

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER MO-3102-I

Appeal MA14-286

Halton Catholic District School Board

September 29, 2014

Summary: The appellant submitted a request under the *Municipal Freedom of Information and Protection of Privacy Act* for access to information pertaining to his son. The Halton Catholic District School Board issued an initial decision setting out a fee estimate and time extension decision, which was appealed to this office. In this order, the adjudicator does not uphold the time extension decision, finding that it was premature. The fee estimate will be addressed in a separate order.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, 20 c. M.56, as amended, sections 19 and 20.

Orders Considered: M-555, MO-2234, P-28, P-81, PO-3048.

OVERVIEW:

[1] On May 9, 2014, the appellant submitted a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act* or *MFIPPA*) to the Halton Catholic District School Board (the board) for access to the following information pertaining to his son. He sought access to:

From Sept. 2009 to Present –

Copies of all OSR and non OSR Records, including all staff notes, meeting notes, observation notes, assessment notes, rubrics, checklists SLP/connections process notes or docs, special ed consultant files/notes, incident/accident investigation notes, all email and electronic communication (school, board, external), referral records, SERT files/notes/records, phone notes, microfilm

[2] The appellant's request was accompanied by a cover letter, in which the appellant wrote:

I respectfully ask that you contact me directly if there are any questions you may have regarding the [request], to ensure there is no unnecessary delay in processing my request. I look forward to a seamless process for the delivery of the information required.

[3] The board issued its initial decision which provided as follows:

In order to ensure that all potential records have been identified we have determined that 48 individuals may have records in their possession that would be part of the request. Of those 48 individuals, 19 individuals have indicated that they have records that may pertain to the request.

From those 19 individuals we have determined that there are 6179 records that pertain to this request.

Under section 6 of Regulation 823 made under the *Act*, the following fees apply:

- Photocopies of approximately 5950 pages at a cost of \$0.20 per page = \$1190.00.

[4] The letter set out that in accordance with section 7(1) of Regulation 823, where the fee estimate exceeds \$100.00 or more, the head may require a deposit equal to 50 per cent of the estimated fee before taking any further steps to respond to the request. The board requested a deposit in the amount of \$595.00 by cheque or money order in order to process the request.

[5] The board's letter further advised:

We will not know until we process the records, but your request raises the potential for the application of the exemption in section 11(h) Questions used in an examination or test for educational purposes, section 12 Solicitor-client privilege and other sections under the *Act* not yet identified.

[6] Finally, the board requested a time extension under section 20(1)(a) of the *Act*, as follows:

In addition, we will require an extension to November 1, 2014 to answer your request for the following reasons:

- The volume of records that need to be reviewed as per the request
- Most of the staff identified in the request are not scheduled to work during July and August

[7] The appellant appealed the board's time extension and fee estimate by filing an Appeal Form dated June 24, 2014.

[8] At mediation, the appellant advised that he would be amenable to receiving the records on a CD-ROM in accordance with section 6(2) of Regulation 823, instead of photocopies.

[9] With respect to the time extension, the appellant contended that the board should have contacted him at the outset when they received his request, if they considered his request to be broad and involving many records, instead of seeking a time extension to Nov. 1, 2014. The appellant also advised that with respect to the time period, he is seeking records that date back to the first day his son attended school (rather than the earlier date of Sept. 9, 2009 noted in his request). In addition, the appellant indicated that he would be amenable to a time extension to Sept. 2, 2014 with the board adopting a staged approach of every 2 weeks, based on the following order of priority for the records:

1. Non OSR records (staff notes, meeting notes, observation notes, rubrics, checklists, SERT files)
2. OSR records, special ed consultant records, SP records, Psych asmt records, incident investigation notes, board staff consultation files
3. All electronic records, emails from school staff, board staff, external, referral records, phone notes, microfilm, other records not included above

[10] Mediation did not resolve the appeal and it was moved to the adjudication stage of the appeals process.

[11] I decided to address the request for a time extension first.

[12] Accordingly, I sent a Notice of Inquiry with respect to the time extension request to the appellant and the board. In the Notice of Inquiry, I invited them to comment upon Orders MO-1764 and PO-3048 when making their submissions. Both the appellant and the board provided responding representations.

DISCUSSION:

[13] Section 19 of *MFIPPA* sets out the basic requirements for responding to a request. Section 19 reads:

Where a person requests access to a record, the head of the institution to which the request is made or if a request is forwarded or transferred under section 18, the head of the institution to which it is forwarded or transferred, shall, subject to sections 20, 21 and 45, within thirty days after the request is received,

(a) give written notice to the person who made the request as to whether or not access to the record or a part of it will be given; and

(b) if access is to be given, give the person who made the request access to the record or part, and if necessary for the purpose cause the record to be produced.

[14] Section 20 of the *Act* provides that in certain circumstances, an institution may extend the time for issuing a response. That section reads:

(1) A head may extend the time limit set out in section 19 for a period of time that is reasonable in the circumstances, if,

(a) the request is for a large number of records or necessitates a search through a large number of records and meeting the time limit would unreasonably interfere with the operations of the institution; or

(b) consultations with a person outside the institution are necessary to comply with the request and cannot reasonably be completed within the time limit.

(2) A head who extends the time limit under subsection (1) shall give the person who made the request written notice of the extension setting out,

(a) the length of the extension;

(b) the reason for the extension; and

(c) that the person who made the request may ask the Commissioner to review the extension.

[15] The issue to be determined, is whether the request for a time extension is reasonable in the circumstances. Factors which might be considered in determining reasonableness include:

- the number of records requested;
- the number of records the institution must search through to locate the requested record(s);
- whether meeting the time limit would unreasonably interfere with the operations of the institution; and
- whether consultations outside the institution were necessary to comply with the request and if so, whether such consultations could not reasonably be completed within the time limit.¹

[16] A number of orders, beginning with Order P-28, have found that where the institution is responding to a number of separate requests by the same individual, which collectively require a search through a large number of records or necessitate consultation, section 20 is not properly triggered.

[17] In Order P-81, dealing with similar provisions in the *Freedom of Information and Protection of Privacy Act (FIPPA)*, former Commissioner Sidney Linden set guidelines for the issuance of final and interim access decisions, fee estimates and time extensions. These guidelines were reviewed, considered and ultimately reaffirmed in Order M-555.

[18] Order P-81 describes the interim access decision and fee estimate procedures as follows, beginning with a discussion of the time extension provisions found in section 27 of *FIPPA*:

"Interim" section 26 decisions are not binding on the head and, therefore, cannot be appealed to the Commissioner.

...

¹ See Order PO-3048.

Regardless of whether the head has issued an "interim" section 26 notice (based on a representative sample or consultations) or a regular section 26 notice (based on inspection of the actual requested record), *if the notice is accompanied by a fees estimate, the issuance of the fees estimate has the effect of suspending the 30 day time limit imposed by section 26. If the institution sends a fees estimate to the requester on day 14, for example, day 15 is deemed to be the day after the institution receives the required deposit from the requester or issues a decision to waive fees pursuant to a request for waiver.* If the requester appeals the issue of fees, the running of the 30 day period is suspended. It begins to run again on the day after the appeal is resolved, either by Order of the Commissioner or mediated settlement between the parties.

As soon as the question of fees is resolved and the 30 day time limit is reactivated, the institution must retrieve and review all of the requested records for the purposes of determining whether access can be given. If the records are to be disclosed, section 26(b) requires the head to "...give the person who made the request access to the record or part thereof, and where necessary for the purpose cause the record to be produced..." within the balance of the 30 day time limit.

...

The 30 day time limit referred to in my discussions is subject to the extension provisions of sections 27 and 28 of the Act, in the usual manner.

[Emphasis added.]

[19] In Order M-555, former Senior Adjudicator John Higgins reaffirmed the approach taken in Order P-81. In regard to when a time extension may be claimed, he stated:

In my view, Order P-81 also stands for the proposition that, once the question of fees is settled and any requested deposit has been paid, if the institution finds that it faces one of the situations described in section 20, it may claim a time extension at that point (subject to the requester's right to appeal that time extension in the usual way). I agree with this interpretation, which is set out in the summary of steps for responding to a request found on page 13 of Order 81, and particularly step 5, which states:

receipt of deposit or decision to waive fees reactivates the 30-day time limit, *subject to extensions under sections 27*

and 28 [the provincial Act's equivalents of sections 20 and 21 of the Act], and ...

- if an "interim" section 26 [the ... equivalent of section 19 of the Act] notice was sent, head reviews all of the records covered by the request and issues a final decision under section 26. (Emphasis added.)

[20] In Order MO-2234, one of the issues under consideration by Adjudicator Colin Bhattacharjee was whether an institution could claim a time extension with respect to items for which it had already made an interim access decision and, if so, whether the time extension claimed by the institution was reasonable. Adjudicator Bhattacharjee did not uphold the institution's decision to claim a time extension, finding that the institution had prematurely claimed the time extension for responding to those items about which it had issued an interim access decision. He further held that the institution could claim a time extension only after it had received the appellant's deposit.²

[21] The parties provide extensive representations with respect to the time to take to respond to the request. The board sets out its rationale for the time extension request. The appellant provides extensive representations on why the board should have addressed his request earlier.

[22] What is clear in this appeal is that the issue of the fee remains unresolved.

[23] In keeping with the reasoning of the Orders set out above, until the matter of the appellant's appeal of the fee for access is resolved the board's request for a time extension is premature. I am therefore not upholding the board's time extension request, and will proceed to issue a Notice of Inquiry with respect to the appeal of the board's fee estimate, which will be addressed in a separate order.

ORDER:

I do not uphold the board's time extension request.

Original Signed By: _____
Steven Faughnan
Adjudicator

_____ September 29, 2014

² In Order MO-2234, Adjudicator Bhattacharjee had upheld part of the institution's fee estimate. See also order PO-3048.