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

ORDER MO-1924

Appeal MA-030211-2

Le Conseil scolaire public de district du Centre-Sud-Ouest

Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9188
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

The appellant submitted a request to the Conseil scolaire public de district du Centre-Sud-Ouest (the Conseil) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for copies of all e-mails containing the appellant's family name in the e-mail accounts of six named individuals. The appellant asked that the search be performed as follows:

> Identify all email addresses of these [named] individuals, including those maintained by them or maintained by others for them such as their assistants, and those that are maintained in computer archives or back-ups.
>
> Perform a text search with the email application for email containing the text ["appellant's family name"]. The list of the email found containing this text is requested as a record in itself, which can be printed, faxed or emailed to me. The email themselves are also requested records. Create a digital copy of the email identified and email them to me at [a specified email address].

The appellant later clarified that the request includes deleted e-mails.

The Conseil did not provide a decision within 30 days as required by the *Act*, and the appellant filed a "deemed refusal" appeal. Appeal MA-030211-1 was opened to deal with this issue. In that appeal, the Acting Adjudicator issued Order MO-1668, ordering the Conseil to issue a decision. The Conseil issued a decision and Appeal MA-030211-1 was closed.

In its decision, the Conseil advised that the fee for the first part of the request would be $129,112.50, including acquiring a server and two computers, and that the task would require a technician to do the programming of the server and the recovery of the backups. The Conseil indicated that a deposit of $64,556.25 would be required before "undertaking such work". The Conseil further indicated that, as regards the second part of the request, the fee could not be determined because the number of responsive pages is unknown.

The Conseil did not indicate whether it would deny access to any of the requested information under any of the exemptions in the *Act* if the deposit were paid and responsive records located. Rather, the Conseil's decision went on to state:

> Considering the amount of work this request involves for a small school board as ours and the burden it will constitute for our staff, we are of the opinion that this request for access is frivolous and vexatious [under section 4(1)(b)of the *Act*] and are refusing to give access to the requested records.

The appellant filed an appeal of this decision.

During mediation, the appellant clarified that his request was directed at only the six named individuals and their assistants, not at the entire Conseil's e-mail accounts, as the Conseil had assumed at the time it issued the decision letter. In light of this, the Conseil issued a revised decision letter which reiterates that it considers the appellant's request to be frivolous or vexatious under section 4(1)(b) of the *Act*. In this revised decision, the Conseil also relies on section 1 of Regulation 823, which provides that a "machine readable record" is not a record

under the *Act* if "producing it would unreasonably interfere with the operations of the institution". The new decision goes on to state that if the Conseil were to process the request, it estimates that the fee for doing so would be $8,100. The appellant appealed the Conseil's revised decision. Further mediation did not resolve this appeal, and the file was transferred to adjudication.

I initiated my inquiry into this appeal by sending a Notice of Inquiry to the Conseil. The Conseil responded with representations. I then sent a Notice of Inquiry together with a copy of the Conseil's representations in their entirety to the appellant, who in turn provided representations. The appellant's representations raised issues for reply by the Conseil, and I therefore sent them to the Conseil in their entirety. The Conseil submitted representations in reply.

The issues to be decided are: (1) whether the request is frivolous or vexatious; (2) whether the requested records are excluded from the definition of "record" in the *Act* by section 1 of Regulation 823; and (3) whether the fee estimate should be upheld.

DISCUSSION

IS THE REQUEST FRIVOLOUS OR VEXATIOUS?

Background

In Order MO-1810, Adjudicator Rosemary Muzzi dealt with a request that was submitted to the Conseil by the appellant in the appeal before me. The appellant sought access to records similar to those requested here, namely "correspondence referring in any way to the appellant", including e-mail. She found the request to be frivolous or vexatious and upheld the Conseil's decision not to process it. She included a further remedy to "deal with the broader issues of the appellant's conduct", which was to "limit his active access to information matters with the Conseil to one at any given time". This limits the appellant to only one active request **or** appeal with the Conseil at any time. Adjudicator Muzzi explained the basis for her findings as follows:

> There are reasonable and sufficient grounds for making a finding that the appellant's request is frivolous or vexatious under section 4(1)(b). This appellant has been engaged in the access process with the Conseil since late 2000. The Conseil has questioned his conduct in making access requests on other occasions. While this office did not make a finding that the appellant's requests were frivolous or vexatious before, in my view the evidence now has accumulated to the point where such a finding can be made. I have based this finding on a consideration of numerous factors including the total number of the appellant's requests, their timing, their detailed nature and broad scope and the appellant's purpose in making his requests. I have also considered the appellant's more recent conduct with the Conseil. In addition, I find nothing in the Conseil's conduct that would negate a conclusion that the appellant's request is frivolous or vexatious.

Prior to beginning my inquiry into this appeal, the Registrar of this office advised the appellant, by letter copied to the Conseil, that as there were no files at the request stage and the current matter was the only outstanding appeal involving the Conseil, this office would proceed to process the appeal. The Conseil did not challenge this approach. Therefore, in accordance with Order MO-1810, the current appeal is the one matter with the Conseil that the appellant is pursuing at this time. Despite this, the Conseil submits that the appellant's current request is frivolous or vexatious under section 4(1)(b) of the *Act*.

General principles

Section 4(1)(b) provides institutions with a summary mechanism to deal with frivolous or vexatious requests. The relevant portion of that section reads:

> Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless,
>
> > the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

Section 5.1 of Regulation 823 under the *Act* elaborates on the meaning of the terms "frivolous" and "vexatious":

> A head of an institution that receives a request for access to a record or personal information shall conclude that the request is frivolous or vexatious if,
>
> (a) the head is of the opinion on reasonable grounds that the request is part of a pattern of conduct that amounts to an abuse of the right of access or would interfere with the operations of the institution; or
>
> (b) the head is of the opinion on reasonable grounds that the request is made in bad faith or for a purpose other than to obtain access.

In Order M-850, former Assistant Commissioner Tom Mitchinson commented on these provisions as follows:

> These legislative provisions confer a significant discretionary power on institutions which can have serious implications on the ability of a requester to obtain information under the Act. In my view, this power should not be exercised lightly.

The Conseil takes the position that the request is frivolous or vexatious under both sections 5.1 (a) and (b) of the Regulation because:

- it is part of a pattern of conduct that amounts to an abuse of the right of access;
- it is part of a pattern of conduct that would interfere with the operations of the institution;
- it is made in bad faith; and
- it is made for a purpose other than to obtain access.

Pattern of Conduct amounting to Abuse of the Right of Access

The Conseil submits that the request is part of a pattern of conduct amounting to an abuse of the right of access, and in particular:

- the requested information here is similar to that requested in the request dealt with in Order MO-1810 and numerous other requests;

- the Conseil has dealt with numerous requests and appeals by the appellant, requiring extensive work to process, which constitute "recurring incidents of related or similar requests on the part of the requester", including: (a) requests for various documents about the institution's chief executive and senior staff including their salaries, salary changes, expense allowances, reimbursements, and career histories with other institutions; (b) requests for any reference to the requester in the institution's custody; (c) requests for any and all manner of financial information for the period covered by the institution's existence; and (d) requests for all particulars of the institution's bills and payments to its law firm;

- where the requester has been granted access subject to a fee, he sometimes does not exercise his right of access, but instead "drops" the request.

- the pattern of conduct is demonstrated with respect to the Conseil, but the appellant's conduct relating to other institutions is also relevant;

- the appellant seeks to use the *Act* and the processes of the Commissioner to make collateral attacks on a party adverse in interest in civil litigation by virtue of its status as an institution covered by [the *Act*];

- the appellant seeks to widen the discovery process available to it under the court process, for reasons unconnected to the spirit or purpose of the legislation in question;

- as soon as the requester becomes involved in a dispute under a contract with a public institution covered by the *Act*, that institution starts to receive access requests of a varied nature for the purpose of harassing the institution, expend the institution's resources to respond to the requests and related appeals, and widen the discovery process in litigation;

- all of the requests originated during a period just preceding litigation and continuing after litigation had commenced.

The appellant argues that the issue of "frivolous or vexatious" is moot because it has already been dealt with in Order MO-1810. The appellant argues that the Conseil's reliance on section 4(1)(b) in this circumstance is, in itself, an abuse.

The Conseil disagrees, arguing that the appellant misunderstands Order MO-1810, and referring to that order's recitation of "nineteen separate access requests by the appellant". The Conseil also notes the statement in Order MO-1810 that "[t]he decision to limit the appellant's active matters to one at a time does not preclude a finding, where appropriate, that any current or future request is frivolous or vexatious".

The latter statement simply means that it is still open to the Conseil, or this office, to decide that a particular request is frivolous or vexatious. On this basis, I disagree with the appellant's contention that the Conseil's frivolous or vexatious claim is "an abuse". But it does not mean that the remedy imposed in Order MO-1810 is irrelevant in determining whether the request at issue here is frivolous or vexatious. In that regard, it is important to observe that Adjudicator Muzzi dealt with the *immediate* issue before her by upholding the Conseil's decision to deny access to the requested records, and that her decision to limit the appellant to one active matter at a time with the Conseil had the following distinct purpose, as described by Adjudicator Muzzi:

> In addition, *in order to deal with the broader issues of the appellant's conduct*, I have decided to limit the number of his active access to information matters with the Conseil to one at any given time. [my emphasis]

In my view, limiting the appellant to one active matter at a time with the Conseil squarely and effectively addresses the mischief targeted by the reference in section 5.1 of the Regulation to a "pattern of conduct that amounts to an abuse of the right of access". The fact that Order MO-1810 precludes the appellant from pursuing multiple access requests and/or appeals at any one time means that no such pattern is occurring, or indeed, can occur, at present. Accordingly, although the present request may have been part of such a pattern of conduct, it cannot be seen as such now, and I do not find the request to be frivolous or vexatious on that basis.

The same analysis applies to the Conseil's arguments that the appellant is using the *Act* to advance his litigation, and/or to harass the Conseil, and that this request is, for that reason, "part of a pattern of conduct that amounts to an abuse of the right of access". Order MO-1810 has put a stop to any such pattern. These arguments also relate to whether the request is "made in bad

faith" or "for a purpose other than to obtain access", and I will consider them in addressing those issues below.

I have considered the Conseil's argument that the appellant's activities with other institutions should be considered in assessing the "pattern of conduct". In my view, it is not necessary to make a determination on whether that could ever be a relevant consideration because, on the evidence before me and in view of the remedy adopted by Adjudicator Muzzi, I am not satisfied that the request at issue here can now be characterized as part of a pattern of conduct amounting to an abuse of the right of access.

I find that, under the circumstances, the request under consideration in this appeal is not "part of a pattern of conduct that amounts to an abuse of the right of access", and section 4(1)(b) cannot be applied on this basis.

Interference with the operations of the institution

The Conseil also submits that the request is frivolous or vexatious because it is part of a pattern of conduct that interferes with the operations of the Conseil:

> [The Conseil] has only one staff member to respond to [Freedom of Information] FOI requests, and whose duties also include assisting the Director of Education. The Technology and Information Services have only 9 technicians or administrative staff to support two administrative offices and 36 schools spread over an area exceeding 68,000 square kilometres. Meanwhile, [the Conseil] is statutorily required to serve over 6,400 students spread over that same area.
>
> To respond to the varied (both in terms of subject matter and time periods), constantly modified and repetitive requests of [the appellant], the simple fact is that more staff have to be devoted to this task. Further, more staff have to be devoted to this task to comply with the timelines under [the *Act*]. Staff must be mobilized to search out, organize and prepare these records for disclosure. This staff, in turn, is unavailable to serve the Charter-protected education rights of minority language students who attend this French-language board which operates 36 schools, serving over 200 municipalities.
>
> Simply put, devoting staff and other resources to the many wide requests made by [the appellant], including this request, interferes with the operations of the institution because it mobilizes them for different and varied topics, none of which are connected to serving the Charter-protected rights of learners who attend schools operated by the institution.
>
> In Order M-850 – Town of Midland at p.8 of the decision, the Adjudicator found that there should not be a finite set of criteria used in determining whether a

request will cause "interference with the operations" of an institution. As it was stated in the decision:

> *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 would vary accordingly.*

It is respectfully submitted that the logic employed in Order M-850 should be applied here, having regard to the relative degree of interference which is to be caused to a small institution, with a small and multi-tasking support staff, supporting a large geographic jurisdiction, and which in turn serves an essential public function (education) to a linguistic minority in Ontario. It is respectfully submitted that having regard to the broad scope of each of the requests, the detail required by the requests, and the fact that [the Conseil] has only one employee devoted to FOI supported by precious few more, a finding should be made that this pattern of requests does constitute a pattern of conduct which would interfere with the operations of the institution.

As noted in my finding concerning "abuse of the right of access", the "pattern of conduct" addressed in section 4(1)(b) has effectively been stopped by the remedy in Order MO-1810. On this basis, I also find that there is no current "pattern of conduct" that would interfere with the operations of the Conseil.

I also note that, in its access decisions, the Conseil refers to the fee provisions of the *Act*, and proposes to acquire additional computer equipment and to use "a technician" to process the requests. Although the Conseil's submissions on its fee estimate indicate an intention "to ask one of our technician[s] to do the work", they also indicate that a technician could be hired for a fee of about $1,000 per day.

Sections 6(6) and 6.1(4) of Regulation 823 both permit an institution to charge a fee for "[t]he costs, including computer costs, that the institution incurs in locating, retrieving, processing and copying … if those costs are specified in an invoice that the institution has received." This charge can be levied in both general access requests (section 6(6)) and requests for one's own personal information (section 6.1(4)). In my view, it would not be reasonable to find that a request is frivolous or vexatious on the basis that it would "interfere with the operations of the institution" where, as here, it appears that cost recovery mechanisms provided by the *Act* would permit the Conseil to mitigate or avoid any such interference.

I am not satisfied that the Conseil has established that any "pattern of conduct", or the request itself, would interfere with the operations of the institution. I find that section 4(1)(b) cannot be claimed on this basis.

Request made in Bad Faith

The Conseil submits that the request is made in bad faith:

> … [I]t seems clear that when a party makes requests that create a large amount of work for an institution, then drops them, but makes very similar requests for the same types of materials that a "furtive design" or "ill will" can reasonably be inferred.
>
> Likewise, where a party makes a request, and while an appeal concerning that request is extant, files another request for identical materials, it is also reasonable to infer an improper design of ill will on the part of that party.
>
> Given that this is exactly what has now happened in this case, in the Conseil's submission these recent activities clearly amount to bad faith.

As I have already mentioned, Order MO-1810 states that the remedy of limiting the appellant to one access request and/or appeal with the Conseil at any one time is intended "to deal with the broader issues of the appellant's conduct". Although Adjudicator Muzzi did not rule on the "bad faith" issue explicitly, she did consider the appellant's purpose in making the requests in finding that a frivolous or vexatious claim was justified. In particular, she considered the appellant's conduct in abandoning requests. She stated:

> His apparent willingness to abandon this part of the request, when he had so vehemently pursued access to these records in the first place, suggests that his main focus was the process itself and not the end result of obtaining the records.

This conduct and the multiplicity of requests submitted by the appellant were clearly important factors that led Adjudicator Muzzi to adopt the remedy she did. The Conseil's section 4(1)(b) argument in this regard has already been addressed and acted upon by Adjudicator Muzzi, and I see nothing in the arguments advanced by the Conseil to justify expanding on that ongoing remedy in the circumstances of this appeal. I therefore decline to impose any further remedy.

Request for a Purpose other than to Obtain Access

Finally, the Conseil submits that the request has been made for reasons other than access. According to the Conseil, the appellant's purpose was twofold: first, to "harass and embarrass the board and its effected senior staff and to cause damage to the institution and the people in it", and second, to pursue his aims in litigation with the Conseil. The Conseil States:

> … it is noteworthy that materials obtained in numerous previous requests are now being incorporated directly into court material served on the Conseil by the appellant and his company. This also suggests that the purpose of these requests may well be to try to fuel the litigation between these parties. This impression is

> further enhanced by the significant increase in requests since the appellant's company commenced litigation against the Conseil.
>
> Access under [the *Act*] is ostensibly a right enjoyed by members of the public. But the exercise of that "right" must be interpreted in context of both the statute and the requester's relationship to the institution. It neither serves the objects nor the spirit of the statute to empower a requester with a vindictive interest in obtaining access – to advance a monetary and punitive claim against an institution, and to injure its financial and other interests. Rather, it allows [the *Act*] to be used as a tool to advance an unfair and expanded discovery process which would be unavailable to a litigant involved in a dispute with a private entity. None of the matters of openness or protection of privacy which are the underpinnings of the statute is served by situating such a "right" in this requester.

As already noted, in Order MO-1810, Adjudicator Muzzi imposed the remedy of limiting the appellant's active requests and appeals with the Conseil to one at a time for the precise purpose of addressing "the appellant's broader conduct". In the appeal before Adjudicator Muzzi, the Conseil had also argued that the appellant's purpose was "to harass the institution with which the appellant has a dispute", and she concluded that his purpose was "simply to engage in the *Act*'s process for its own sake, as a means to involve the Conseil in a continuing dispute." Again, in my view, the remedy in Order MO-1810 which the Adjudicator fashioned to deal with "broader conduct" deals appropriately with the Conseil's allegations concerning intended harassment. I see nothing in the circumstances of this appeal to justify imposing any further remedy on that basis.

The Conseil also suggests that the objective of obtaining information for use in litigation with the Conseil or to further the dispute between the appellant and the Conseil was not a legitimate exercise of the right of access.

This argument necessitates a discussion of whether access requests may be for some collateral purpose over and above an abstract desire to obtain information. Clearly, such purposes are permissible. Access to information legislation exists to ensure government accountability and to facilitate democracy (see *Dagg v. Canada* (Minister of Finance), [1997] 2 S.C.R. 403). This could lead to requests for information that would assist a journalist in writing an article or a student in writing an essay. The *Act* itself, by providing a right of access to one's own personal information (section 36(1)) and a right to request correction of inaccurate personal information (section 36(2)) indicates that requesting one's personal information to ensure its accuracy is a legitimate purpose. Similarly, requesters may also seek information to assist them in a dispute with the institution, or to publicize what they consider to be inappropriate or problematic decisions or processes undertaken by institutions.

To find that these reasons for making a request are "a purpose other than to obtain access" would contradict the fundamental principles underlying the *Act*, stated in section 1, that "information should be available to the public" and that individuals should have "a right of access to

information about themselves". In order to qualify as a "purpose other than to obtain access", in my view, the requester would need to have an improper objective above and beyond a collateral intention to use the information in some legitimate manner.

I dealt with a similar argument in Order M-906:

> In its submissions addressing this aspect of the matter, the City indicates (as noted above) that the appellant seeks access to assist him in taking action against it with respect to a number of land transactions. In the City's view, this means that the request was "for a purpose other than to obtain access". To support its position, the City relies on the appellant's complaints and litigation against it, as outlined above under "Pattern of Conduct that Amounts to an Abuse of the Right of Access". The City also refers to media reports that the appellant intends to "fight City Hall".
>
> In my view, the fact that once access is obtained, a requester intends to use the document for a particular purpose, for example, to substantiate a complaint against an institution, does not mean that the request is "for a purpose other than to obtain access" within the meaning of section 5.1(b) of the Regulation.
>
> As I noted in Order M-860:
>
> > ... if the appellant's purpose in making requests under the Act is to obtain information to assist him in subsequently filing a complaint against members of the Police, in my view this does not indicate that the request was for a purpose other than to obtain access; rather, the purpose would be to obtain access **and** use the information in connection with a complaint.
>
> …
>
> Moreover, in my view, to find that a request is "for a purpose other than to obtain access" and thus "frivolous or vexatious" on the basis that the requester may use the information to oppose actions taken by an institution would be completely contrary to the spirit of the Act, which exists in part as an accountability mechanism in relation to government organizations.

As regards the "expanded discovery" argument, I note that records protected by litigation privilege are subject to the solicitor-client privilege exemption at section 12. In addition, section 51 expressly addresses the relationship between the *Act* and the litigation process. This section states:

> (1) This Act does not impose any limitation on the information otherwise available by law to a party to litigation.

> (2) This Act does not affect the power of a court or a tribunal to compel a witness to testify or compel the production of a document.

The Legislature clearly considered the relationship between the *Act* and the litigation process, and could have chosen to go beyond the section 12 exemption to limit the application of the *Act* where the requester is engaged in litigation with an institution. It did not do so. In my view, the Conseil's argument on this point is entirely without merit.

Senior Adjudicator David Goodis rejected a similar argument in Order PO-1688. In so doing, he provided a helpful summary of the jurisprudence on this issue:

> The application of section 64(1) [the equivalent of section 51(1) of the *Act* in the provincial *Freedom of Information and Protection of Privacy Act*] was cogently summarized by former Commissioner Sidney B. Linden in Order 48, where he made the following points:
>
> > ... This section makes no reference to the rules of court and, in my view, the existence of codified rules which govern the production of documents in other contexts does not necessarily imply that a different method of obtaining documents under the [provincial Freedom of Information and Protection of Privacy Act] is unfair ... Had the legislators intended the Act to exempt all records held by government institutions whenever they are involved as a party in a civil action, they could have done so through use of specific wording to that effect. …
>
> …
>
> In Doe v. Metropolitan Toronto (Municipality) Commissioners of Police (June 3, 1997), Toronto Doc. 21670/87Q (Ont. Gen. Div.), Mr. Justice Lane stated the following with respect to the relationship between the civil discovery process and the access to information process under the Act's municipal counterpart, in the context of a motion to clarify an earlier order he had made granting a publication ban:
>
> > The order which I made on October 18, 1996 herein was not intended to interfere in any way with the operation of the Municipal Freedom of Information and Protection of Privacy Act legislation, nor ban the publication of the contents of police files required to be produced under that Act. … In my view, there is no inherent conflict between the Act and the provisions of the Rules [of Civil Procedure] as to maintaining confidentiality of disclosures made during discovery. The Act contains certain

> exemptions relating to litigation. It may be that much information given on discovery (and confidential in that process) would nevertheless be available to anyone applying under the Act; if so, then so be it; the Rules of Civil Procedure do not purport to bar publication or use of information obtained otherwise than on discovery, even though the two classes of information may overlap, or even be precisely the same.
>
> …

Reinforced by the findings in Orders 49 and P-1688, as well as the reasons of Justice Lane in the *Doe* case, I find that any intention on the part of the appellant to use the requested information in furtherance of his dispute or his litigation with the Conseil is not a basis for me to find that there is a "purpose other than to obtain access".

In summary, in the circumstances, I am not satisfied that the request is "frivolous or vexatious", or alternatively, to the extent that it may have been part of a "frivolous or vexatious" pattern, the remedy already imposed by Adjudicator Muzzi is sufficient.

ARE THE RECORDS EXCLUDED FROM THE DEFINITION OF "RECORD" BY SECTION 1 OF REGULATION 823?

In their revised decision letter in response to the appellant's request, the Conseil states:

> [W]e firmly believe that, pursuant to article 1. of Regulation 823 pertaining to the *Municipal Freedom of Information and Protection of Privacy Act*, the information requested does not constitute a record as such.

The term "record" is defined in section 2(1) as follows:

> "record" means any record of information however recorded, whether in printed form, on film, by electronic means or otherwise, and includes,
>
> (a) correspondence, a memorandum, a book, a plan, a map, a drawing, a diagram, a pictorial or graphic work, a photograph, a film, a microfilm, a sound recording, a videotape, a machine readable record, any other documentary material, regardless of physical form or characteristics, and any copy thereof, and
>
> (b) subject to the regulations, *any record that is capable of being produced from a machine readable record under the control of an institution by means of computer hardware and software or any other information storage equipment*

> *and technical expertise normally used by the institution* [emphasis added].

Section 1 of Regulation 823, made under the *Act*, reads:

> A record capable of being produced from machine readable records is not included in the definition of "record" for the purpose of the Act if the process of producing it would unreasonably interfere with the operations of an institution.

Describing first how the requested records are capable of being produced from machine readable records the Conseil submits:

> First, we could only provide the backups of all e-mails (as well as the ones erased or stored in the computer archives) for the period from August 31, 2002 to February 16, 2003 by producing them from machine readable records. We no longer have the yearly backups dating before August 2002.
>
> To provide the backups of e-mails for the period from August 31, 2002 to February 16, 2003, we would have to acquire and program a server so that it can process the restoration of the backups of e-mails. Two additional computers would be needed: one to do the transfer of the data and the other to verify all the e-mails for the requested documents and to generate a list of the requested e-mails. This task would require a technician to do the programming of the server, the recovery of the backups, which involves a few technical operations to generate the list of the requested files. These programming, searching and recovering operations would have to be done 28 times (corresponding to the daily backups for the last four weeks = 20 + 7 for the monthly backups for the last 7 months + 1 for the annual last backup) for the 6 users of the e-mail system and their assistants.
>
> To initiate this restoration, we would have to place the cartridges and begin the recovery of one backup at a time. The next step would be to reproduce the requested files into a computer which overlaps our network and a small network that would also have to be created. Then, the small network would have to be disconnected from the [Conseil's] network and the information would have to be loaded on to the server that would have been programmed to receive the information.
>
> For each backup to be recovered, another computer would have to be used to open on an individual basis each electronic mailbox of [the six named individuals] and their assistants and then initiate an advanced search. This would require some configuration. Afterwards, the next step would be to print each e-mail found containing the [appellant's family name].

The Conseil then explained the basis on which the process of producing the records at issue would unreasonably interfere with the operations of the Conseil. The Conseil submits:

> To provide the requested records would require a great deal of work from a small school board as ours and would constitute a burden considering the few staff we have. The Technology and Information Services is already under staffed and is having difficulty to meet with the numerous demands of our 36 schools and administrative offices scattered all over in the Central, Southern and Western regions of Ontario.
>
> If we were to hire a technician from an external firm to undertake this task, they would charge us approximately $1,000 per day which is their usual rate.
>
> We would also have to acquire a server and two computers to do the job. All our servers and computers are in full use and not available to undertake such a task.
>
> Only one recovery of backups at a time could be done and the technician would have to wait until it is completely finished to undertake another recovery of backups. The extent of the operation would only allow us to recover two to three backups per day and would require some time until completion. This operation would also mobilize the time of a technician on a continuous basis, which our Board can ill afford.

With respect to this issue, the appellant submits generally that the "exact same issue was addressed in MA-030108, MO-1726, by Adjudicator [Sherry] Liang which determined that e-mail records are proper releasable records under the *Act*."

On reply, the Conseil submits:

> [The Conseil] does not contest that e-mail correspondence constitutes "records" **as such** under the *Act*. Among the points made by [the Conseil] in its submissions of August 31, 2004 in response to [this issue] is that the process requires to produce this record excludes it from the definition of "records" because it would "interfere unreasonably with the operations of the institution."

As noted earlier in my discussion of whether the request is frivolous or vexatious because it would interfere with the operations of the institution, the Conseil refers to the fee provisions of the *Act*, and proposes to acquire additional computer equipment and to use "a technician" to process the requests. In the "frivolous or vexatious" discussion, I was not satisfied that the Conseil had established that the request "would interfere with the operations of the institution". I have reached a similar conclusion here.

In its submissions on this particular point, the Conseil provides even more detail about how it would handle the request, which I have reproduced above. As regards the steps outlined by the

Conseil, I again note that sections 6(6) and 6.1(4) of Regulation 823 both permit an institution to charge a fee for "[t]he costs, including computer costs, that the institution incurs in locating, retrieving, processing and copying … if those costs are specified in an invoice that the institution has received." This charge can be levied in both general access requests (section 6(6)) and requests for one's own personal information (section 6.1(4)). Similar to my finding on the question of whether the request was part of a pattern of conduct that "would interfere with the operations" of the Conseil, I reject the argument that producing the requested information "would unreasonably interfere with the operations of the institution" because, in my view, the cost recovery mechanisms provided by the *Act* would permit the Conseil to mitigate or avoid any such interruption.

I find that the responsive information constitutes "records" for the purposes of the *Act*.

SHOULD THE FEE ESTIMATE BE UPHELD?

The Conseil's fee estimate appears to be an alternative approach to be applied in the event that its primary arguments, that the request is frivolous or vexatious, and that the requested information does not constitute "records" under the *Act*, do not succeed.

To deal with that eventuality, the Conseil's amended decision letter goes on to indicate that the cost for providing records responsive to a portion of the request, specifically, the list of all e-mails containing the appellant's family name generated by the software from each search, is estimated at $8,100. The Conseil further states that it would require a deposit of $4,050 before it would undertake such work. With respect to the remaining portion of the request the Conseil states:

> Since we do not know the number of pages where the term ["appellant's family name"] appears, nor if the requested e-mails contained personal information, we would only be able to provide you with a cost estimate of the printing and severing of the confidential information, if need be, once the list of all the e-mails containing [the appellant's family name] is generated.

In other words, the Conseil has provided an $8,100 estimate for providing a list of e-mails, and no estimate at all for what must surely be the bulk of the request, that is, the e-mails themselves. In my view, this provides a sufficient basis for concluding that the Conseil's fee estimate is inadequate. The purpose of a fee estimate is to give the requester sufficient information to make an informed decision on whether or not to pay the fee and pursue access [Orders P-81, MO-1367, MO-1479, MO-1614, MO-1699].

There are further reasons for finding the Conseil's decision inadequate. As noted, in the circumstances of this appeal, the Conseil's fee decision could only come into effect where the request is not frivolous or vexatious and the records are subject to the *Act*. In that situation, section 19 requires the Conseil to indicate whether access will be given, and section 22(1) requires the Conseil to identify which exemptions it claims, and why they apply. This would be

a final access decision. The Conseil's decision here does not constitute an adequate final access decision because it does not indicate which exemptions would be claimed, which information would be exempt, and on what basis.

Alternatively, since the fee is over $100, the Conseil could have issued an interim access decision and fee estimate, as contemplated in Order 81 and many subsequent orders. An interim access decision is based on a review of a representative sample of the requested records and/or the advice of an individual who is familiar with the type and content of the records. An interim access decision must be accompanied by a fee estimate and must contain the following elements:

- a description of the records;
- an indication of what exemptions or other provisions the institution might rely on to refuse access;
- an estimate of the extent to which access is likely to be granted;
- name and position of the institution decision-maker;
- a statement that the decision may be appealed; and
- a statement that the requester may ask the institution to waive all or part of the fee.

[Orders 81, MO-1479, MO-1614]

It appears that the Conseil may have intended its decision to be an interim access decision. The Conseil states that it did not base the calculation of its fee on the actual work required to release the requested record nor did it base its decision on a representative sample of the records but did the following:

> [T]he fee estimate was calculated with the help of the Superintendent of Finance who has sought the advice of her Co-ordinator of Technology and Information Services. This person is responsible for the whole computer system of the Board and has been with the Board since its inception in 1998. He supervised the installation of the whole computer system within the two administrative offices of our Board and its 36 schools and was in charge of the update and improvement of the system over all those years. Knowing very well how the system and the backup of e-mails work, he is the best person to give us advice on how the requested records can be provided.

In this case, the Conseil's decision does not constitute an adequate interim access decision because it does not indicate which exemptions are likely to be claimed, nor does it estimate the extent to which access is likely to be granted.

In addition, the Conseil's decision fails to indicate whether or not the records contain the requester's own personal information, a distinction that has an important impact on the applicable fee structure. A perusal of the difference between section 6 of Regulation 823 (regarding general access requests) and section 6.1 (regarding requests for one's own personal information) indicates that charges for manual search time and preparing a record for disclosure

can only be levied in general access requests. Significantly, the Conseil states in its representations that it "is not in a position to confirm" whether the records contain the appellant's personal information.

In this case, the Conseil's representations indicate the possibility of charges for severing the records in the event that they contain the personal information of other individuals, which is an aspect of "preparing the records for disclosure". In addition, the Conseil describes a $2,100 component of its estimate as "developing a computer program or other method of producing" from a machine readable record, but it is evident from Conseil's description of "programming, searching and recovering" operations that not all of the time would be spent developing a computer program and much of it would be search time. Although developing a computer program may be the subject of fees in a request for one's own personal information, search time cannot be charged in such a request.

I find that, whether intended as an interim or final decision, the Conseil's decision is inadequate because it:

- fails to provide a fee estimate for a significant portion of the request;
- fails to indicate the extent to which access would be granted, or likely be granted, upon payment of the fee, and whether exemptions would be claimed for all or part of the responsive information, and if so, on what basis; and
- fails to indicate whether the requested information contains the requester's personal information or whether it relates solely to his business and therefore does not qualify as personal information.

Given these omissions, I am not in a position to determine whether the fee estimate should be upheld, since it relates only to part of the request, and I do not even know whether I am applying section 6 or section 6.1 of Regulation 823, a decision that turns on the question of whether the records contain the appellant's personal information.

Given that the decision and the fee estimate are inadequate, I will order the Conseil to issue a new decision in either final or interim form, and a new fee estimate, in keeping with the requirements outlined above. Under the circumstances, the Conseil may wish to consider an interim access decision and fee estimate.

ORDER:

1. I order the institution to issue a final or interim access decision and fee estimate to the appellant regarding access to the records under the *Act*, consistent with the findings in this order in relation to "frivolous or vexatious" and section 1 of Regulation 823, and consistent with the requirements for access decisions and fee estimates outlined in this

order and in sections 26, 28, 29 and 57 of the *Act* and in sections 6, 6.1 and 7 of Regulation 823, without recourse to a time extension, treating the date of this order as the date of the request.

2. To verify compliance with the provisions of this Order, I order the institution to provide me with a copy of the decision letter referred to in Provision 1 when it is sent to the appellant. This should be forwarded to my attention, c/o Information and Privacy Commissioner/Ontario, 2 Bloor Street East, Suite 1400, Toronto, Ontario, M4W 1A8.

Original Signed by: May 6, 2005
John Higgins
Senior Adjudicator