Information and Privacy Commissioner,
Ontario, Canada

Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

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# ORDER PO-3002

Appeal PA10-235-2

Landlord and Tenant Board

October 14, 2011

**Summary:** The appellant requested access to a report that the Landlord and Tenant Board had previously provided to him on an ongoing basis, which was produced by electronic means. After it migrated to a new electronic case management system, the Board sought to impose a fee of $16,349 on the appellant to cover the cost of developing the same report in its new case management system. I find this fee estimate to be totally unreasonable and it is disallowed in its entirety. The Board is ordered to produce the report and to provide it to the appellant without charging a fee.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, s. 2(1) (definition of "record"); ss. 57(1) and (3); s. 63(2); Regulation 460, ss. 2 and 6

**Orders and Investigation Reports Considered:** Orders P-81, M-555, M-1123, MO-1573, MO-1699

**Cases Considered:** *Toronto Police Services Board v. Information and Privacy Commissioner*, 2009 ONCA 20; Information and Privacy Commissioner of British Columbia Order 03-16

## OVERVIEW:

[1] The Landlord and Tenant Board (the Board) is the administrative tribunal responsible for adjudicating applications under the *Residential Tenancies Act, 2006*.

[2] The appellant had been receiving information from the Board about upcoming Board hearings, in the form of a weekly report, but found that his access to this report was interrupted by the Board's migration to a new computer system, intended to service the Social Justice Tribunals of Ontario, a newly clustered group of tribunals of which the Board forms a part. The Board informed the appellant that this type of report "does not exist" in its new case management system, which is called Cmore. As a consequence, the appellant made a request to the Board under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the information previously provided routinely in the report:

> Landlord data, name, address, city, postal code, residential address, file number, date of hearing, similar or identical to the Landlord data received before it was interrupted under the new computer system…

[3] In its decision letter, the Board indicated that it would have to "develop" the report, and it estimated the cost of doing so at $16,349. Before the Board would take any step towards developing the report, the appellant was required to pay a 50% deposit, in the amount of $8,264.50.

[4] The appellant disagreed with the fee estimate and filed an appeal with my office, which is addressed in this order.

[5] During mediation of the appeal, the appellant mentioned that he objects to the Board no longer providing the report, which he had previously received "by custom or practice." The appellant may be referring to section 63(2) of the *Act*, which preserves access to non-personal information that was available by custom or practice before the *Act* came into force in 1988. The report only began to be produced in 2000, and was not available by custom or practice before the *Act* came into force, so section 63(2) does not apply. Accordingly, I will not refer to this section again. Nevertheless, the appellant's previous access to the report is a highly significant factor in this appeal.

[6] The appellant also advised the mediator that he relies on Order PO-2265, and in his representations also refers to Orders PO-2266 and PO-2267, arguing that these orders require the information he has requested to be disclosed to him. These decisions do not assist the appellant because, rather than dealing with the fee issue addressed in this appeal, they considered whether tenant information in the dockets of the Board's predecessor tribunal, the Ontario Rental Housing Tribunal, were subject to the personal privacy exemption. That issue is not before me here. Rather, the question I will be addressing is whether the Board can charge the proposed fee for re-creating a previously existing reporting function, as a consequence of adopting a new case management system.

[7] In his representations, the appellant argues that the information he requires is available in other forms already produced by the Board, such as mailing labels, but it is evident that the information the appellant seeks could not easily be assembled from other available records.

[8] Accordingly, the question addressed in this order is whether the Board's fee estimate should be upheld.

[9] The Board's decision refers to the judgment of the Ontario Court of Appeal in *Toronto Police Services Board v. Information and Privacy Commissioner*[1] in support of its view that the appellant should be required to pay a fee of $16,349. However, that case was about machine readable records in the context of the term "record" as defined in section 2(1) of the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA*). It did not present a fact situation like the one here, where the Board migrated to a new case management system without providing for the continuation of an existing reporting function that it knew was being used by members of the public.

[10] Despite this distinction, however, *Toronto Police Services Board* could not be clearer about the importance of public access to electronic records. It explains that a purposive interpretation of the *Act* must "… take into account the prevalence of computers in our society and their use by government institutions as the primary means by which records are kept and information is stored." The Court rejected the approach advocated by the Police in that case because it would "… minimize rather than maximize the public's right of access to electronically recorded information."

[11] In this appeal, the Board's approach is not consistent with the view that institutions should take a proactive approach to access, and should build access directly into new systems, as they are developed. These principles are reflected in my *Access by Design* concept, which is attached to this order as an appendix.

[12] Where an institution knows it is providing information to members of the public or to businesses in a particular form, and fails to provide for this in a newly designed computer system, it departs from these principles in a fundamentally unacceptable way. Even more concerning is the Board's attempt to require the appellant to bear the expense of correcting its failure to build continued access into its new system. This approach is fundamentally unfair, and represents an abuse of the user-pay principle embodied in the *Act*. Accordingly, I have decided that the fee estimate issued by the Board is not a reasonable estimate within the meaning of section 57(3) of the *Act*. In these circumstances, I have concluded that the appropriate remedy is to order the Board to disclose the record to the appellant without charging a fee.

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[1] 2009 ONCA 20.

[13] In addition to finding that the fee estimate is not reasonable, I have concluded that the Board's decision does not conform to the requirements articulated in Order P-81. Order P-81 contemplates that, where an institution does not produce responsive records in order to calculate its fees and issue an access decision, the institution will calculate its fee estimate by producing a representative sample of the records, or by obtaining the advice of a knowledgeable employee. No representative sample was produced in this case, and for the most part, the fee was also not based on the advice of a knowledgeable employee.

[14] In addition, my review of the Board's fee calculations indicates that the proposed fees are not consistent with the fee provisions of the *Act* or Regulation 460.

[15] Having disallowed the Board from charging a fee, it is not necessary to address the appellant's request for a fee waiver.

[16] During the inquiry into this appeal, both the Board and the appellant were invited to provide representations, and these were shared between the parties in accordance with *Practice Direction 7* issued by my office.

## DISCUSSION:

### FEES/FEE ESTIMATE

#### Introduction

[17] The *Act* embodies a user pay principle in its fee provisions. Section 57(1) sets out the fees to be charged:

> 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.

[18] Section 6 of Regulation 460 provides more detailed information about how fees under the *Act* are calculated. It 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 records provided on CD-ROMs, $10 for each CD-ROM.
>
> 3. For manually searching a record, $7.50 for each 15 minutes spent by any person.
>
> 4. For preparing a record for disclosure, including severing a part of the record, $7.50 for each 15 minutes spent by any person.
>
> 5. For developing a computer program or other method of producing a record from machine readable record, $15 for each 15 minutes spent by any person.
>
> 6. The costs, including computer costs, that the institution incurs in locating, retrieving, processing and copying the record if those costs are specified in an invoice that the institution has received.

[19] Section 57(3) of the *Act* requires fee estimates to be given in some cases. It states:

> The head of an institution shall, before giving access to a record, give the person requesting access a *reasonable estimate* of any amount that will be required to be paid under this Act that is over $25. [Emphasis added.]

[20] In an appeal of a fee estimate, bearing in mind the wording of section 57(3), my responsibility is to determine whether the estimate is reasonable. The burden of establishing its reasonableness rests with the Board (Order M-1123).

[21] In all cases, the institution must include a detailed breakdown of the fee, and a detailed statement as to how the fee was calculated (Orders P-81 and MO-1479).

[22] In a number of previous orders, proposed fees have been disallowed because they were unfair or unreasonable in the circumstances. For example:

- where an institution attempted to raise fees to a figure 1,000 times greater than its initial estimate (Order MO-1980);
- where the institution did not comply with Order P-81 for an interim access decision and did not adequately explain the basis for its fees in its representations (Orders M-1123, MO-1294 and MO-1614[2]); and
- where there was an "indefensible delay" in providing an access decision (Order PO-1998).

[23] The Board provided the appellant with a lengthy letter setting out its fee estimate of $16,349. The Board did not produce the records in order to make a final access decision, and therefore its fee estimate should have been part of an "interim access decision." The letter does not in fact contain an interim access decision because it provides no indication of whether access would be granted or denied. The Board later indicated in its representations, provided during this appeal, that full access would be granted upon payment of the fee.

[24] However, the Board's decision does set out the following information:

- the appellant requested a report "the same or similar to the report that existed on the Board's Caseload case management system";
- the appellant had received this report "on a weekly basis";
- a comparable report does not exist on the Board's new "Cmore" computer system;
- the new system is provided by the Ministry of Government Services (the ministry), which now provides IT services to the Board; and
- developing a new report on the Cmore system requires the government to hire outside consultants.

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[2] Order MO-1614 was upheld on judicial review in *Toronto (City) v. Humane Society of Canada*, [2004 O.J. No. 659 (Div. Ct.).

[25] In several places in the estimate, the Board refers to another "project currently underway" to develop seven other CMore reports, whose nature and genesis are not explained, and whose relationship or similarity to the report requested by the appellant is also not explained.

[26] The Board's decision letter states that its fee estimate has three components, as follows:

a) the fee for a Board staff member to spend two full weeks developing a proposal called a "business requirements document" or "functional design document," in order to request that the ministry develop the necessary report to respond to the request, at $7.50 per 15 minutes ($4,350);

b) one-seventh of the estimated cost for an outside consultant to develop the seven other CMore reports in the "project currently underway" ($8,571); and

c) one-seventh of the estimated costs for government IT staff based on the estimated salary costs for the seven other reports ($3,428).

[27] Amounts (a), (b) and (c) add up to $16,349.

**Is the fee estimate reasonable?**

[28] As already noted, section 57(3) of the *Act* requires the Board to provide the appellant with a reasonable estimate of any amount that will be required to be paid under the *Act*.

[29] In assessing the reasonableness of the fee estimate, I have considered the purposes of the *Act*, which are set out in section 1, and in particular, the critical principle that "information should be available to the public."

[30] The issues in this appeal also relate to my 7 Fundamental Principles of *Access by Design*. These principles encourage public institutions to proactively build in access when creating new information systems. Principle 1 requires institutions to take a proactive approach to access. Principle 2 requires that access be directly embedded in design.

[31] In its representations, the Board mentions that the report it had previously been providing to the appellant was first developed in responding to another requester, who in fact had paid for the cost of developing the report. In my view, however, this provides no justification for now seeking to extract payment from the appellant for, in effect, re-developing the means to produce the report that the Board's old software

system was already producing, and which the Board had been providing to the appellant on an ongoing basis.

[32] Several previous orders of my office indicate that institutions under the *Act* are not required to modify existing information storage facilities or systems in order to accommodate the needs of requesters.[3] But the present situation is different. The Board moved to using new case management software without building in access to a report that it knew was already being provided to the appellant, and to at least one other requester, on an ongoing basis. In that situation, it was incumbent upon the Board to ensure that the new system had the same capacity to produce this report as the old system. It failed to do so.

[33] I find that it is not appropriate for the Board, or any other institution, to create a new electronic records system that effectively denies cost-effective access to information that had previously been provided to requesters. But this is precisely the situation described by the Board in this appeal.

[34] In its decision letter, the Board refers to a passage from the Ontario Court of Appeal's judgment in *Toronto Police Services Board v. Information and Privacy Commissioner*,[4] in which the Court stated:

> In some circumstances, new computer programs will have to be developed, using the institution's available technical expertise and existing software, to produce a record from a machine readable record, with the requester being held accountable for the costs incurred in developing it.[5]

[35] The Board relies on this statement in support of its decision to charge fees in this case. But the situation before the Court was not comparable to the facts of this appeal. In making the comment, the Court was addressing the question of whether a requirement to insert coding to identify repeat entries relating to one individual meant that the requested information would not be a "record" as defined in section 2(1) of *MFIPPA*, and was not addressing a specific fee issue. More importantly, *Toronto Police Services Board* did not involve a situation where the institution sought to charge a fee for computer services to re-create a report that had previously been provided on an ongoing basis to members of the public.

[36] Moreover, the Court explained that a purposive interpretation of the *Act* must "… take into account the prevalence of computers in our society and their use by government institutions as the primary means by which records are kept and information is stored." The Court rejected the approach advocated by the Police in that

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[3] See Orders M-166, M-546, M-549 and M-555.
[4] See citation at footnote 1, above.
[5] at para. 52.

case because it would "… minimize rather than maximize the public's right of access to electronically recorded information." In its analysis, the Court also referred to and adopted the following statement by British Columbia's former Information and Privacy Commissioner, David Loukidelis:

> It is not an option for public bodies to decline to grapple with ensuring that information rights in the Act are as meaningful in relation to large-scale electronic information systems as they are in relation to paper-based record-keeping systems… Public bodies must ensure that their electronic information systems are designed and operated in a way that enables them to provide access to information under the Act. *The public has a right to expect that new information technology will enhance, not undermine, information rights under the Act and that public bodies are actively and effectively striving to meet this objective.* [Emphasis added by the Court.][6]

[37] In this appeal, the Board's approach does not conform to the principles that institutions should take a proactive approach to access, and should build access into new systems as they are developed. These principles are reflected in my concept of *Access by Design*. They are also common sense.

[38] Where an institution knows it is already providing information to requesters under the *Act* in a particular form, and fails to provide for this in a newly designed computer system, it departs from these principles in a fundamentally unacceptable way. Even more concerning is the Board's attempt to require the appellant to bear the high cost of correcting the Board's own oversight. This approach is fundamentally unfair, and represents an abuse of the user-pay principle embodied in the *Act*.

[39] Accordingly, I have decided that the fee estimate issued by the Board is not a reasonable estimate within the meaning of section 57(3) of the *Act*. The proposed fee is therefore disallowed in its entirety. Moreover, in the circumstances described in the preceding paragraph, I have concluded that the appropriate remedy is to order the Board to disclose the record to the appellant, without charging a fee.

[40] Although that is sufficient to deal with the matter, I will also assess the Board's proposed fee in relation to the requirements for interim access decisions, and the fee structure set out in the *Act* and Regulation 460, and this analysis provides further support for my decision to disallow the fee.

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[6] B.C. Order 03-16 at para. 64, quoted at para. 55 of *Toronto Police Services Board*.

**Did the Board comply with the requirements for an interim access decision?**

[41] In this case, the Board did not produce the responsive records in order to prepare its access decision. In that circumstance, it should have followed the process for issuing an interim access decision and fee estimate as originally set out in Order P-81 and affirmed in many subsequent orders.[7] In Order P-81, former Commissioner Sidney Linden described the contents of such a decision as follows:

> . . . In my view, the *Act* allows the head to provide the requester with a fees estimate pursuant to subsection 57(2) of the Act. This estimate should be accompanied by an "interim" notice pursuant to section 26. This "interim" notice should give the requester an indication of whether he or she is likely to be given access to the requested records, together with a reasonable estimate of any proposed fees. In my view, a requester must be provided with sufficient information to make an informed decision regarding payment of fees, and it is the responsibility of the head to take whatever steps are necessary to ensure that the fees estimate is based on a reasonable understanding of the costs involved in providing access. Anything less, in my view, would compromise and undermine the underlying principles of the *Act*.
>
> How can a head be satisfied that the fees estimate is reasonable without actually inspecting all of the requested records? Familiarity with the scope of the request can be achieved in either of two ways: (1) the head can seek the advice of an employee of the institution who is familiar with the type and contents of the requested records; or (2) the head can base the estimate on a representative (as opposed to a random) sample of the records.

[42] For the most part, the Board did not comply with Order P-81 in the approach it took to the fee estimate and interim access decision. One requirement of that approach is to indicate whether access would be granted. While the Board did not do so, I conclude that in this case, given the appellant's prior access to the same information, it was probably implicit in the Board's decision that it would grant access. The Board later confirmed this in its representations.

[43] It is clear that the Board did not rely on a representative sample in order to produce this estimate. Although it did rely on a comparison to another situation requiring Cmore reports to be developed (the "project currently underway"), its extrapolations to produce projected fees for the appellant's request were based on an estimate rather than work actually done, and no explanation has been provided as to how these reports or the data they would contain are similar to the subject matter of

[7] See, for example, Orders M-555 and MO-1699

the appellant's request, other than the fact that they would also be developed for the Cmore system.

[44] On the question of whether an experienced employee was consulted, the Board's representations indicate that the staff member who would produce the "business requirement" or "functional design" document was consulted, but there is no indication that this approach was followed to come up with the remainder of the estimate.

[45] Accordingly, for most of the estimate, the methodology outlined in Order P-81 was not followed.

**Does the proposed fee accord with the fee structure in the *Act* and Regulation 460?**

[46] The Board states that the process for carrying out IT projects has changed from the time period when the earlier version of the report requested by the appellant was developed. The Board states that:

> … developing reports in the computer system used at that time was also a much simpler programming task than developing reports in the current system.

[47] The Board goes on to explain that:

> Currently, IT services are provided to the Board through the Community Services Cluster (the CSC) of the Ministry of Government Services [MGS]. The Board pays for the IT services provided by MGS through the CSC
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> ...
>
> When the Board requires IT services from the CSC to complete a project, the CSC first requires the Board to provide a Functional Design Document incorporating detailed business requirements related to the project. The Board has a program analyst who has completed this document for other IT projects. The program analyst has indicated that completing it typically requires at least two weeks of work before it can be submitted to the CSC
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> ...
>
> When the CSC receives the Functional Design Document from the Board, CSC staff will review it and perform a technical gap analysis to determine whether it is possible to meet the requirements of the project. If the CSC determines that the project can be done, they will "size" the project and provide the Board with an estimate of how much the project will cost. …

…

Developing reports in the Board's new case management system requires a platform (or report generating engine) called "Actuate". The CSC cluster does not have in-house expertise related to Actuate. The CSC must hire an outside consultant with expertise in Actuate to develop reports for the Board. When the CSC hires an outside consultant, they will charge the Board for the consultant's fees.

… [T]he Board considered alternate ways of estimating the fee for this request. …

… Another option the Board considered was to base the fee estimate on existing estimates prepared by the CSC for other projects that involved developing reports for the Board's case management system. This approach would allow the Board to provide a fee estimate to the requester much more quickly than by the method described above, and would not require the Board or the CSC to divert IT resources from other projects. The Board submits that basing the fee estimate on estimates for similar IT projects is both reasonable and fair in the circumstances.

A project is currently underway to develop seven reports for the Board's case management system. The CSC had provided the Board with an estimate of the costs associated with providing IT services related to this project (including the costs associated with hiring an Actuate consultant). The Board relied on this estimate to calculate the fee estimate given to the requester.

The estimate provided by the CSC for IT services associated with developing the seven reports included $60,000 to hire an Actuate consultant and $24,000 for the work carried out by CSC staff associated with the project.

The first component of the fee estimate provided to the requester was for costs associated with preparing the Functional Design Document. Paragraph 5 of s. 6 of Reg. 460 sets out that the fee applies to "...developing a computer program..." Although the work involved in preparing these documents does not involve computer programming in the sense of writing lines of code, it is a required stage in the development of an IT project in the OPS [Ontario Public Service]. The Board submits that it should be allowed to charge fees for this work. As set out above, the program analyst who does this work has indicated that two weeks of work are required to prepare this document. As a result, the

Board estimated this component of the fee according to paragraph 5 of s. 6 of 0. Reg. 460 as follows:

72.5 hours of work (two weeks at 36.25 hours per week) x $60 per hour = $4350

The second component of the fee estimate relates to the costs associated with hiring the Actuate consultant. As indicated above, the estimate provided by CSC for hiring an Actuate consultant to program the seven reports for the Board was $60,000. Therefore, the Board estimated this component of the fee (hiring an Actuate consultant), pursuant to paragraph 6 of s. 6 of 0. Reg, 460 as follows:

$60,000/7 reports = $8,571.43

The third component of the fee estimate related to the costs associated with IT services that the CSC will provide to the Board to develop the report. The Board originally intended to base this component of the fee estimate on paragraph 5 of s. 6 of 0. Reg. 460 ($60 per hour for work associated with developing a computer program). However, the estimate provided by CSC for developing the seven reports did not break down the costs for their portion of the work in terms of hours of work required. As a result, the Board estimated this component of the fee by taking the total estimated costs for the component of the project carried out by CSC and dividing by seven (for seven reports)… $24,000/7 = $3,428.57

Total estimated fee. $4350 + $8571.43 + $3,428.57 = $16,350[8]

…

The Board has a standard administrative fee that applies whenever a report from one of its computer systems is provided to an individual. This fee is $100 per report sent to the individual. The appellant was paying the $100 per report fee for the report he previously received. If the appellant pays the fee required to develop the new report, the Board will charge $100 per report.

[48] With respect to the first component of the fee, it is simply not credible that it would take two full weeks to assemble a document asking the ministry's IT group to estimate the cost of developing a Cmore report to contain the data elements identified in the appellant's request. Beyond a bare assertion that this is the time that would "typically" be required, the Board provides no evidence to substantiate this claim, and

[8] This figure is stated as $16,349 in the Board's decision letter.

based on the information I have received, it is difficult to see how it could take any significant amount of time to assemble such a request, given that the data elements are apparent and the information clearly needs to be extracted from the Board's case management system.

[49] In addition, the *Act* and Regulation 460 do not contemplate fees for time spent writing out what is, in effect, a request to compute estimated consulting costs. I also note that the need for the "fundamental design" document arises from the government's own decision on how to structure IT services for the Board and the other members of the cluster, and in my view, it is not appropriate to require the appellant to pay costs that arise from this approach.

[50] For all these reasons, the fee in connection with component (a) is disallowed.

[51] As already stated, components (b) and (c) are based on the estimated cost to develop seven other reports. Unlike representative sampling, where the estimate is based on actual work to locate and prepare a sample of responsive records, this estimate is not based on actual work done, nor is any explanation provided to support the view that the seven reports are comparable to the one requested by the appellant. No invoice relating to the cost of the seven reports has been produced. No estimated number of hours is provided. In my view, this is not a sustainable approach to fee calculation, and I also disallow these amounts.

**The meaning of the term "record"**

[52] The Board's reply representations also allude to the definition of "record" in section 2(1) of the *Act*, which is amplified in Regulation 460. Although the question of whether the requested report qualifies as a "record" under this definition was not raised by the Board in its original decision letter, and was also not an issue in this appeal, the Board appears to be raising it in its reply representations.

[53] The relevant portion of section 2(1) states that the term "record" includes:

> [S]ubject 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.

[54] In addition, section 2 of Regulation 460 states that:

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

[55] The Board points out that, because it has to use a consultant to develop the requested report, it is using technical expertise that is not available from within the institution. It also argues that the time spent by its staff testing and producing the report will divert staff from other projects and interfere with its operations.

[56] Based on its evidence, it is clear that the Board normally hires consultants to develop reports using the Actuate program. The Board refers to this in its evidence concerning the "project currently underway" to develop the other seven reports, which was used as the basis for much of its fee estimate. It is therefore evident that this technical expertise is "normally" used by the Board when new reports are needed, and the fact that external consultants are used does not negate this fact.

[57] And, while I appreciate that developing, testing and producing the report may consume staff resources, I am not satisfied that this process will "unreasonably" interfere with the Board's operations. As I have already noted, I do not accept the Board's view that developing the "business requirements document" or "functional design document" will require two weeks of staff time.

[58] More importantly, given that the Board knew it was routinely providing this report to the appellant, it should have ensured that the capacity to continue doing so was built into the new system up front, rather than playing catch-up, after the fact. In my view, the Board is the author of its own misfortune. Any interference with operations that may occur arises entirely from the Board's earlier failure to ensure ongoing capacity to produce the report. Such interference is therefore a consequence of the Board's own actions and cannot, in fairness, be attributed to the appellant's access request.

[59] I therefore affirm that the report is a "record" as that term is defined in section 2(1).

**Standard administrative fee**

[60] There is one other aspect of the proposed fee that requires comment. The Board proposes to charge a "standard administrative fee" of $100 per report. In a disclosure under the *Act*, this fee must be disallowed as it is not contemplated under section 57 or Regulation 460. If the Board is proposing to set up a system of alternate access, it may be possible to charge such a fee, but other fees contemplated by section

57 would not be permissible because this would not constitute a disclosure under the *Act*.[9]

## ORDER:

1. I do not uphold the Board's fee estimate.

2. I order the Board to provide the appellant with a copy of the record, at no charge, by no later than **November 14, 2011**.

3. In order to verify compliance with the provisions of this order, I reserve the right to require the Board to provide me with a copy of the record, provided to the appellant, pursuant to provision 2 of this order.

Original Signed by: ________________ ________________________

Ann Cavoukian, Ph.D. October 14, 2011

Commissioner

[9] See, for example, the decision concerning an alternate scheme for access to accident reconstruction reports prepared by the Niagara Regional Police in Order MO-1573.

**APPENDIX**

# *Access by Design*

## The 7 Fundamental Principles

**Ann Cavoukian, Ph.D.**
**Information & Privacy Commissioner**
**Ontario, Canada**

My concept of "Access by Design" (AbD) consists of fundamental principles that encourage public institutions to take a proactive approach to releasing information, making the disclosure of government-held information an automatic process where possible – access as the default.

"Access by Design" advances the view that government-held information should be made available to the public, and that any exceptions should be limited and specific.

While this is not a new idea, it certainly has taken on a new meaning since the advent of the Internet. The ubiquitous nature of the Web has driven dramatic new increases in public demand for government-held information, fostering civic participation and redefining the significance of freedom of information legislation. Further, advances in information communications technology have also driven an explosive growth in the collection and storage of information, with countless databases now holding vast amounts of data. Consequently, new challenges have arisen in balancing the need for access to information while ensuring its quality, and protecting individual privacy.

The principles of "Access by Design" may be applied to almost all types of government-held information, but the emphasis is on information that allows citizens to hold their government accountable. When information is freely available, the public may question the actions of their government and participate meaningfully in policy decisions. Transparency helps to create a culture of accountability.

Government transparency and access to information are vital ingredients for a free and functioning democratic society. Citizens must be ensured the right to government-held information in order to participate meaningfully in civil life – something which is not possible if government activities are hidden from public view.

The objectives of "Access by Design" - ensuring access, openness and transparency in order to foster a culture of accountability and improved service to the public - may be accomplished by practicing the following 7 Fundamental Principles.

## The 7 Fundamental Principles

1. **Proactive**, not Reactive
Many public institutions are still reactive and wait until a request for information is received before deciding to release it; this can be a slow, cumbersome process, easily used as a mechanism to deny access to information. With "Access by Design", government institutions can take a proactive approach to promote full transparency, while at the same time, achieving cost-savings by eliminating a costly and cumbersome disclosure process.

2. Access **Embedded** into Design
When access is embedded into the design of public programs from the outset, it delivers the maximum degree of access to government-held information by making proactive disclosure the default. The benefits are twofold: the public can access information more directly; and government institutions can save significant resources by making their information available on a routine basis – *by default*.

3. Openness and Transparency = **Accountability**
A transparent and open government is vital for a free and democratic society. The essential purpose of access to information legislation is to support the democratic process by ensuring that citizens have the information required to hold their governments accountable – which is not possible if government activities and documents are hidden from public view. When government proactively provides routine access to government-held information, it creates a "culture of accountability."

4. Fosters **Collaboration**
The Internet has given impetus to a new phenomenon where more and more community groups are coming together online with the power to engage government policy makers directly. Government institutions need to embrace this new culture by making data readily available to these groups as part of the social contract to serve their citizens. Further, there are new opportunities for the private sector to work collaboratively with government in utilizing public data, with many potential benefits for the economy as a whole.

5. Enhances **Efficient Government**
The demand for government services continually increases, while governments constantly face the need for cost reduction measures. By embracing "Access by Design", public institutions can improve their information management practices by eliminating the inefficient process of "reactive" disclosure, and yet provide more streamlined access to public information. Further, citizen groups can also utilize public data to spot inefficiencies in, and improvements for, government services – increasing efficiency by reducing demand on government resources.

6. Makes Access Truly **Accessible**
Simply releasing more data is not enough. "Access by Design" also requires that public information be easily found, indexed and presented in user-friendly formats. There is little value in proactively disclosing public information if it is quietly placed online in obscure locations, using uncommon software which cannot be widely utilized. In addition, public institutions need

to ensure that their IT systems are up-to-date and can meet increased public demand by extracting information quickly, in a cost-effective manner.

7. Increases **Quality** of Information

Information has been called the lifeblood of the 21st century economy. This is no less true when it comes to meaningful citizen participation in public life. Not only is it essential for government institutions to place public data on public databases, they must also ensure that the information is accurate, reliable and up-to-date. Quality control and assurance protocols are vital to ensure that public participation in the democratic process remains relevant and meaningful.