseminate the contents of the records.

The Board's position

The Board notes that the appellant is seeking historical records (from 1962-95) and submits that they are "not likely to have any direct bearing on current circumstances some seven years later". The Board submits further that there is no reasonable connection between the staff harassment/discrimination records and health and safety.

The Board explains that at the time of his request the appellant was involved in labour litigation with the Board in connection with his previous employment at the named school, and contends that "it may reasonably be assumed that the records were intended to address the issues raised in the requester's personal labour relations proceedings". Moreover, the Board argues that the appellant has not demonstrated that he is able or willing to disseminate the information.

The appellant's position

The appellant acknowledges that he has a personal interest in the records at issue in that he has brought a complaint under the Ontario *Human Rights Code* against the Board and the affected school. He submits, however, that there is also a public interest in the records because:

> The alleged existence of a school with a history of employee intimidation/harassment/discrimination and a Board that ignores, condones, and privately sanctions this behaviour is indeed a matter of public interest. In fact, *that* coupled with alleged abuse of students (children) also by some personnel, then one has not only a matter of collective interest but a matter of law.

Referring to Order PO-1962, in which Assistant Commissioner Tom Mitchinson found that records relating to quality of care and service at group homes and day programs funding by the Ministry of Community and Social Services (the Ministry) relate directly to public health and safety issues, the appellant submits that discrimination and abuse (particularly concerning children) "is a very significant and active issue of grave concern with the public".

The appellant states that dissemination of the records "will reveal a public health and safety concern which in turn will prompt public pressure on legislators and community agencies to correct the situation". He goes on to state:

> I think it a fair and reasonable statement that these records will be disseminated if produced. On the balance of probabilities, I feel confident that the appropriate organizations will ensure that these matters are before the public. I refer to also to Tab 3.

Findings

In Order PO-1962, the requester sought serious occurrence reports (SORs) and annual summaries created through the community agency program run by the Ministry. In arriving at his conclusions on the issue of public health and safety, the Assistant Commissioner noted that community agencies provide services that include safeguarding the health and safety of their clients (in this case people with developmental disabilities). Moreover, he found that the records at issue in the appeals associated with that order relate directly to problems identified in the delivery of services (by the Provincial Auditor Report, 1999).

Tab 3 of the appellant's submissions contains several newspaper articles dealing with children, attitudes and discrimination, including bullying at school, with reference to the named school

among others, and information about the history of the named school (not in relation to discrimination or abuse).

I agree with the appellant that discrimination and bullying (by other children) are very serious issues, and they are issues that the public generally is more aware of and concerned about. Similarly, where there is evidence of discrimination and abuse by staff, I accept that such evidence would relate to public health and safety within the meaning of this section. This was the case in Order PO-1962, in that the appellant in that case provided evidence that concerns had already been raised in the public about service delivery directly related to the health and safety of the clients of the service programs.

In my view, the evidence provided by the appellant falls short of establishing that these concerns have been raised in a significant way at the named school, or that records going up to 1995 (almost eight years ago), as opposed to the present, would either disclose a public health and safety concern or contribute meaningfully to the development of the understanding of this health and safety issue. Moreover, I agree with the Board that historical records dating back as far as 1962 are unlikely to have any direct bearing on current issues. In addition, the appellant is only seeking information about students in one of his requests. The other request pertains more directly to employment-related issues, again, primarily from a historical perspective.

Therefore, even though I accept that there is likely a public interest in some records, if they exist, these records are unlikely to relate directly to a current public health or safety issue. Nor is it likely that dissemination of the records would yield a public benefit by a) disclosing a public health or safety concern or b) contributing meaningfully to the development of understanding of an important public health or safety issue. Further, given the circumstances under which the appellant has submitted his request, I am inclined to find that his interest in the records is primarily a private one. That is, I am persuaded by both his and the Board's submissions, that he is seeking the requested records primarily in furtherance of his own labour relations issues with the Board.

This factor, combined with my conclusions regarding dissemination of the records (discussed below) lead me to conclude that the appellant has failed to establish that the fees should be waived on the basis of public health and safety.

Insofar as dissemination of the records (if they exist and are subsequently disclosed) is concerned, the appellant's submissions provide vague and speculative assumptions that others will readily take on his battle with the named school. The records he is seeking are between seven and 40 years old. I am not convinced that "the appropriate organizations" whoever they may be, would be interested in these records. Even if they were, this interest would be primarily from a historical perspective and not likely to enhance or benefit public health as contemplated by this section.

On the basis of the above discussion, I find that the appellant has failed to establish that dissemination of the records will benefit public health and safety in this instance.

Financial Hardship

The Board re-asserts that the appellant has failed to provide evidence to the Board of his financial circumstances, thereby suggesting that he has not established that payment will cause him financial hardship.

In his representations, the appellant indicates that he is on long-term disability and living on a fixed income. He provides a breakdown of his expenses and investments. From this, it is apparent that the appellant lives on a relatively modest income.

The amount of the fee estimate is high and relative to the appellant's disposable income, I have no doubt that paying it would cause him financial hardship.

Is it Fair and Equitable to Waive the Fees?

The *Act* requires that I also make a determination as to whether it is fair and equitable to waive the fee. Previous orders have set out a number of factors to be considered in determining whether a denial of fee waiver is "fair and equitable" (see, for example, Orders P-474, P-890, P-1183, P-1259 and P-1557). These factors are:

- the manner in which the institution attempted to respond to the appellant's request;
- whether the institution worked with the appellant to narrow and/or clarify the request;
- whether the institution provided any documentation to the appellant free of charge;
- whether the appellant worked constructively with the institution to narrow the scope of the request;
- whether the request involves a large number of records;
- whether or not the appellant has advanced a compromise solution which would reduce costs; and
- whether the waiver of the fee would shift an unreasonable burden of the cost from the appellant to the Board.

As I indicated above, the appellant takes the position that the manner in which the Board has dealt with him throughout the processing of these requests warrants a finding that it is fair and equitable to waive the fees in this case. In essence, the appellant takes the position that because the Board failed to comply with the requirements of the *Act*, which has led to "undue delay", it should not, thereafter, be permitted to charge a fee. In this regard, the appellant submits:

> MA-010339-2 and MA-010338-2 were received by the Board on July 23, 2002 and September 13, 2001 respectively. Despite various attempts at clarification, several unsuccessful trips to the Board Archives, and a deemed refusal, I did not receive a substantive decision until February 6, 2002, almost 7 months later and only then through mediation. It is also important to recognize that that decision is

> only an interim access decision, requiring the payment of fees before records are assessed against various exemption claims available to the Board under the *Act*. I feel the Board's delays alone are objectionable and that it ought to be denied the ability to charge this fee as a sanction for delay, as rendered in Orders PO-1998, 193, P-855, M-439, M-452 and PO-1909. [emphasis in the original]

With respect to his interaction with the Board in regard to conducting the phase one search, the appellant indicates that he attempted to find the reference material at the Sesquicentennial Museum and Archives (the Archives) as suggested by the Board. In his representations, he states:

> … I spoke to … (archive conservator) and informed him that I would like to review the historical employee files and the public minutes of meetings … informed me I was seeking access to confidential information.

The appellant acknowledges that, after contacting the Board regarding his lack of success in locating the information at the Archives, the Senior Manager, Business Services and Freedom of Information and Privacy Co-ordinator (the Co-ordinator) went to the Archives with him and helped him to identify the "publicly available records" (the Board minutes of public meetings). The appellant states that after the Co-ordinator left:

> …archivist… said I might get some use from the yearbooks, when I explained to him that I was looking for as much information concerning [the named school] personnel as possible. I was unsuccessful in finding the information relating to my 2 requests.

In addition, the appellant believes that the Board "was acting arbitrarily by currently invoking historical employee files and board minutes of meetings when it did not do so for MA-010160-2". In my view, the Board has adequately responded to the appellant's allegations regarding its approach to his access requests (as discussed above) and the appellant's arguments in this regard do not support the conclusion that the burden of the cost of responding to his requests should be shifted to the Board.

While the Board is not able to completely account for the delay in responding to the appellant's request, it does note that its offices are closed for a period of time during the summer. The Board indicates further that much of the delay in finally responding to the appellant was a result of attempts to assist him in reducing the costs by assisting him in use of the publicly available records. The Board notes that the appellant did not find the recommended sources to be helpful, but adds:

> In fact these very same records were used to compile the sample search list used to create the final fee estimate.

The Board distinguishes the circumstances in Order PO-1998 from the current appeal on the basis that the Board has worked with the appellant throughout the processing of his requests in order to both clarify one of his requests and to reduce the costs of responding to them.

The Board indicates that at this point in time it is premature to determine whether the requests will reveal a large number of records, but submits:

> What is not in doubt is that the search will involve a substantial period of time involving staff files compiled over a 33 period involving an estimated 627 staff files.

Finally, the Board notes that it is unlikely that access would be granted to the records once they are located, indicating that the requests, on their face, identify records which fall outside the scope of the *Act* by virtue of section 52(3). In support of this position, the Board refers to previous orders of this office (Orders P-1242, P-1260 and P-1395) which have found that records associated with discrimination complaints initiated by employees and records associated with substantiated or alleged abuse of students by personnel fall within the scope of section 52(3).

Findings

It is clear that there has been considerable delay in the Board's processing of these requests, in that the appellant did not receive a fee estimate and interim decision (of his first request) until almost seven months after it was made. It is equally apparent that there has been a considerable amount of communication between the Board and the appellant relating to the public availability of information and the relevance of this information to the requests (or at least the Board's ability to respond to them).

It is also apparent that there has been some confusion with respect to these issues. According to the appellant, he followed the Board's suggestions about locating information himself and was not able to do so, either because he was told it was confidential or because he did not believe it was relevant. However, the Board essentially followed the route suggested to the appellant and located the necessary sources, and followed an approach to processing the appellant's requests that I have upheld in this order.

In my view, the circumstances in this appeal are distinguishable from those confronting Assistant Commissioner Mitchinson in Order PO-1998. In that order, there had also been considerable delay in the institution's processing of the appellant's request. The institution in that case offered a variety of reasons for the delay and there was evidence that the appellant had attempted to work with the institution over the nine months that it took before the decision and fee estimate was given. Assistant Commissioner Mitchinson concluded:

> Based on the material provided to me, it is clear that the Ministry was in breach of its obligations under section 26 of the *Act*. Although a decision was ultimately provided to the appellant, this only occurred on January 11, 2002, after the date

> when the Ministry provided representations in this appeal, and four months after the appellant's revised request was submitted.

In looking at the appropriate remedy in that case, the Assistant Commissioner recognized that there was a history of the institution not meeting its timelines vis-à-vis this particular appellant's requests:

> In support of its position, the appellant lists a number of examples of instances where the Ministry did not meet the statutory timelines in responding to the appellant's requests. The appellant also refers to five orders issued by this office that, in its view, support the position that denying an institution the ability to charge a fee has been used as a sanction for delay (Orders 193, P-855, M-439, M-452 and PO-1909). The appellant states:
>
> > In these cases, non-compliant Ministries were ordered to respond to the requests without fees as a means to sanction their delay tactics. In this case, the [Ministry] has demonstrated a lack of concern for the purposes of the *Act*.

He concluded:

> However, in my view, the issue of delay in this case cannot be ignored. The appellant originally submitted its request to the Ministry on February 28, 2001 and, despite working cooperatively with the Ministry to narrow the request and after filing two separate deemed refusal appeals, the appellant did not receive a substantive decision until January 11, 2002, almost 11 months later. And it is important to recognize that this decision is only an interim access decision, requiring the payment of fees before records are assessed against the various exemption claims available to the Ministry under the *Act*. It is also significant to note that the appellant, several months ago, offered to pay the required search fees and then sit down with the Ministry to review the various records in order to reduce photocopy charges, only to have the offer declined by the Ministry. In my view, this case is outside the norm. The Ministry's delays are indefensible, and I find that this is an appropriate case to require the Ministry to waive photocopy charges. I assume that the appellant is still prepared to sit down with Ministry staff and review the various records prior to incurring photocopy costs, and I strongly encourage this reasonable approach to minimizing costs.

I also note that the Assistant Commissioner addressed the "contentious issues management" process at this institution as a possible factor in the delay. Referring to previous orders in which he has concluded that fees could not be charged where there was evidence that issues management factored into the delay, he encouraged the institution to consider waiving the fees in the future "should its ability to meet its statutory response obligations under the *Act* be compromised by any issues management process in place in the Ministry."

In the current requests, there was also a deemed refusal with respect to the Board's response. I accept that closure of the Board offices may have contributed to some of this delay. However, there is evidence, by way of correspondence between the Board and the appellant, that over this period of time, the Board was actively attempting to respond to the appellant's two requests (which were received by the Board approximately a month apart, but which involved a search through the same files). I am satisfied that the purpose of these communications was not to deliberately delay the process, but to assist both the Board and the appellant in understanding the nature of the information requested and in reducing the time and ultimately the expense of responding to the requests.

I also find that the appellant's divergence from the Board as to the best approach to take with respect to phase one (as evidenced in his representations, and discussed above) likely contributed to some of the delay.

In these circumstances, unlike the situation in Order PO-1998, I do not conclude that the delays are "indefensible" to such a degree as to warrant waiving the fees.

Moreover, I find that the Board has attempted to take a reasoned and efficient approach to responding to the appellant's request, which encompasses a relatively long time span. There is no evidence before me that the appellant has made genuine attempts to co-operate with the Board. Although the appellant indicates that he unsuccessfully attempted to locate the various public records as suggested by the Board, I suspect that, in part, his disagreement with the Board as to the necessity of taking this approach likely had an impact on his level of co-operation. It is also apparent from his representations that during his discussions with the archive staff, he expressed a desire to obtain access to considerably more information than was necessary in order to complete phase one of the search, such as "historical employee files" and "as much information concerning…personnel as possible", which likely resulted in much of the confusion in locating the documents that would contain the information he needed to conduct the phase one search himself.

It is possible that a search may not produce many records, but in this case, the search itself is the challenge. As I found above, the steps taken in phase one are necessary in order to conduct an efficient and effective search for records covering a 40-year span of time.

Finally, as the Board notes, it intends to claim the application of section 52(3) to any records that might be located. Without making a finding on its application, I am satisfied that the Board's rationale for its interim access decision has a reasonable basis (in light of previous orders of this office that have addressed similar types of records).

In these circumstances, I am not persuaded that the Board should be required to waive the fees associated with responding to these requests. In my view, to do so would shift an unreasonable burden of the cost from the appellant to the Board.

ORDER:

1. I do not uphold the Board's fee estimate of $6,984.71.

2. I do not uphold the appellant's request for a fee waiver.

3. I uphold the Board's entitlement to charge the appellant, at a minimum, $2,385.38 and to require the payment of a deposit from the appellant in the amount of $1,192.69 before proceeding in accordance with Order Provisions 4 and 5.

4. I order the Board to re-estimate the costs associated with phase two of the search, taking into account the overlap in staff from year to year.

5. I order the Board to issue a revised fee estimate to the appellant with respect to the re-estimated costs for phase two by providing him with a decision letter no later than **3 weeks** after the appellant pays the amount specified in Order Provision 3.

6. In order to verify compliance with Provision 5 of the order, I order the Board to provide me with a copy of the decision letter referred to in Provision 5 no later than **4 weeks** after the appellant pays the deposit. This should be forwarded to my attention, c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.

Original signed by: November 19, 2002
Laurel Cropley
Adjudicator