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

# ORDER PO-2883

## Appeal PA08-186

## Ministry of Education

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## BACKGROUND:

In 2002, the Education Equality Task Force was struck to review the province's education funding formula and to make recommendations on ways to improve the funding of Ontario's students and schools. One of the key issues addressed in the task force's report was the deferred maintenance of schools. The Ministry of Education (the Ministry) also worked concurrently with individual school boards to assess school renewal needs through conditions inspections of all schools in Ontario, using a consulting company and third party building inspectors. The data obtained from the inspections of approximately 5,000 schools in the province was entered into the consulting company's database. Based on that information, a preliminary list of schools designated as Prohibitive to Repair (PTR) was produced. The list of PTR schools was finalized later, after individual school boards were given an opportunity to dispute the PTR status and/or identify other schools considered to be PTR.

In February 2005, the Ministry announced the Good Places to Learn (GPL) initiative which was intended to provide funds for repairs, additions and new school construction. There was a PTR component to the initiative which was intended to address renovation and new school construction for certain facilities. In order to access PTR funding, school boards were required to apply to the Ministry and submit a business case to address the possible replacement of schools designated as PTR.

## NATURE OF THE APPEAL:

The Ministry received a detailed multi-part request from an individual under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information related to the relocation of her daughters' school (the School). The requester expressed interest in obtaining access to "any and all relevant and supporting information, communications, and documentation in regard to" relocation, repair, renovation, funding, and the School's PTR designation. She also specifically sought communications between the Ministry and the local French public school board (the Board) on these issues, as well as outside consultants, the local English language public board and other named entities. The requester provided further elaboration of the information of specific interest to her and to the association of concerned parents on whose behalf she submitted the request.

The Ministry issued an interim decision with a fee estimate of $5,380.00, which included a charge of $3000.00 to obtain a copy of the original inspection report from the consulting company named in the request. The Ministry claimed a time extension of 30 days to process the request and also advised the requester that if she narrowed the scope of her request, the Ministry would issue a revised fee estimate. The Ministry requested a 50% deposit to process the request.

The requester submitted a fee waiver request and also indicated that she would be satisfied by receiving the specified consulting company's inspection summary, as long as it contained certain information, along with a copy of the Board's application to the Ministry regarding the School's PTR designation. The Ministry responded by reducing the charges for search time by 50%, resulting in a revised fee estimate of $4255.00. The Ministry once again requested a 50% deposit to proceed with processing the request. The Ministry advised the requester that it would provide

her with a document that summarized the five year renewal costs for the school at no cost. However, the Ministry stated that since this summary likely did not contain enough detail for the requester's purposes, the cost of retrieving the full inspection report was unchanged.

The following month, before the 30 day appeal period had elapsed, the Ministry issued another decision which purported to close the request file. The Ministry enclosed records that it claimed responded to the requester's "narrowed request," and advised that if she still wished to receive records responding to the "original request, a new file would be opened upon receipt of the fee deposit."

The requester (now the appellant) appealed the Ministry's decision to this office, disputing the closing of the appeal file. A mediator was appointed to explore resolution of the issues, but a mediated resolution was not possible, and the appeal was transferred to the adjudication stage, where it was assigned to me to conduct an inquiry. I sent a Notice of Inquiry outlining the facts and issues, to the Ministry initially, seeking representations. Although the only issue formally identified at the close of mediation was the Ministry's fee estimate, I sought representations from the Ministry regarding the scope of the request, its search, the adequacy of its interim access decisions and fee waiver based on my review of the file.

After reviewing the representations submitted by the Ministry, I asked staff from this office to contact the Ministry to seek clarification regarding two attachments: a 75-page "Portfolio Condition Assessment regarding the School; and a six-page "Event Listing [*event* meaning specific repair to be done] by Descending Event Priority." These records were not contained in the appeal file and it was not clear if they had been identified previously during mediation of the appeal and/or if they had been disclosed to the appellant. In response, the Ministry stated that the records had been identified at mediation, but it maintained that the appellant had not wanted them, as she was interested in more "historical" data. These records show a "date printed" that post-dates the appellant's request, but the information in the records is drawn from the consultants' database that is the subject matter of the request. The Ministry explained that the "Portfolio Condition Assessment" is the current version of the historical, or original, inspection report sought by the appellant. These records were then disclosed to the appellant in their entirety by the Ministry, and at no cost.

I subsequently sought the appellant's representations on the issues. The appellant provided extensive written submissions. Upon review of the appellant's representations, I decided that it was necessary to seek reply representations from the Ministry and did so, receiving representations in return.

## DISCUSSION:

The representations provided by the appellant and the Ministry in this appeal are lengthy and extremely detailed. For reasons of economy, these are reproduced in summary fashion in the body of this decision although I have carefully considered them in their entirety.

The appellant's representations contain a great deal of argument and commentary that is directed, in my view, at the Board's decision respecting her daughters' school. Under the *Act*, my

authority in this appeal is limited to reviewing the decisions made by the Ministry as regards access to the information requested by the appellant, including the fee estimate and fee waiver decisions. I have no jurisdiction to review any decisions made or actions taken by the Ministry or the local Board in relation to the School's PTR designation and/or relocation, and I will not be reviewing or commenting upon them in this order.

## COMMUNICATIONS BETWEEN PARTIES AT REQUEST STAGE

The following list sets out in detail the communications between the Ministry and the appellant during the request stage, an understanding of which was helpful to me in reviewing the Ministry's interim and fee decisions:

1. **May 7, 2008**: the Ministry responded to the appellant's April 25, 2008 request by providing a fee estimate of $5380.00, representing 75 hours of search time at $30.00/hour ($2250.00), photocopying of 650 pages ($130.00), and $3000.00 for obtaining the original inspection report. No further itemization or description of the responsive records identified was provided. The Ministry requested payment of 50% of the estimate, or $2690.00, by June 7, 2008 or the request will be considered abandoned. The Ministry mentioned that if the request is narrowed, the fee estimate would be adjusted accordingly, and advised that a request for a fee waiver may be made. The Ministry also claimed a time extension of 30 days under section "27(1)(a or b)." The appellant is advised that she has "a right to appeal any part of [her] access request" to this office within 30 days of the date of the letter.

2. **May 26, 2008**: the appellant submitted a fee waiver request to the Ministry on the grounds of "financial hardship" and "public health or safety." The appellant advised that if a certain record is provided in advance of the appeal date and "if it is detailed and provides enough information, perhaps we will be able to narrow our request."

3. **May 29, 2008**: the Ministry provided a revised fee estimate to the appellant, stating:

> I am writing in response to your request for a fee waiver received on May 26, 2008. After reviewing your representations on why the fee should be waived, a decision has been made to reduce the fee charged for search time by 50%.
>
> I have also considered your offer to narrow the scope of your request to … [the] "Summary of inspection… if it is detailed and provides enough information." I am prepared to provide to you, at no cost, the summary of the 5-Year School Renewal Costs for [the School] as assessed on December 9, 2003. However, I understand from part 2(a) of your access request as well as conversations between you and staff … that this summary … does not provide

> the level of detail you are requesting. The cost of retrieving this detailed historical data from [the consulting company], therefore, remains the same.

The Ministry's revised fee estimate accounted by 37.5 hours of search time instead of 75 hours, reducing the overall estimate to $4255.00. The Ministry advised the appellant that if a 50% fee deposit was not received by June 29, 2008, the Ministry would consider the request abandoned and would close the file. The Ministry again advised the requester of her right to appeal the decision to this office within 30 days. No further explanation or breakdown of the fee estimate was provided nor did the Ministry provide any other response specific to the fee waiver request.

4. **June 6, June 23 and June 24, 2008**: the appellant contacted the Ministry seeking clarification of the May 29, 2008 revised fee estimate and responsive records, as well as the possible narrowing of the request. In her June 6th letter, the appellant writes, "This summary has a direct effect on the situation. It may in fact result in the overall request being narrowed or becoming unnecessary. But I cannot make that decision until I receive the Summary." The appellant also requested a copy of the Board's application to the Ministry regarding the PTR designation. Finally, the appellant stated: "I also confirm that our deadline was extended to June 29th (from June 7th) because of our ongoing communications." The second contact on June 23 resulted from there being no response from the Ministry to her June 6th letter. The appellant noted that "As our deadline is fast approaching, and time is of the essence… we would appreciate a telephone call or email as soon as possible." On June 24th, the appellant sent an email to another Ministry employee requesting a response, as there has not been a response from her main contact.

5. **June 25, 2008**: the Ministry wrote to the appellant, stating, "Further to your letter of June 6, 2008, we have narrowed your request to … [the summary and the Board's application to the Ministry]. The Ministry provided two severed one-page records at no charge and advised the appellant that her file had been closed. The Ministry advised: "If you still wish to receive records responding to your original request, a new file will be opened upon receipt of the fee deposit." The appellant was advised of her right to appeal the decision to this office within 30 days. The letter concluded with the statement, "This now closes your access request."

6. **June 26, 2008**: the appellant wrote to the Ministry insisting that she had not agreed to narrow her request, and reiterating her June 6th statement regarding review of the promised records prior to making that decision. She stated:

> I absolutely have NOT and will NOT narrow my request to these 2 useless … documents… I stated that I would NOT agree to narrow my … request without seeing the "Summary". … Please be advised that I am continuing my original … application of April 25th in its entirety. I also understand from your June 25th

> correspondence that my appeal deadline is now 30 days from June 25, in other words until July 25th. I also understand that we have the same amount of time to pay the original deposit quoted in order to receive the documents from our April 25th request.

7. **July 10, 2008**: the Ministry responded to the appellant's June 26th email stating, in part, that it had provided her with the June 25th decision letter and two records,

> with the understanding that these records would assist you in determining whether you would pay the fee to receive further documentation. Closing a file once records have been released and/or opening a new file number upon receipt of a late fee deposit is consistent with the Ministry's procedures for administering access requests. … You were advised of the fee associated with the request on May 7, 2008 and again on May 29, 2008. However, the Ministry has not received payment of the fee deposit to date. Upon receipt of the fee deposit, a new file will be opened immediately.

8. **July 22, 2008:** the appellant wrote to the Ministry, stating, in part:

> As clearly stated in my correspondence, I never intended to accept these documents in lieu of my complete April 25th request when I asked to see them. I stated that I *might* narrow my request. Immediately prior to sending these documents, … you telephoned to tell me you had good news and would be sending these documents. You did not discuss with me that my request would be narrowed. Your written reply narrows my request unilaterally. However, as I stated I was not at that time narrowing my request, and I expect to rely upon my original request of documents. … In any event, I have already appealed this matter. My position is that my file should remain open until this appeal is disposed of.

## PRELIMINARY ISSUES: SCOPE OF THE REQUEST/SEARCH FOR RESPONSIVE RECORDS

The Ministry commented in its representations that the request's scope and the adequacy of its search for responsive records had not been raised as issues prior to the adjudication stage. It is true that these issues were not listed for the parties in the mediator's report provided at the close of mediation. However, the extensive correspondence, email and facsimile communications exchanged between the parties during the initial stages after the request's receipt by the Ministry suggested their relevance. Furthermore, in my view, these issues were raised implicitly not only by the information in this appeal file but also, in part, because the Ministry's decision letters did not provide a clear enough picture of what steps were taken by the Ministry to search for and locate responsive records. It is also unclear from the Ministry's interim decisions and fee estimates what records had actually been identified through their searches. Although the Ministry's searches did not result in final access decisions, but only interims decisions that

cannot be reviewed by this office for their adequacy, I concluded that clarification regarding the process of identifying responsive records for the purpose of preparing the fee estimates would be helpful, and so I requested evidence from the Ministry using this office's search issue framework.

Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This provision requires a requester to "provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record [section 24(1)(b)]." Section 24(2) requires the institution to assist the requester in "reformulating" the request if it does not adequately describe the records sought.

It is a well-settled principle that institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Ambiguity in the request should be resolved in the requester's favour [Orders P-134, P-880]. To be considered responsive to the request, records must "reasonably relate" to the request [Order P-880].

The adequacy of an institution's search for responsive records is also addressed under section 24. Previous orders of this office have established that when a requester claims that additional records exist beyond those identified by an institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 24 [Orders P-85, P-221, PO-1954-I]. As suggested above, however, the issue of search was canvassed for clarification purposes only as the Ministry has not actually conducted all of the searches necessary to respond fully to the request.

**Representations and Comments of the Parties**

The Ministry's initial acknowledgement of the request identified the following categories of records from the request itself, summarizing them as: "Information, Communications, & Documentation; PTR Designation; Funding; Inspection & Engineering Reports, Photographs, etc.; Reporting to Ministry (milestones & approvals); and [the Replacement School] Site." The Ministry also acknowledged the requester's interest in "information, communications, and documentation" exchanged between the Ministry and a specified consulting company (or any other company used by the Ministry) for the purpose of making its determination on the PTR designation of the School.

During the inquiry, and in response to my request for submissions on the issue, the Ministry stated that the scope of the appellant's request was never really in question. According to the Ministry, it was clear from the appellant's detailed written request and extensive and regular contact with the Ministry that she was interested in "any and all records that the Ministry might hold pertaining to the School and its PTR designation." The Ministry states that staff also understood that the appellant "had a particular interest in obtaining a copy of the original inspection report." The Ministry also notes that it sent the "exact text of what was sent to the program area" for its search to the appellant in the acknowledgement letter, and the appellant did not advise that anything was missing or misstated.

The Ministry submits that when the appellant's request was received, the Good Places to Learn (GPL) Policy Team Lead was also leading the Ministry's PTR initiative. The Team Lead had spoken with the appellant directly before the request was submitted, and therefore had a good sense of what records she was seeking. According to the Ministry, this awareness was important because that individual was located within the Capital Programs Branch where the responsive records would be located and the awareness would assist in focusing the search efforts. The Ministry notes that the Capital Programs Branch had never received a request for records similar to that submitted by the appellant. Further, the Director of the Capital Programs Branch states in her affidavit that:

> This was a very detailed and comprehensive request, spanning a 6 year period – from 2002 when the school condition inspection process began to April 25, 2008 when the FOI request was received.

With reference to the 650 pages identified in the fee estimates, the Ministry describes these as memoranda and documents pertaining to the GPL initiative. The Ministry states that these documents are all referable to the parts of the appellant's request related to communication between the Ministry and the Board on the methodology, decision criteria and process used for renewal funding. Based on conversations with the appellant, as well as the wording of the nine-page request itself, the Ministry maintains that these records are responsive to the request but acknowledges that the appellant appears to already be in possession of them.

The appellant concedes that she asked for many records and sent a very detailed request, but maintains that "upon making my request, I did not have, and could not have been expected to have, any knowledge of how many documents such a request would entail until receiving the estimate of fees." Having reviewed the Ministry's representations, and the reference to the Ministry memoranda, the appellant asserts that she "only requested and continue[s] to request specific communications between the parties … [not] … generalized memoranda or communications to which I did not refer in my request."

According to the appellant, some of the records identified by the Ministry as responsive (as above) are not responsive. The appellant also submits that she had also expressed an interest in "state-of-repair, engineering, maintenance, health and safety, as well as hazardous waste including asbestos" related to the School and to its future site but had not received any response from the Ministry specific to those points.

**Findings**

Based on my review of the extensive correspondence between the appellant and the Ministry, and the parties' submissions during this inquiry, I conclude that the Ministry has properly construed the appellant's request as for "all records related to the School's designation as a PTR school as well as the purchase of the other school board's facility for use as the new School site" from 2002 when the process started to the date of the appellant's request. This would include records in the Ministry's custody or under its control that relate to communications regarding the School with the local French public board (CEPEO,) the English public board from which the new facility was purchased, the CFB Base Commander, Department of National Defence, the

Treasury Board of Canada and the consulting company that prepared the report evidencing the School's PTR status.

Based on the wording of the request, I am also satisfied that the memoranda and documents pertaining to the GPL initiative are responsive records notwithstanding that the appellant may have already had them in her possession. Although the appellant argues that responsive records are ones that directly relate to the School, the Board and the Ministry, and not generalized Ministry memos or communications with all Ontario school boards, the request does specifically refer to "and supporting documentation" several times, namely in the introductory sections to parts 1, 2 and 3. Giving a liberal interpretation to the request, as the Ministry was required to do, could reasonably, in my view, lead to the inclusion of these memoranda and documents.

The appellant expressed concern about asbestos, mould and other toxicity issues in the School, but I accept the Ministry's submission that the inspection conducted for the purpose of determining PTR status was "non-invasive," and that it did not include inspections geared toward such issues. Accordingly, I find that records of inspections for these hazards, even if they exist, would fall outside the scope of the appellant's request.

It must be acknowledged, in my view, that the extremely detailed nature of the request may have presented a challenge to the parties in terms of discussion. It also seems from the appellant's representations that further discussion or mediation of the issues in this appeal would have been desirable. However, this is not a task that can be accomplished through adjudication. At best, this order can confirm the scope of the request, as summarized above, and serve as the starting point for any future pursuit of the records sought by the appellant from the Ministry.

**ADEQUACY OF INTERIM ACCESS DECISIONS / FEE ESTIMATES AND FEE WAIVER**

In the Notice of Inquiry sent to the Ministry, I prefaced the fees section in the following manner:

> Before setting out the general principles applicable to fees and fee estimates, I am providing the Ministry with an outline of this office's approach to reviewing interim access decisions. On my review of this appeal file, it appears that some confusion has arisen between the parties as a consequence of the information provided to the appellant by way of the Ministry's interim decision(s), as well as by the Ministry's decision to close the appellant's request file in the particular circumstances of this appeal.

Further, and in relation to the Ministry's fee estimate that referred to 650 pages of records, I stated the following: "Other than portions of two records disclosed to the appellant, it appears from the Ministry's decision letter(s) that no other records responsive to the appellant's request have been identified by the Ministry." In this way, I sought clarification from the Ministry as to the nature of the identified and responsive records**.** I also asked the Ministry to provide representations on the closure of the appellant's appeal file in view of the appellant's assertion that the Ministry had done so unilaterally.

## ARE THE MINISTRY'S INTERIM ACCESS DECISIONS ADEQUATE?

The issue for me to determine is whether the Ministry's interim decisions comply with the requirements of the *Act* and this office for interim access decisions and fee estimates.

As outlined for the parties in the Notice of Inquiry documentations, the purpose of the interim access decision, fee estimate and deposit process is to provide the requester with sufficient information to make an informed decision as to whether or not to pay the fee and pursue access, while protecting the institution from expending undue time and resources on processing a request that may ultimately be abandoned [Order MO-1699].

Where a fee exceeds $100, an institution may choose to do all the work necessary to respond to the request at the outset. If so, it must issue a final access decision. Alternatively, the institution may choose not to do all of the work necessary to respond to the request, initially. In this case, it must issue an interim access decision, together with a fee estimate [Order MO-1699]. When the fee is estimated to be over $100, the institution is entitled to require the requester to pay a deposit equal to 50% of the estimate before it takes any further steps to respond to the request [section 7 of Regulation 460].

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-1614 and MO-2020]

### Representations

Regarding the June 25, 2008 letter she received from the Ministry, the appellant expresses concern about the Ministry's "decision to unilaterally close" her appeal without having sent the requested documents or any other record containing sufficient detail to satisfy her concerns. The appellant also notes that she did not have a breakdown of the fees for the estimate until receiving the Ministry's representations during the inquiry.

The Ministry advises that it closed the request file on June 25, 2008 with the letter granting access to two severed records because the fee deposit was not paid. The Ministry submits that the appellant clearly indicated that she did not want to pay the fee deposit "that would allow the

Ministry to assemble the records she had requested," but that it has always been "willing to undertake this work upon payment of the fee deposit." The Ministry submits that it closed the appeal file only after discussing fee and fee waiver options with the appellant and after making it clear that the fee could be reduced if she were to narrow the scope of her request. According to the Ministry, when the appellant declined to narrow the request,

> the Ministry provided her with the records it could free of charge, with the offer that a new request would be opened upon receipt of the fee deposit…
>
> The Ministry felt that after many weeks of conversations with the appellant and having already reduced the fee estimate by over $1,000, an impasse had been reached, leaving the appellant with the option of appeal, which she took.

As noted earlier, the appellant has acknowledged that her detailed request sought many records but she submits also that "upon making my request, I did not have, and could not have been expected to have, any knowledge of how many documents such a request would entail until receiving the estimate of fees." The appellant then argues that the fee estimate was inadequate for this purpose. She refers to Order PO-2139, also mentioned by the Ministry, in order to illustrate what she contends are shortcomings in the Ministry's fee estimate. The appellant notes that in Order PO-2139, the Ministry of Transportation's fee estimate letter provided:

> a great amount of detail regarding the type and content of records. The Ministry advised where the documents were stored; whether they were hard or electronic format; whether they required certain staff versus computer programmers; whether they were archival or current; and in which cabinets or locations they would be found. With regard to each area of search, there is also a count of how many pages will need to be searched.
>
> In contrast, the Ministry's original … response with an estimate of fees simply refers to "search time", "reproduction/photocopying" and "other – the cost to obtain original inspection report…" The Ministry's [later] fee reduction … gave no further details or breakdowns either. On Appeal, the Ministry's Fee Administration Form still only denotes an estimate of time allocated to the people who would be the search team for these documents. There is no further detail included and no mention of how many documents would need to be searched, except with regard to the Ministry Memoranda.
>
> Therefore, had the Ministry's original Fee Estimate (or reduction) included this Fee Administration Form as well as the level of detail evident in Order PO-2139, this would have been more helpful in not only clarifying and narrowing the request of the search, but also the reasonableness of the estimated fee. I would also note that the [historical inspection report] "breakdown" on appeal is merely an email not an invoice.

The Ministry submits that its "description of the records" was contained in the four-page summary of the appellant's request sent to the appellant with the initial April 25, 2008

acknowledgement letter, which assigned a Ministry FOI number. The Ministry states that although the interim decision letter of May 7, 2008 "did not reiterate the four page summary, reference was made to the FOI file number in the subject line, indicating that these were the records to which the fee estimate pertained."

**Analysis and Findings**

Having reviewed the representations provided by the parties, I find that the Ministry has failed to satisfy the requisite elements of a proper interim decision in both of its interim decisions to the appellant. In my view, the interim decisions provided to the appellant by the Ministry represent lost opportunities: for the appellant to consider the pursuit of the full scope of her access request and payment of the fees with a good sense of what records would be provided; and for the Ministry to prepare a fulsome response to this detailed and complex request.

In Order M-1123, former Assistant Commissioner Tom Mitchinson had the following to say about the rationale of the fee estimate process:

> The process outlined in Order 81 (and subsequently reviewed and confirmed in Order M-555) takes into account the interests and obligations of all parties. It allows the institution to determine an estimated fee from a position of knowledge; it gives the requester a basis for assessing the fee calculation, and also a preliminary indication of whether or not access will be granted; and it puts the Commissioner in a position to review the fee estimate should the requester appeal the institution's decision.

The Ministry's May 7, 2008 interim access decision should have had the effect of suspending the 30 day limit described in section 26 (Order 81). However, the Ministry also claimed a time extension under section 27(1), as it is permitted to do (PO-2634), but then took no further action in relation to the request (such as identifying a representative sample of the responsive records). Next, and in response to the request for a fee waiver, the Ministry wrote to the appellant on May 29 with a revised interim decision that did not specifically address the merits of the fee waiver, but reduced the search time portion of the estimate. The Ministry informed the appellant that she had until June 29 to submit the fee deposit or the appeal would be considered abandoned. The next step the Ministry took in writing, and which is before me for review, was the letter sent to the appellant on June 25, which purported to close her appeal file.

I am not satisfied by the Ministry's explanation that the appellant's file was closed because staff concluded that an impasse had been reached, and that the appellant should therefore be given "the option of appeal." In my view, the Ministry not only unilaterally closed this appeal file before they told the appellant they would, but did so in spite of her express written intentions and contacts to the contrary.

Moreover, I find that the interim access decision letters of May 7 and May 29, 2008 are both inadequate. Neither of these interim decisions provided the appellant "with sufficient information to make an informed decision regarding payment of fees (Order 81)." Among other shortcomings, these interim decisions are inadequate because they are not identified as interim

decisions. Importantly, however, the Ministry did not provide a description of the responsive records identified to that point, nor is there an indication whether access would be granted or what exemptions may apply.

As suggested above, however, the Ministry's failure to describe responsive records, or even categories of records, with any particularly is the main problem with these interim decisions. The appellant's original request letter provides considerable detail about the type of records she was seeking. During this inquiry, the Ministry responded to my request to clarify the nature of the responsive records identified by indicating that "with regard to 'a description of the records,' [it] relied on its four page summary of the appellant' request." It is no answer, in my view, to simply rephrase or refer to the wording of a request in lieu of actually identifying or describing the records which are responsive to the request.

The Ministry also submitted during this inquiry that it had never received a request like the appellant's. In my view, therefore, this would have been a situation where expending the effort to identify a representative sample of responsive records would have been appropriate. In fact, the Ministry could have culled a representative sample during the appeal stage to provide some clarity to the appellant, but it did not. As for the 650 pages of Ministry memoranda and documents pertaining to the GPL initiative, given that these appear to be documents that the appellant either had already and/or which were publicly available online, I conclude that these records, as described by the Ministry only during the inquiry stage, do not either constitute a representative sample nor do they provide any useful information to the appellant.

In the circumstances, I agree with the appellant that more detail, as would likely have been offered by a representative sample of responsive records "would have been more helpful in not only clarifying and narrowing the request of the search, but also the reasonableness of the estimated fee." The effect of this deficiency in the interim decisions is that the appellant was not in a position to make an informed decision on whether to accept the fee estimate, pay it, and proceed with her request.

In addition, and as noted above, the Ministry provided no indication to the appellant of whether access would be granted to any records ultimately identified. The Ministry advised in its representations that it did not anticipate that it would be applying any exemptions to deny access. However, the Ministry was required to include a statement to this effect in the interim decisions.

In my view, given the Ministry's failure to provide an adequate description of the records available to respond to the appellant' request or provide her "with sufficient information to make an informed decision regarding the payment of fees," the appellant's unwillingness to comply with the Ministry's demand for payment of 50% of a fee estimate that amounted to thousands of dollars is hardly surprising.

In Order M-1123, former Assistant Commissioner Tom Mitchinson reviewed an institution's decision where it responded to a request by providing some records, and issuing a fee estimate to cover other possible responsive records not yet identified. The former Assistant Commissioner found that the institution did not provide an adequate interim access decision to accompany the fee estimate, stating:

> By not complying with Order 81, none of the benefits of the process identified in that order are present in this case…The appellant does not have the benefit of an interim access decision. Finally, the Commissioner's office has not been provided with the type of information required in order to assess the reasonableness of the fee estimate.

In the circumstances of that appeal, the former Assistant Commissioner disallowed the fee and ordered the institution to issue a final access decision to the appellant. In Order MO-1614 (upheld by the Divisional Court on judicial review: *Toronto (City) v. Humane Society of Canada*, [2004] O.J. No. 659), the former Assistant Commissioner considered a similar situation and concluded that the chosen remedy must be determined first by the facts and circumstances of a particular appeal and, second, must be crafted to balance the rights and expectations of appellants to a substantive decision under the *Act* with an institution's right to recover some of its costs for locating a large number of varied records responsive to an appellant's request. As in Order M-1123, the former Assistant Commissioner found that this office may disallow some or all of the fee and may also order an institution to issue a final access decision to the appellant [see also Orders MO-1980, MO-2020 and MO-2355].

I agree with the approach to inadequate interim decisions outlined in these orders and I will consider the appropriate remedy in the present appeal based on the principles enunciated therein. I will proceed by reviewing the quantum of the Ministry's fee estimates.

**FEE ESTIMATE**

This office has the power to review an institution's fee to determine whether it complies with the fee provisions in the *Act* and Regulation 460. In conducting this review, I may uphold the fee estimate or vary it.

Section 57(1) of the *Act* requires an institution to charge fees for requests under the *Act*. That section reads:

> 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.

More specific provisions regarding fees are found in section 6 of Regulation 460 under the *Act*. This section states:

> The following are the fees that shall be charged for the purposes of subsection 57(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 a 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.

In all cases, the institution must include a detailed breakdown of the fee, and a detailed statement as to how the fee was calculated [Order P-81, MO-1614].

**Representations**

The Ministry submits that the fee estimate for this request consisted of two parts: records held by the Ministry and the retrieval of an historical inspection report that had been input into the database in 2002-03." The Ministry indicates that "with regard to 'a description of the records' [in the former category, it] relied on its four page summary of the appellant' request."

According to the Ministry, the preparation of the Fee Administration Form was done by the GPL staff member familiar with the "type and contents of the records held both by the Ministry and in the named consulting company's database." The Ministry states that

> In order for the program area to complete a thorough search, the Policy Team Lead estimated that the records of all five staff members (and previous staff members), as outlined [previously], would need to be searched. These would include all e-mails and attachments, notes from meetings and conversations, files and correspondence logs.
>
> The Fee Administration Form reflects the estimated time it would have taken each of the five staff to search for the various types of records that would respond to

> the request. For example, with regard to "Search Time (Documents and Email)", the Policy Team Lead estimated that it would take her 25 hours of search time as the lead for the PTR program. Support staff and the ADM were likely to have less e-mail during the 6 year span of the request; therefore 5 hours were estimated in their respective cases.

The Ministry notes that after review of the appellant's fee waiver request, and further discussion with the GPL staff member who prepared the estimate, "it was agreed to cut the estimate for search time in half, thus reducing the fee by $1,125.00". The Ministry submits that the search for the records requested by the appellant was "estimated to be extensive but nonetheless the Ministry reduced the search time in half as this was the only portion of the fee that the Ministry had any discretion to reduce."

With reference to the 650 pages identified in the fee estimate, the Ministry describes these records as memoranda and documents pertaining to the Good Places to Learn (GPL) initiative. The Ministry states that these documents are all referable to the parts of the appellant's request related to communication between the Ministry and the Board on the methodology, decision criteria and process used for renewal funding. While defending the inclusion of these records in calculating the fee estimate, the Ministry observed that since the appellant "appears to have [them] already," it will rescind the $130.00 stated in the fee estimate for photocopying them. However, the Ministry adds that it did not include a charge for copying "any of the other documents, such as e-mail or meeting notes." What the "other documents, such as e-mail or meeting notes" consist of is not specified by the Ministry in its representations.

In response to the appellant's objection to the $3000.00 figure quoted for obtaining the historical inspection report from its consultant, the Ministry notes that the current report on the School's condition includes complete repair requirement details and is readily accessible without requiring the preparation of the report from the consulting company that owns the database. This is the report provided to this office as an attachment to the Ministry's representations, and which was subsequently provided to the appellant by the Ministry. The Ministry submits that the School's original inspection report has never been requested by, or provided to, the Ministry. The Ministry explains that

> … the [consultant's] database captures all data entered into it, including this report, and any updates from boards, and is used to produce reports at points in time when and as needed… The database does not warehouse historical documents and the Ministry never had a business need for the original inspection reports… The named consulting company, which owns the database and has the best understanding of how to use it, has prepared a detailed estimate of the cost it will incur to retrieve the original report.

The "detailed estimate of the cost" to retrieve the original, or historical, report was provided with the Ministry's representations in response to the following question in the Notice of Inquiry:

> Has the Ministry received an invoice for any other costs, including computer costs, for locating, retrieving, processing and copying the records? If so, what is the amount of the invoice? If so, please provide a copy.

The Ministry obliged by providing an email from the consulting company that had been prepared during the inquiry stage of the appeal. The document states, in part:

> … the following are the tasks required to restore the data:
>
> 1. Submit request to off-site company to bring the data tapes – requires 0.5 hr. + costs to bring the data in.
> 2. Update inventory/tracking tape library from the off-site tape – 2 hrs/tape (up to three tapes)
> 3. Locate DSB [District School Board] #59 database
> 4. Restore the data from the tape – 3 to 4 hrs (depends on the database size)
> 5. Request for server/hardware to setup old environment – 0.5 to 1 hr.
> 6. Environment setup – 3 hrs.
> 7. Generate … Reports – 1 hr.
> 8. Print/bind/PDF Reports – 1 hr.
> 9. Delete the database, clean the server – 0.5 hr.
> 10. Overall mgmt of all this process/communication – 1 to 2 hrs.
>
> So, the total number of hours goes from 12.5 hrs to 19 hrs (the average hourly rate is $175).

The appellant expresses concern about the fact that the fee breakdown statement (Fee Administration Form) was prepared by Ministry staff in May 2008, but was not provided to her until well into her appeal with this office. She refers to the requirement that the Ministry "include a detailed breakdown of the fee, and a detailed statement as to how the fee was calculated [Order 81, MO-1614]." The appellant also reiterates her comments about Order PO-2139 with respect to the lack of detail provided as to searches and the identification of responsive records in the Ministry's interim decisions. She points out that even the Fee Administration Form provided at the inquiry stage contains only "an estimate of time allocated to the people who would be the search team for these documents" without further detail "and no mention of how many documents would need to be searched, except with regard to the Ministry Memoranda."

In reference to the search and photocopying component of the fee estimates, the appellant acknowledges the Ministry's removal of the memoranda and documents from the fee estimate and states that:

> If any of the remaining search time relates to these Memoranda, this should also be removed. The fees that remain all relate to search (and preparation) time.

> Therefore, the detail in location and extent of documents should have been provided in order to determine the reasonableness of these fees, especially in light of the fact that a large portion is for search time. Reasonableness of search time is also an issue with regard to the PTR designation of [the School] because supposedly there were minimal discussions between the Ministry and [the local French Board], according to the Ministry, which will likely be reflected in equally minimal documentation.

Observing that the breakdown of charges for the consulting company's original inspection report was not requested from the company by the Ministry until the appeal (i.e., the adjudication) stage in March 2009, the appellant submits that the Ministry is, therefore, quoting costs that were not specified "in any invoice received by the Institution at the time the Fee Estimate was provided to me/the appellant" as required by the *Act*.

The appellant argues that the fee is excessive because, as a taxpayer, she and other parents "have already paid for these inspection reports" and the information collected in the consultant's database. Further, the appellant submits that the Ministry should have anticipated a future need to retrieve the data that substantiated the PTR designations and to do so without further cost. With specific reference to the consultant's hourly rate of $175, the appellant submits that she and other members of the public "should not be forced to pay high-priced specialty fees because the Ministry chose a high-end consulting company." The appellant refers to Order PO-2139 where computer programmers accessed "extensive archival databases and electronic files" but the fees attached to those actions were still charged at the "tariff rates" permitted by the regulation.

The appellant also argues that the number of hours charged by the consultant is excessive and provides examples of individual tasks that she contends are not recoverable under the *Act*.

The Ministry notes in reply that if the appellant had paid the fee deposit, staff would have taken careful note of the actual time spent and the amount of the invoice provided and the fee would have been adjusted accordingly.

**Analysis and Findings**

On my review of the evidence and the arguments of the parties regarding the components of its fee estimate, I am prepared to uphold the Ministry's fee estimate only in part. I make this finding based on the inadequacy of the Ministry's interim decisions and the insufficiency of evidence provided to me by the Ministry during this inquiry.

Respecting the search time component of the Ministry's fee estimate, beyond general claims as to the number of hours estimated to be required by each of the specific Ministry employees within the Capital Programs Branch for the activity, I find that the Ministry's submissions do not provide sufficient evidence or a description of the necessary searches to justify the search fee. As noted previously, there are no estimates as to the number of pages that could be responsive nor is there an adequate description of possibly responsive records or categories of records. Regarding the lack of an estimate of the possible volume of the records responsive to the request, I note that while the request may span six years, it addresses the PTR designation of a single

school. There was no representative sampling of the records conducted which, given the Ministry's indication that it had never received a request like the appellant's, would have been extremely useful in the circumstances. In addition, the Ministry has not provided a satisfactory explanation regarding the reduction of the search component of the fee estimate from 75 hours (the equivalent of two full-time employee weeks) to 37.5 hours (one full-time employee week), particularly in view of the Ministry's position taken on appeal, and as outlined below, that the appellant has not established the requirements for fee waiver.

For these reasons, I find that the Ministry has not provided sufficient evidence for me to conclude that the search component of the fee estimate was reasonable or that it was calculated in accordance with the *Act* and the Regulations. Further, and in conjunction with my finding that the Ministry failed to provide an adequate interim decision to the appellant, I will not allow the Ministry to charge the appellant any fee for search time.

During this inquiry, the Ministry rescinded the $130.00 component of the May 7 and May 29, 2008 fee estimates related to photocopying charges for the 650 pages of responsive records which may already be in the appellant's possession. In my view, therefore, since no "other documents" beyond the 650 pages have even been identified as responsive, the Ministry's submission that it did not include a charge for photocopying such "other documents" has little meaning. The Regulation prescribes photocopying charges on a per page basis. In this appeal, no responsive records have yet been identified nor has the Ministry estimated the number of pages identified beyond the general Ministry memoranda and two one-page records provided to the appellant with the June 25, 2008 letter. In these circumstances, and as part of the remedy related to the inadequacy of the Ministry's interim decisions, I will disallow any photocopying fees that may otherwise have been charged to the appellant by the Ministry upon identification and disclosure of responsive records.

Finally, I will review the disputed component of the fee estimates related to the Ministry's $3000.00 charge for the "cost to obtain original inspection report" from its consultant. To begin, I accept the Ministry's submission that the "current" report from 2005, a copy of which was provided to the appellant during this inquiry, provides a great deal of similar and relevant information to the appellant and her group at no charge. However, I also understand that the appellant remains keen to review the historical basis for the PTR designation of her daughters' school said to be contained in the original inspection report.

Section 6.6 of Regulation 460 allows an institution to charge fees for costs that the institution incurs in locating, retrieving, processing and copying the records if those costs are specified in an invoice that the institution has received. Some past orders of this office have found that an institution may not claim charges in an invoice for work that could be done by its own staff. Others have found that where a cost is not recoverable by an institution under the *Act*, any distinction based on the fact that an activity was done by an outside source and billed to the institution was not supportable. In other words, an institution may not recover costs through invoiced charges for activities which would be ineligible for cost recovery if performed internally by Ministry staff [Orders M-1090, P-1536 and MO-2471].

In Order MO-2471, I considered the recoverability of costs invoiced to the City of Guelph by a consultant for records related to a specified area quarry. In that appeal, I agreed with the appellant's submission that the City had failed to provide sufficient evidence to establish whether the consultant spent any of his time on work for which costs are recoverable under the *Act* and Regulations. I made this finding because the City had not provided an invoice at all, let alone a detailed breakdown of the tasks performed and the costs incurred by the consultant, who was actually a city employee under contract. In that appeal, I permitted the institution to levy a fee to the appellant only for certain activities carried out by the consultant that were chargeable under the *Act* and at the fee levels prescribed in the Regulation.

However, it must be noted that some orders have sought to distinguish these situations from ones similar to the present appeal where, in order to obtain a specific record sought by an appellant, an institution *must* use the resources, and information in the custody, of a third party [P-1606]. In my view, this latter point distinguishes the present appeal from the circumstances considered in Order PO-2139 where fees for access to databases and electronic files by the Ministry of Transportation's *own* computer programmers were charged at the "tariff rates" permitted by the *Act* and Regulation 460.

In Order PO-2214, Adjudicator Sherry Liang considered an interim decision and $2,760.00 fee estimate issued by the Public Guardian and Trustee (PGT) in response to a request under the *Act*. The fee estimate in that appeal was based on the steps identified by the PGT as necessary in order to locate, retrieve, process and copy the requested records, which included the consultant's estimate of the time required to process the request (five days) at the consultant's daily rate pursuant to a contract with the PGT ($552.00 per day). The PGT maintained that the consultant's cost was recoverable under the *Act* because it was required to pay the consultant pursuant to their contract; and the PGT "should not have to absorb those out-of-pocket costs…" Based on the evidence provided by the PGT, Adjudicator Liang made the following finding:

> Given the information before me, which I find cannot be seriously challenged by the appellant, I find that the fee estimate provided by the PGT is reasonable.
>
> First, it appears that there are approximately 1900 computer fields in the primary database of the PGT. Second, I accept that no current, comprehensive manual exists that would be responsive to the request, and that the information is stored in electronic format. The PGT has described in detail the steps required to locate, retrieve and process the information sought from its electronic records. It has also described in detail the method by which the consultant performed a search on a representative sample of the records.
>
> Paragraph 6 of section 6 of the Regulation permits the recovery of any costs incurred by an institution in locating, retrieving, processing and copying a record if those costs are specified in an invoice received by the institution. Prior orders have upheld the recovery of invoiced costs by an institution, provided that the activities for which the institution was invoiced would have been recoverable under the Act if performed directly by the institution's employees (see, for instance, Order M-1090). In the appeal before me, I am satisfied that the activities

> the consultant proposes to perform are covered by section 57(1), and are activities for which the PGT could recover costs if they were performed directly by its employees. Accordingly, it is entitled to recover the amount for which it will be invoiced by its consultant for those activities.
>
> As this appeal deals with an interim decision and a fee estimate, the search has not yet been performed. Therefore, an invoice does not yet exist, only an estimate of the eventual amount of that invoice by the consultant who will perform the search. Based on the PGT's representations, I find that this consultant is the person with the best ability and knowledge to perform the search, and that it was reasonable for the PGT to base its fee estimate on the consultant's assessment of his eventual invoice, as this is the amount that the PGT will have to pay …

I agree with this approach. In this appeal, I have accepted that the Ministry must use the services of the external consultant if it is to obtain a copy of the historical inspection report sought by the appellant. The Ministry has also provided me with a copy of an email received from the consulting company that contains an itemized list of activities said to be required for retrieving and producing the report. I acknowledge the appellant's argument that this document does not constitute an invoice. However, at this point, the Ministry could not have been expected to produce an invoice for work not yet performed by its consultant. I note that it would have been more helpful for the Ministry to have provided this document to the appellant at the time of the fee estimate in order to substantiate the $3000 estimated fee for the report, rather than a year later when sought by this office during the inquiry stage [see Order M-171]. Notwithstanding this point, in the circumstances, I find that this itemized list comprises a satisfactory estimate of the eventual amount the consultant would charge to the Ministry for the historical inspection report.

Accordingly, I am satisfied that the Ministry may recover for invoiced "costs, including computer costs, that [it] incurs in locating, retrieving, processing and copying the record" pursuant to section 6.6 of Regulation 460, but not costs for activities which would be ineligible for cost recovery if performed internally by Ministry staff. Under this approach, I find that there are several items in the consultant's emailed estimate that may not be charged through to the appellant in processing her access request. Specifically, I disallow the charges described under Items 1, 8 and 10 of the consultant's email of the projected cost to obtain the report. In my view, Items 1 and 10 are not permitted charges under the *Act* as these functions represent an institution's general responsibilities under the *Act* [Orders P-1536 and MO-1380]. I will not allow the component of the invoice related to "printing/binding/PDF Reports" as the appellant has indicated she would be willing to accept a diskette copy of the report which would obviate the need to carry out these activities.

Furthermore, although the email estimate refers to the total number of hours as ranging from 12.5 to 19, my calculation of the hours itemized therein (uncorrected for the disallowances noted above) provides a range of 12.5 to 15 hours. No explanation of this discrepancy was provided by the Ministry. Accordingly, I will start from the lower part of the range and subtract the number of hours disallowed for Items 1, 8 and 10. This results in an allowable charge of 10 hours for activities that are chargeable under the *Act* and Regulation. At the consultant's "average hourly rate" of $175.00, the projected cost estimate for obtaining the historical inspection report is

$1750.00 which I find to be reasonable and calculated in accordance with the *Act*. Accordingly, I will allow the Ministry to charge the appellant this amount.

On a final note under this issue, I acknowledge the appellant's concern about having paid for the report once already, as a taxpayer. However, while I sympathize with the appellant's desire to understand the process behind the decision to relocate her daughters' school, as well as to be able to participate effectively in decisions that affect her children's education, the *Act* stipulates that, with certain exceptions, records in the custody and control of government and its institutions are subject to the *Act*. Further, the *Act* clearly contemplates that fees *shall* be charged for access to records falling under the purview of the *Act*, in accordance with section 57(1) and Regulation 460 [Order P-1628]. In my view, the appellant's reasons for seeking this information are more aptly addressed under fee waiver, which I will now review in the next section.

**FEE WAIVER**

The appellant relies on sections 57(4)(b) and (c) in support of her request for a fee waiver in this appeal. Section 57(4) of the *Act* requires an institution to waive fees, in whole or in part, in certain circumstances. The relevant parts of that provision state:

> 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,
>
> (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; …

Section 8 of Regulation 460 sets out additional matters for a head to consider in deciding whether to waive a fee; however those provisions are not relevant in the circumstances of this appeal.

A requester must first ask the institution for a fee waiver, and provide detailed information to support the request, before this office will consider whether a fee waiver should be granted. This office may review the institution's decision to deny a request for a fee waiver, in whole or in part, and may uphold or modify the institution's decision [Orders M-914, P-474, P-1393, PO-1953-F]. The standard of review applicable to an institution's decision under this section is "correctness" [Order P-474].

The fee provisions in the *Act* establish a user-pay principle which is founded on the premise that requesters should be expected to carry at least a portion of the cost of processing a request unless it is fair and equitable that they not do so. The fees referred to in section 57(1) and outlined in section 8 of Regulation 460 are mandatory unless the requester can present a persuasive argument that a fee waiver is justified on the basis that it is fair and equitable to grant it or the *Act* requires the institution to waive the fees [Order PO-2726]. In other words, while the burden

of proof for establishing that its fee estimate is reasonable and is calculated in accordance with the *Act* and Regulations rests with the Ministry, in the case of my review of the fee waiver request, the burden of proof rests with the appellant [Orders M-429, M-598, and MO-2495].

There are two parts to my review of the Ministry's decision under section 57(4) of the *Act*. I must first determine whether the appellant has established the basis for a fee waiver under the criteria listed in subsection (4). If I find that a basis has been established, I must then determine whether it would be fair and equitable for the fee, or part of it, to be waived [Order MO-1243].

**Financial hardship – section 57(4)(b)**

Under section 57(4)(b), the appellant bears the onus of establishing financial hardship. Generally, the appellant must provide details regarding his or her financial situation, including information about income, expenses, assets and liabilities [Orders M-914, P-591, P-700, P-1142, P-1365, P-1393]. The fact that the fee is large does not necessarily mean that payment of the fee will cause financial hardship [Order P-1402].

The appellant submits that although the Ministry argues that she did not substantiate the basis for her fee waiver requests during initial stages, Order PO-2515-F supports her position that she can do so during the inquiry stage.

Regarding the financial hardship basis for fee waiver, the appellant refers to the group of concerned parents she represents and describes their involvement, on a voluntary basis, in opposing the closure and relocation of their children's school. The appellant submits

> The Ministry did not advise that financial records were necessary and I was not aware of this until Appeal. We are from all walks of life and I verily believe that no one of our group would want to publicly disclosure their financial statements for something they believed and continue to believe is in the public's best interest. None of us would have to expose our finances if the government had been more forthcoming, transparent, and cooperative from the beginning and throughout this process. [Our parents group] should not have to bear the burden of these exorbitant fees for documents which should exist, be well-managed, accessible and easily duplicated.

The appellant states that her parents group has no resources and that other than having created a logo for their group, it has no financial assets, is not a not-for-profit organization, incorporated or otherwise formally bound together. The appellant herself is not "gainfully employed." Furthermore, the appellant submits that "at this stage of the procedure, during a public appeal process, I do not wish to make public my financial situation."

The Ministry states that it reviewed the appellant's request to waive the fee in its entirety based on financial hardship to the appellant and the other parents in her group, as well as "benefit to the greater public." The Ministry submits that it considered the relevant fee waiver provisions in section 57(4) of the *Act*, but that the appellant did not provide any information to substantiate the claim that financial hardship would result from payment of the fee. The Ministry notes that no

financial details of the appellant's personal position, or that of the "other 160 plus families" affected by the decision to relocate the school, were provided.

***Analysis and Findings***

As noted above, in order to qualify for a fee waiver on the basis of financial hardship, an appellant must provide details regarding his or her financial situation, including information about income, expenses, assets and liabilities. The appellant has not provided detailed financial information, either respecting her own personal financial circumstances or that of the concerned parents group she represents. In fact, she has specifically declined to do so. It should perhaps be noted at this point that any financial information provided to this office would remain confidential, pursuant to section 55 of the *Act*, and would only have been used for the purpose of my determination of this issue.

As the appellant raised financial hardship as the basis for claiming a fee waiver, she bore the onus of providing reasonable information concerning her financial position to justify the waiving of fees. As the required information has not been provided to the Ministry or to this office on appeal, I find that there is not sufficient evidence to support a finding that payment of the fee estimate to the Ministry would impose a financial hardship on the appellant or her group. While I recognize that the fee, even as reduced by this order, is fairly substantial, that fact alone is not sufficient to trigger the application of section 57(4)(b) [Order P-1402].

Given my finding that financial hardship under section 57(4)(b) has not been established by the appellant, it is not necessary for me to consider whether it would be fair and equitable to waive the fee on this basis. However, I will now consider the appellant's claim that a waiver is warranted on the basis of benefit to public health or safety.

**Public health or safety – section 57(4)(c)**

In past orders of this office, the following factors have been found to be relevant in determining whether dissemination of a record will benefit public health or safety under section 57(4)(c):

- whether the subject matter of the record is a matter of public rather than private interest
- whether the subject matter of the record relates directly to a public health or safety issue
- whether the dissemination of the record would yield a public benefit by
  - disclosing a public health or safety concern, or
  - contributing meaningfully to the development of understanding of an important public health or safety issue
- the probability that the requester will disseminate the contents of the record

[Orders P-2, P-474, PO-1953-F, and PO-1962]

This office has found that dissemination of the record will benefit public health or safety under section 57(4)(c) where, for example, the records relate to:

- compliance with air and water discharge standards [Order PO-1909]
- expansion of a landfill site [Order PO-2514]
- a certificate of approval to discharge air emissions into the natural environment at a specified location [Order PO-1688]
- environmental concerns associated with the issue of extending cottage leases in provincial parks [Order PO-1953-I]

The appellant submits that the state of the buildings "our children attend on a day-to-day basis or will inherit in the future [are] directly related to health and safety issues." She also submits that the records she has requested relate directly or indirectly to "our children's school… [and that] none of the records are private in nature, as the request did not pertain to any specific child or children." Furthermore, the appellant submits that:

> Schools, too, obviously concern, affect and are of interest to many families with school-aged children across the province, and our specific school and adjacent daycare (within the school and sharing the same school facilities) is of interest to French-speakers across the country who consider military postings or jobs in [our area]. … [C]hildren [are] "vulnerable individuals", and … the "care and safety of these vulnerable individuals is a public responsibility and of public concern [Order PO-2515-F]."

The appellant argues that the issues surrounding this matter "encompass the state-of-repair, safety, mental health, quality of life, physical and environmental concerns of [School] families and our community" and so fall within the scope of "public health or safety." Furthermore, the appellant submits that while "public health" is not defined in the *Act*, there are definitions of the term that refer to "the health and well-being of the whole community," and that contemplate public, rather than merely medical, health. The appellant submits that, according to the World Health Organization, "health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity." The appellant refers to the following factors related to the relocation of the School that may affect mental and public health: increase in percentage of students requiring bussing, increased travel times, attendant decrease in quality of life, dilution of French language and culture, environmental impact of bussing, neighbourhood quality of old and new site of School. The appellant also argues that mental and social well-being includes the element of "empowerment" of the citizenry through, in part, access to information in order to influence public decision–making and hold decision-makers accountable.

The appellant notes that she and the other parents share concerns around asbestos at the School, which she maintains is a health and safety matter. She suggests that:

> One would expect that these multi-faceted reports held by the Ministry or provided by the School Board to the Ministry, and communications between the parties, surrounding [the School, the new School site], or other sites considered, would encompass all the issues of public health or safety mentioned here or in my

> Affidavit (mould, asbestos, air quality, toxic tiles, heating and cooling systems, roof, other states-of-repair, demographics and effects of this school closure on children, the school system, community, and the local economy, bussing routes and times, environmental impact, etc.). …

The appellant also relies on Order MO-2163 in stating that section 57(4)(c) "does not demand that there be absolute, or indisputable certainty as to the existence of a threat to public health or safety before the basis can properly be relied upon in seeking waiver of a fee."

Regarding dissemination, the appellant describes her efforts to keep parents informed about the process and developments through conversation, emails, meetings and events. She indicates that her parents group has also "authored or been the subject of news stories on radio, television and in newsprint." The appellant notes that she has distributed the 2005 report she received during the inquiry into this appeal to other parents, and it has been considered at two Board meetings. The appellant refers to extensive television and newspaper coverage of the events relating to her children's school and submits that there is broad public support, including from base command, School and other families, and the larger community.

The Ministry disputes the appellant's assertion that the circumstances of this appeal are analogous to Order PO-2515-F, where complaints against Ontario daycare facilities were addressed, or other orders in which the care received by vulnerable individuals was in question. According to the Ministry,

> The records in this case concern one facility with a relatively small number of children, whereas the appeals where the records were found to benefit public health and safety under s.57(4)(c) concern a large number of people across the province at numerous facilities.

The Ministry also maintains that the appellant's concerns are personal in nature and that she is mainly seeking access to the records to try to convince the Board not to relocate her children's school further away. The Ministry submits that the appellant's membership in "a group of parents" whose children attend the School suggests a private interest rather than a public interest. The Ministry adds that:

> … the subject matter of the records [do not] relate directly to a public health and safety issue. Even if the student, parents and teachers could be considered "public" in a broad sense, the Board has made them aware that the School has been deemed PTR under Ministry guidelines. The records at issue would not reveal any immediate public health or safety issues but rather would identify the non-invasive repairs that would have to be made to the school in the years to come, which make the school too costly to repair, but in no way pose a health or safety risk.

The Ministry acknowledges the appellant's concerns about asbestos in her children's school, noting that it is a known occupational hazard that falls under the school board's responsibility and Ministry regulation. However, the Ministry continues by noting that

> While the presence of asbestos in a school is a legitimate concern, the records at issue in this appeal do not pertain to asbestos. The records the appellant is seeking would not have included information specifically related to health and safety risks, including asbestos… [T]he facility condition assessment initiative was non-invasive. As stated on page 6 of the Portfolio Condition Assessment… of which the appellant was sent a copy … "evaluations of environmental conditions (such as mould, asbestos, and indoor air quality) were beyond the scope of [this report]."

***Analysis and Findings***

Although the information responsive to this request may inform the appellant and the public about the context of the decision to designate the School's former facility PTR, I am not persuaded that it would contribute meaningfully to the development of an understanding of a public health and safety issue. Accordingly, for the reasons that follow, I find that the "public health or safety" basis for fee waiver in section 57(4)(c) of the *Act* has not been established.

The appellant appears to be arguing that there is room for an expansion of the existing categories of information qualifying as "public health and safety" matters under this section. I am not persuaded, however, that such an expansion to the scope of fee waiver under section 57(4)(c) is warranted, notwithstanding the evidence provided by the appellant regarding World Health Organization definitions related to public and mental health and well-being.

Based on the appellant's submissions, I am satisfied that the subject matter of the School's relocation is one that has garnered some media attention, and caught the public's interest generally, in the area where the appellant lives. I accept the likelihood that the appellant and her parents group will continue to contribute to the public debate about the PTR closure of the School's former facility, and that the records that may be disclosed in response to this request would likely be disseminated by these individuals to inform this debate.

However, the mere existence of a public interest does not by itself fit within the "public health or safety" section of the fee waiver provisions in section 57(4). In order to meet the requirements of this ground, this is not sufficient. Rather, the subject matter of the records themselves *must relate directly* to a public health or safety issue [Order P-474]. In Order MO-1336, Adjudicator Laurel Cropley expanded on the requirements for fee waiver on this basis and confirmed that the focus of the section is public *health or safety*, not merely a public *interest*. The records themselves must illuminate the connection between the public interest and an established public health or safety issue [see also Order PO-2592].

In Order PO-2515-F, which related to records respecting complaints about daycare facilities, Senior Adjudicator John Higgins was able to draw a bright line between the subject matter of the requested records and the public health or safety issue he had identified. He stated:

> Accordingly, I find that the subject matter of the requested records clearly relates to a public health or safety issue. The records relate directly to complaints about

> the services provided by licensed day care centres and the actions that may have been taken by the Ministry with respect to those complaints. I also find that this is a matter of public rather than private interest.

Conversely, in the present appeal, the Ministry's evidence suggests that while the responsive records would relate to the PTR designation, this was based on a non-invasive facility condition assessment, which would not have included information specifically related to health and safety risks, including asbestos. In the circumstances of this appeal, and based on the representations provided by the parties, I find that the appellant has not established that a public health or safety issue exists that is directly connected to the records requested. Similarly, I find that there is insufficient evidence to suggest that dissemination of the requested information will contribute meaningfully to the understanding of a public health or safety issue. Accordingly, I find that the fees should not be waived on the basis of "public health or safety".

In addition to the public health and safety and financial hardship grounds for fee waiver, the appellant had also requested that I consider granting her fee waiver request on the basis of "delay, prejudice, and a 'de facto' denial of access" by the Ministry. In my view, the conduct of an institution is not a consideration that favours the granting of a fee waiver [see Order PO-2812]. As has been noted above, the access provisions of the *Act* are based on a mandatory user-pay principle and the fee waiver provisions may not be relied on to undermine that user-pay principle. In any event, I note that I have already addressed the inadequacy of the Ministry's interim decisions by reducing the fee estimate.

In view of my findings on the first part of the test for fee waiver, it is not necessary for me to address the second part of the test, namely the assertion that granting the fee waiver would be fair and equitable in the circumstances.

As neither of the grounds for fee waiver under section 57(4)(b) or (c) have been established by the appellant, and there is no information before me to bring the waiver request within the scope of sections 57(4)(a) or (d), or "any other matter prescribed" in section 8 of Regulation 460, I will uphold the Ministry's decision not to grant a fee waiver in this appeal.

## ORDER:

1. I will allow the Ministry to charge the appellant a fee of $1750.00 for processing this request according to the confirmation of the scope of the request contained in this order.

2. I uphold the Ministry's decision not to grant the appellant a fee waiver.

Original signed by: April 26, 2010
Daphne Loukidelis
Adjudicator