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

ORDER MO-1980

Appeal MA-040236-1

Toronto District School Board

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NATURE OF THE APPEAL:

The Toronto District School Board (the Board) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records indicating the costs of operating its Continuing Education Community Programs and the revenues these programs generate from student fees.

The request was submitted by a representative of a small group of concerned citizens trying to ensure the survival of the continuing education program at the Toronto District School Board. As a cost-cutting measure, the Board had cancelled this program in 2003. According to the requester, this cancellation was based on erroneous financial information, and "only through the efforts of our group this decision was reversed, thus saving a program that has been a part of the Toronto school system for over 140 years". The request was in furtherance of the group's continuing efforts to establish the cost to the Board of providing this program.

The request referred to information previously disclosed to the requester by the Board. It stated:

> I would like to thank you and the Board Staff for providing the following information for the Continuing Education Community Programs for the 2002-2003 year copies attached.
>
> 1. Fall Budget Analysis - Jan. 23, 2003
> 2. Budget Analysis - May 2003
> 3. Con Ed GI Projected Costs for 2002/2003 - July 4, 2003
> 4. Enrolment and Fee Analysis - Sept. 4, 2003
> 5. Con Ed Community Programs 2002/2003 Enrolment -Sept. 26, 2003
> 6. Con Ed Community Programs 2002/2003 Enrolment - Sept. 26, 2003
> 7. Con Ed Community Programs 2002/2003 Budget - Sept. 26, 2003
>
> I am requesting similar information which would include the following for each course and site, course title and code, fees collected and number of registrants, e.g. regular fees, seniors fees, and gains subsidy, instructor salaries, details of site and central administrative costs, all expenditures should have explanations and rationale. There would be separate account statements for each term. I understand that this type of detailed accounting information is outlined on the Quinte Data Base.
>
> The account statements requested cover the following school years:
>
> 2001-2002
> 2000-2001
> 1999-2000
> 1998-1999
> 1997-1998
>
> Please enclose the Board's Schedule for calculating Facilities Costs.

The appellant made his request on October 16, 2003. On October 27, the Board returned his application fee because it was made out incorrectly and asked him to issue a new cheque. He submitted a new cheque on October 29, 2003.

The Board wrote to the requester on January 7, 2004, stating, "If the TDSB were to process your request in full, we have estimated a cost of $6,000." However, the Board also stated in its letter that it expected that information would be published within 90 days which would provide the requester with some of the information requested.

On July 15, 2004, the Board wrote to the requester stating that the process that it had expected to result in publication of some of the requested information "has not produced information that would be helpful in clarifying or narrowing your request. …A search for documents responsive to your request remains an expensive undertaking".

On July 26, 2004, the requester (now the appellant) appealed the $6,000 fee. Subsequently, the appellant requested that the Board waive the fee. In a follow-up decision dated September 24, 2004, the Board stated, "In the circumstances, the Board has determined that it is not appropriate to waive the fee in whole or in part." The appellant then clarified to this office that his appeal was intended to include an appeal of the fee waiver decision.

This office appointed a mediator to assist in resolving issues in the appeal. During the mediation process, the Board provided the appellant with a sample budget for the 2001-2002 adult education program and some further financial information for the continuing education program for the 2002/2003 school year. It indicated that this information was not responsive to the appellant's request, but might be of assistance. It also indicated that the appellant could contact the Board to receive information similar to the 2001-2002 sample budget dating back to 1999-2000.

However, no further issues were resolved through mediation. Accordingly, the appeal entered the inquiry stage. The Board was initially provided with a Notice of Inquiry summarizing the facts and setting out the issues in the appeal and requested to provide representations. It provided representations on the issues set out below as well as supporting affidavits. In its representations, the Board stated that it had revised its fee estimate from $6,000 to $5,195,576.00.

I provided to the appellant a Notice of Inquiry and shared the representations of the Board and the supporting affidavits with him, except for the information in paragraph 15 of one of the affidavits about the remuneration of four Board employees who participated in locating the requested records, which the Board asked be kept confidential. I invited the appellant to provide representations on the issues set out in that Notice.

I received representations from the appellant. I shared those representations with the Board and asked the Board to reply to those representations. I received further representations from the Board in reply to the representations of the appellant. I shared those reply representations with the appellant and received additional representations from him in response, which did not raise

any new issues or include any new facts that necessitated inviting any further submissions from the Board.

DISCUSSION:

FEES

Should the fee be upheld?

As indicated earlier, the Board provided a $6,000 fee estimate to the appellant on January 7, 2004. I must determine whether this fee estimate is reasonable. However, during its representations in this inquiry, the Board submitted a revised fee estimate of $5,195,576. This raises the question of whether I should uphold the revised fee estimate of $5,195,576.

The $5,195,576 fee estimate

General principles governing fee estimates

An institution that receives a request for information must provide an access decision within 30 days, unless a time extension is requested or notice to affected parties is required (sections 19, 20 and 21 of the *Act*). The institution is entitled, when providing this access decision, to charge fees authorized by the *Act* and regulations, but must give the requester a "reasonable" estimate of any proposed fee over $25 (section 45(3)). Where the fee is $100 or more, the institution may also require the requester to pay a deposit of 50% of the estimated fee before it "takes further steps to respond to the request" (Regulation 823, section 7(1)).

As the fees charged can be substantial, and even prohibitive – often in the hundreds or thousands of dollars – this fee estimate gives a requester, who often does not know what records exist at the time the request is made or whether they contain the information he or she needs, an opportunity to consider how best to proceed – for example, whether to proceed with the request as it stands and pay the fee deposit; appeal the fee estimate, or any part of it; refine the request with a view to lowering costs; or abandon all or any part of the request, without paying associated costs [Order MO-1294, *Fees, Fee Estimates and Fee Waiver: Guidelines for Government Institutions*, Information and Privacy Commissioner/Ontario, October 2003, pp. 8, 13].

This office has recognized that in some cases, it may be unduly expensive for an institution to inspect every potentially responsive record before making the access decision required by sections 19 and 20 and providing an estimate of the fee for providing access. In Order 81, issued in 1989, former Commissioner Sidney B. Linden established a procedure that institutions may follow instead of issuing a final access decision within the time limits in sections 19 and 20 where records are unduly expensive to produce for inspection before making an access decision because of the size of the record, the number of records, or the physical location of the records within the institution.

In these circumstances, Order 81 indicates that an institution may issue a fee estimate without having made a final access decision, by issuing an "interim access decision" providing a preliminary indication of whether or not access will be granted, as well as the fee estimate. To make an interim decision, an institution may use whichever of two approaches is the most appropriate in the circumstances: either base the decision on a review of a representative sample of records, or consult with a knowledgeable employee or employees.

Order 81 set out the requirements for a fee estimate in an "interim decision", which may be summarized as follows:

1. A reasonable estimate of proposed fees under section 45(3) should be accompanied by an interim notice under section 19 indicating whether the requester is likely to be given access to the requested records;

2. A requester must be given sufficient information to make an informed decision regarding payment of fees;

3. It is the responsibility of the head of the institution to take whatever steps are necessary to ensure the estimate is based on a reasonable understanding of the costs involved in providing access. Anything less would compromise and undermine the underlying principles of the *Act*;

4. To be satisfied that the fee estimate is reasonable without actually inspecting all the records, the head must do one of two things:

    a. Seek the advice of an employee of the institution who is familiar with the type and content of the requested records; or
    b. Base the estimate on a representative sample of the records;

5. The head's notice to the requester should include:

    a. A breakdown of the estimated fees;
    b. A clear statement of how the estimate was calculated; and
    c. Whether it is based on consultations or a representative sample;

6. If the institution does not indicate in its fee estimate that access to the records will not be granted, it is reasonable to conclude that the records will be released in their entirety upon payment of the required fees;

The head's decision on any fee waiver request should be given in this interim notice [Order 81, Order MO-1614].

In Order MO-1699, Adjudicator Shirley Senoff commented on the relationship between section 7(1) of Regulation 823, which provides that if the estimated fee is over $100, the institution may

require payment of a 50% deposit "before it takes any further steps to respond to the request", and the interim access and fee estimate approach established in Order 81. She stated:

> Where the fee is $100 or more, the 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 the work necessary to respond to the request, initially. In that case, it must issue an interim access decision, together with a fee estimate, and may require the requester to pay a 50% deposit of the estimated fee….

In other words, the institution must in all cases issue either an interim or final access decision within the applicable time frame mandated by the *Act*. It cannot simply issue a fee estimate and refuse to provide any indication of whether access will be granted, and if denial of access in whole or in part is contemplated, it must either indicate which exemptions apply to what information and why (final decision), or the extent to which access is likely to be granted (interim decision.) In addition, an interim access decision should indicate which exemptions may apply, to the extent that can be determined by reviewing a representative sample or consulting with a knowledgeable employee (see Order MO-1614).

As former Assistant Commissioner Tom Mitchinson explained in Order PO-2299:

> The purpose of the fee estimate, an interim access decision and deposit process is to provide the requester 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.

And as he explained in Order M-1123:

> 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 Board's Actions in Response to the Request

In this case, without any request for a time extension, the Board replied to the appellant's October 16, 2003 request on January 7, 2004 with a fee estimate of $6,000. The letter gave no indication of how the Board arrived at this fee estimate. It did not contain a breakdown of the estimated fees, a statement of how the estimate was calculated, or whether it was based on consultations, review of a representative sample of records, or some other activity. Nor did it indicate whether, or to what extent, access to the information would be likely be granted on

payment of the fee, and if anything was likely to be withheld, which exemptions would likely be claimed.

In its representations in the course of this inquiry, the Board states that in response to the appellant's request, it "issued a decision, including a fee estimate of $6,000". It does not state when this decision was issued; however, as noted above, the fee estimate of $6,000 was contained in a letter dated January 7, 2004. In that letter, the Board stated, "I will not begin the process of determining what records the Board has that are responsive to your request". The letter was clearly not an access decision. On the contrary, it conceded that no access decision had been made and essentially refused to provide one.

Moreover, the letter did not provide to the requester "sufficient information to make an informed decision as to whether or not to pay the fee and pursue access" which is "the purpose of the fee estimate, an interim access decision and deposit process" [Order PO-2299, above]. It provided the requester with no indication of what information, if any, he was likely to receive in return for payment of $6,000, what information might be withheld, and what exemptions might apply.

In its fee waiver decision letter, dated September 24, 2004, almost ten months later, the Board did tell the appellant:

> We anticipate that access will likely be granted to most if not all of the information requested (to the extent such information exists which is responsive to the request).

However, not all information requested is equally important to requesters. Before agreeing to pay a fee of $6,000, a requester needs a reasonable indication of whether the information does, in fact, exist, and a breakdown of which portions of the $6,000 fee relate to which kinds of records.

The Board explained for the first time in its January 2005 representations how it arrived at a fee estimate. However, it was not an explanation of the $6,000 fee estimate, but of a new $5,195,576 estimate. Although it appears that the Board did not initially do any record searches before determining its $6,000 fee estimate, its representations and supporting affidavits provide a detailed explanation of the sample searches done during the inquiry stage of this appeal and their results, which led to the $5,195,576 fee estimate.

In its reply representations in this inquiry, in response to a question from me, the Board provided for the first time some information about how it had arrived at the $6,000 fee:

> The current access request of the appellant is actually his third request. …
>
> In responding to the second request (the 2002-3 request), the Toronto District School Board (TDSB) staff prepared new documentation for the 2002-2003 year related to Continuing Education Programs. The time taken to respond to this request equated to approximately $6000 worth of search and preparation time. …

> When the third request was received (the request currently appealed), the Board used its experience with the previous request to form the basis for its initial fee estimate.

The Board used a different method to arrive at a fee estimate during the inquiry. It designed and carried out searches of a representative sample of records. Based on searches done to respond to this appeal, the Board decided that the fee estimate of $6,000 (arrived at through the methodology described above) was inaccurate, and revised it to $5,195,576.

Analysis and findings

The Board had a choice of methods that it could use in estimating the fee and made its choice. The Board must be accountable for its choice of methods. While Order 81 does not dictate which method is to be used, the method must be one that results in a **reasonable** fee estimate as required by section 45(3).

As indicated earlier, the purpose of a fee estimate and interim access decision is to permit an institution to meet its obligations to a requester under the *Act* while not putting it to the expense of locating and making a final access decision on each one of a large number of records. The necessary elements of a fee estimate and interim access decision outlined in Order 81, and reproduced in detail above, are designed to ensure that the requester, and the Commissioner on an appeal, are in a position to assess whether the fee estimate is in fact, reasonable.

The Board's delay and non-compliance with the *Act* are relevant to whether it should be permitted to increase its fee estimate. The Board engaged in a pattern of conduct that should not be reinforced or rewarded by approving a higher fee.

In this case, the Board has failed to comply in any meaningful way with the requirements to provide a timely decision together with a fee estimate. The appellant made his request on October 16, 2003, and the Board has stated that it was received on October 21, 3003. The Board responded on November 24, 2003 by stating that it was extending the time for responding to December 20, 2003 because of "unanticipated staff absences". Although the appellant did not appeal this, I note that this is not a basis for a time extension contemplated by section 20 of the *Act*.

Despite claiming a time extension not sanctioned by the *Act*, the Board did not respond by its projected date of December 20, 2003. On January 7, 2004, the Board again wrote to the appellant but gave him no access decision on any of the requested records, stating its belief that information responding to his request would be published by the Board within 90 days, and "[t]herefore, at this time, I will not begin the process of determining what records the Board has that are responsive to your request". Section 15(b) of the *Act*, which the Board did not expressly mention in its January 7, 2004 letter, is a discretionary exemption from the right of access under the *Act* that may be claimed where "the head believes … that the record or the information in the record will be published by an institution within ninety days after the request is made …". Neither this section nor any other provision in the *Act* would justify refusing to locate and

identify responsive records and state definitively which ones are exempt or, alternatively, issue an interim access decision.

In the same letter, the Board also stated, "If the TSDB were to process your request in full, we have estimated a cost of $6,000". The letter gave no indication of how it arrived at this cost estimate.

The January 7, 2004 letter did not state that it was intended to be an interim decision on access. If it was intended as an interim decision, it met none of the requirements set out in Order 81 except for providing a fee estimate. The Board is well aware of these requirements [see Order M-555]. Nor did it meet the requirements for a final access decision.

Nevertheless, as a result of the January 7, 2004 letter, the appellant had a reasonable expectation that he would receive at least some of the requested information by around April 7, 2004. From February to May, 2004, the appellant made several telephone calls to the Board asking when he would receive the information promised in the January 7, 2004 letter. According to page 3 of the Board's reply representations, the Board was aware by March or April 2004 that the information promised in its January 7, 2004 letter "would not produce useful information". Yet it still did not provide an access decision.

The appellant continued to telephone the Board to request that information responsive to his request be provided. On July 6, 2004, the appellant wrote to the Board asking about the information promised in the January 7, 2004 letter and requesting "a reply to this request".

On July 15, 2004, the Board again wrote to the appellant. It acknowledged that the promised report existed in draft form, but stated that it would not meet his needs. Thus, the letter acknowledged that the original reason for refusing to process his request no longer applied (information to be published within 90 days), but still provided no access decision.

The July 15, 2004 letter reiterated the contents of his request, but contained no description of the records that may be responsive to his request, no indication of what records he might expect to receive in response to paying the fee of $6,000, what records might be denied, what exemptions might apply to those records, no breakdown of the fee or explanation of how it was calculated, no information about his right to appeal a deemed refusal, and no information about his right to request a waiver of the fee. It was neither a final access decision nor a proper interim decision.

I note that by the time of the July 15, 2004 letter, about nine months had passed since the date of the appellant's request. Even if the Board's time extension until December 20 was based on grounds sanctioned under the *Act*, which apparently it was not, nearly seven months had passed since that date and the appellant was still without an access decision of any kind.

On July 24, 2004, the appellant finally appealed the fee and the Board's refusal to waive the fee.

On September 24, 2004, the Board wrote to the appellant stating that it had some additional information dating back to 1999 "which may be of assistance to you which could be provided to

you immediately and at no cost. …Please call me if you would like to receive that information". It is unclear from the material provided to me whether this information was responsive to the request or merely additional helpful information.

Nevertheless, the letter shows that the Board did make a decision in September 2004 to provide some information at no cost if requested. The appellant indicates in his representations that he confirmed in September through the mediation process conducted by this office that he would like access to this information, but the Board did not provide it until December 23, 2004. An affidavit affirmed by the Board official who provided by the states, "After the Board was notified that [the appellant] was interested in receiving the remainder it was sent with covering letter dated December 23, 2004". The affidavit does not state how long after the request this was. The Board does not dispute the appellant's allegation that it did not provide the information until three months after he requested it.

On December 8, 2004, I gave the Board this office's usual three weeks in which to provide representations in this inquiry. In response, the Board asked for an extension to January 14, 2005, which was granted. One of the reasons given for requesting this extension was that, "the Board has determined that it is appropriate to conduct an *amended* sample search in order to greater ensure the accuracy of the fee estimate." [Emphasis added]. However, it appears from the information provided about the initial basis for estimating the fee, set out earlier, that in fact there was no initial sample search to amend.

In this case, although the representations of the Board state that it issued a "decision", I find that the Board not only failed to issue an adequate interim decision, if indeed its letter of January 7, 2004 can be characterized as an interim decision, but that it refused in that letter to even "begin the process of determining what records the Board has that are responsive to [the] request". In fact, the Board still has not issued a "decision" to the appellant either in accordance with the *Act* or the procedure outlined in Order 81.

Many institutions issue revised decisions during the course of an appeal, based on additional information that becomes available during the course of the appeal, often acknowledging that they have located additional records or agreeing to disclose records that they had previously refused to disclose. In this case, the Board has now carried out extensive work to define what information is and is not available and has had the benefit of receiving submissions from the appellant, but still has not issued an access decision.

In deciding whether to uphold the Board's increased fee estimate, I have taken into account purpose of the *Act* and the circumstances of this case. I have taken into account that the *Act* incorporates a "user-pays" principle. Circumstances favouring the Board include the fact that the appellant's request is very broad; that much of the information does not exist in the format in which the appellant wants it; that the information is in various locations; that the amalgamation of several school boards, the initial decision to discontinue the continuing education program, and the passage of time have increased the difficulty of locating the information or determining whether it exists; that the Board has voluntarily and without charge provided other information to the appellant before and during this appeal; that the Board has made some efforts to work with

the appellant to clarify and narrow his request; and that some of the delay in providing a decision has resulted from factors such as the Board being short-staffed and the Board believing that certain events would result in at least some of the information becoming available to the appellant through other means.

However, I must also take into consideration the failure to take advantage of the procedures outlined in Order 81, which are intended to address some of the problems the Board faces, even though the Board is familiar with those procedures; the Board's delay at almost every step of the process; the Board's outright refusal in its letter of January 7, 2004 to even process the request without any legitimate basis for doing so; the failure of the Board to take advantage of the opportunity to issue even a revised interim access decision following the searches done to respond to this appeal; and the need to preserve the integrity of the *Act*.

In my view, this situation is similar in some respects to the situation described in Order MO-1699. In that case, the City of Hamilton issued a decision letter identifying a number of responsive records and gave a fee estimate of $366 for preparing and copying the records. The City then wrote to the requester indicating that it was continuing to search for additional responsive records. The City subsequently issued a third decision letter, identifying and describing additional responsive records and indicating that two of its departments had just informed the City of the time they had spent searching for responsive records. Based on this new information, the City charged a search fee of $469.80 in addition to the initial fee estimate of $366.

The requester in that case appealed the decision to charge a search fee and asked that it be disallowed, either in whole or in part. He argued that the City should not be allowed to "return to the well" nearly two months after providing an interim decision and charge new fees that it had not originally contemplated. He contended that allowing institutions to revisit the entire basis of fee estimates "after the fact" would open the door to abuse of process, with a view to discouraging access. The appellant noted that the search fee related not only to the newly identified records but also to some identified in the City's first decision letter. The appellant submitted that he relied upon the City's original fee estimate in deciding how to proceed. Had he known that additional fees would be charged, he might have amended the scope of his request.

In Order MO-1699, Adjudicator Shirley Senoff stated:

> …I agree with the appellant that the City should not be permitted to charge a search fee in this case.
>
> …[O]ne of the purposes of the fee estimate, interim access decision and deposit process is to provide requesters with sufficient information to make an informed decision as to whether to proceed. …
>
> The City should have informed the appellant of possible search fees and given him an estimate of the amount of such fees at the time it issued its first decision and asked for a deposit. The City's failure to do so prejudiced the appellant by

> putting him in the position of having to decide whether or not to proceed, without the benefit of the "full picture" regarding applicable fees.

Adjudicator Senoff ordered the City to issue a final decision to the appellant, which was not to include a fee for searching for responsive records.

I also note that, as stated in Order 81, a fee estimate review is designed to ensure that "the head of the institution [has taken] 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 would compromise and undermine the underlying principles of the *Act*". In my view, an attempt to increase the fees charged from an initial estimate of $6,000 to a revised estimate of over five million dollars, or nearly 1,000 times the amount of the original estimate, is sufficient to demonstrate that the Board's initial process did not come close to complying with this objective.

It would be unfair to the appellant to permit the Board, over one year after it gave him a fee estimate of $6,000 to change that estimate to $5,195,576. The appellant relied upon the initial estimate in deciding whether to appeal and in formulating his appeal and paid a fee to appeal. Had he known that the fee would be changed so dramatically, he might have taken a different course of action, such as agreeing to pay the initial fee or narrowing his request. The Board's decision to charge a larger fee fundamentally changed the landscape of this appeal.

An appellant who appeals a fee estimate should not be subjected to an institution substantially raising the fee as a result of belated efforts to determine a reasonable fee estimate which it could have made by complying initially with Order 81 but chose not to at the time. In my view, permitting an institution to raise a fee estimate to over $5 million would undermine the integrity of the *Act*.

One of the key purposes of access to information laws is to permit the public, including public interest groups, to participate in influencing policy development. The Divisional Court has cited with approval the following statement by the Federal Court of Canada:

> …[D]emocratic principles require that the public, and this often means the representatives of sectional interests, are able to participate as widely as possible in influencing policy development. Without a degree of openness on the part of government about their thinking on public policy issues, and without access to relevant information in the possession of government, the effectiveness of public participation will inevitably be curbed.
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> *Ontario (Ministry of Northern Development and Mines) v. Mitchinson* [2004] O.J. No. 163

Excessive delays and prohibitive fees defeat the purpose of access to information laws. The need to avoid excessive delay and excessive expense to requesters was addressed in the report of the Williams Commission, which led to the passage of *the Freedom of Information and Protection of Privacy Act*, and later, its municipal equivalent. As that Commission stated, "Access delayed is

access denied": *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980* , (Toronto: Queen's Printer, 1980) at 266-7 and 268 to 273.

In particular, the unreasonableness of charging a requester a substantial fee without any assurance that records will be provided has been recognized not only by the Commissioner in fashioning his interim decision procedure, but also by the Williams Commission and the U.S. Attorney General: See *Public Government*, above, at 270.

In my view, the appropriate remedy under the circumstances with respect to the new estimate of $5,195,576 is to disallow it to the extent that it exceeds the original estimate of $6,000. Accordingly, I will not permit the Board to charge any fee that exceeds its original $6,000 estimate. I turn, therefore, to whether the original $6,000 fee estimate should be upheld.

The $6,000 fee estimate

As indicated earlier, until January of 2005, the Board provided to the appellant no explanation of how it arrived at the $6,000 fee estimate. However, in its January, 2005 representations, the Board provided extensive information about the steps that need to be taken to locate the requested records and the expected costs in doing so. I am satisfied from the information provided that the cost of responding to the appellant's request will exceed $6,000. Therefore, I would be prepared to uphold a fee estimate of up to $6,000, if I am provided with a breakdown of this $6,000 indicating which portions of the fee are attributable to which procedures, and provided that these fees are the ones permitted by section 45 and section 6 of Regulation 823.

I have considered whether I should disallow part of the $6,000 fee as a result of the Board's conduct. Much of the delay and failure to comply with the *Act* that I have outlined above is not only relevant to whether to allow an increase beyond the original $6,000, but could also be relevant in deciding whether to uphold the $6,000 fee estimate.

As indicated earlier, the Board has never provided the appellant with an adequate interim decision and has not provided a final access decision, despite the clear language of the *Act* requiring an access decision and the procedures developed by this office in Order 81 to facilitate providing information through the use of interim decisions.

In Order MO-1614, (upheld by the Divisional Court on judicial review: *Toronto (City) v. Humane Society of Canada*, [2004] O.J. No. 659) former Assistant Commissioner Tom Mitchinson considered the appropriate remedy where an interim decision is found to be inadequate. After reviewing several orders in which the interim decision was found to be inadequate and the remedies utilized in those cases, the Assistant Commissioner concluded that those cases made it clear that the appropriate remedy is dependent on the facts and circumstances of a particular appeal. This office will craft a remedy that will attempt 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. Assistant Commissioner Mitchinson found that one of the available remedies is that this office may disallow some or all of the fee.

In this case, based on the representations of the Board and supporting affidavits, the actual cost of responding properly to the request is likely to greatly exceed $6,000. Given that I have already addressed the Board's delay and the other deficiencies in its response by disallowing the new fee over and above that amount, I will not further reduce the fee that can be charged on this basis.

Therefore, in the circumstances of this appeal, I consider an appropriate remedy to be an order requiring the Board to issue a final access decision and to recalculate the fee based on its decision, but to limit the fees that may be charged to the appellant to a maximum of $6,000.

FEE WAIVER

Should the fee be waived?

General principles

Section 45(4) of the *Act* requires an institution to waive fees, in whole or in part, in certain circumstances. Section 8 of Regulation 823 sets out additional matters for a head to consider in deciding whether to waive a fee. Those provisions state:

> 45(4) A head shall waive the payment of all or any part of an amount required to be paid under subsection (1) if, in the head's opinion, it is fair and equitable to do so after considering:
>
> (a) the extent to which the actual cost of processing, collecting and copying the record varies from the amount of the payment required by subsection (1);
>
> (b) whether the payment will cause a financial hardship for the person requesting the record;
>
> (c) whether dissemination of the record will benefit public health or safety; and
>
> (d) any other matter prescribed by the regulations.
>
> 8. The following are prescribed as matters for a head to consider in deciding whether to waive all or part of a payment required to be made under the Act:
>
> 1. Whether the person requesting access to the record is given access to it.

2. If the amount of a payment would be $5 or less, whether the amount of the payment is too small to justify requiring payment.

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 institution or this office may decide that only a portion of the fee should be waived [Order MO-1243].

Below, I will consider whether the statutory factors set out above support a fee waiver in this case.

In his representations, the appellant provides some background to his request and describes the group he represents:

> On February 17, 2003, a news release was issued by [the Board] stating that the Seniors, After School, Enrichment and General Interest Continuing Education programs would be discontinued based on the rationale that the program was running in a deficit position. In response to this announcement, [the appellant's group] was formed, to advocate for the reversal of this policy position and restore adequate funding and programs.
>
> [The group] obtained 5000 [signatures on] petitions, made several presentations to Toronto Board of Education, requesting that the program would continue. Upon our review and with limited financial knowledge we determined that there were several errors in the budget analysis which would make the program viable. We presented our findings to [the Board].
>
> Through the efforts of our group on May 21, 2003 it was announced that the decision to cancel the program was reversed.
>
> Without our organization's ability to assess the financial information, this 140-year tradition which prior to amalgamation of [the Board] had served 300,000 participants annually would have been eliminated.

To what extent will the actual cost of processing, collecting and copying the record vary from the amount of the payment required by subsection (1) of section 45?

The appellant's representations in respect to this issue do not address this factor. In its fee waiver decision, the Board stated, "The cost of the search is substantial". The Board states in its representations that the actual cost of the search for records, of severing records and of photocopying records will likely exceed the fee estimate, and provides affidavits that support this conclusion. I am satisfied that the actual costs will likely exceed the original $6,000 fee estimate which is the maximum fee estimate this order will permit. Therefore, this is not a factor that weighs in favour of a fee waiver.

Will the payment cause a financial hardship for the person requesting the record?

The fact that a fee is large does not necessarily mean that payment of the fee will cause financial hardship [Order P-1402]. Generally, a requester should 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]. When access requests are made by individuals representing small, grass-roots groups, this office's practice has been to take into account the financial resources available to both the individual and the group. In Order P-111, Commissioner Linden held that when an institution is considering whether payment of a fee by an association would cause financial hardship, it is appropriate to consider the size of the association and the cost per member if the association were to pay the fee.

In the appellant's fee waiver request to the Board, the only information about his ability to pay or that of his group is the statement, "as you know, we have no funding". In its fee waiver decision, the Board stated that it took this into account, but does not state findings or what weight it gave to this factor.

In the Notice of Inquiry that I sent to the appellant, I drew his attention to the requirement to provide information about income, expenses, assets and liabilities. In his representations, the appellant states:

> The Board is aware in my [letter requesting a fee waiver] that [the group] is a grassroots organization made up of a handful of concerned volunteers (many of them seniors) and as such have no funding and I am sure that the Board officials are aware of this.

This limited information does not allow me to assess how much, if any, of a fee of up to $6,000 the appellant and the members of his group are able to pay without suffering financial hardship. Therefore, this is not a factor that supports a fee waiver.

Will dissemination of the record benefit public health or safety?

The Board's fee waiver decision stated that "the information does not pertain to public health and safety". It is clear from the description above of the purpose and activities of the appellant's group that it intends to use the requested information in support of a public interest, namely, preserving continuing education programs that benefit, among others, the elderly. However, the

appellant has not argued that the information will be used to benefit public health or safety. This is not a factor favouring a fee waiver.

Will the person requesting access to the record be given access to it?

In my view, the less access is likely to be provided, the more this factor favours a fee waiver. In its representations, the Board states:

> Based on a description of the information requested, it is likely that the requester will obtain much of the information requested – to the extent it still exists. The Board does not anticipate significant reliance upon the exceptions to the general access obligation.

This does not weigh in favour of granting a fee waiver.

Conclusions

Having considered these factors, I do not find any reason to vary the Board's decision not to grant a fee waiver. In Order PO-1998, Assistant Commissioner Mitchinson considered an additional factor. He ordered an institution to waive various fees in connection with an access request because there was "indefensible delay" in responding to the request. The institution took approximately eleven months to respond and then only provided an interim decision. In my view, the Board's action in this case might also be characterized as unconscionable or indefensible. However, I have already taken this delay into account in my decision whether to uphold the fee estimate.

Based on the information provided to me, I find that the Board is not required to waive the fee. Nevertheless, because I am ordering the Board to issue a new fee decision, the appellant may, if he wishes, make a further request for a fee waiver after he receives the new estimate.

ORDER:

1. I order the Board to provide to the appellant and to me a final access decision in accordance with sections 19 and 21 and to notify any affected persons under section 22 without recourse to a time extension under section 20 within fifteen days after the date of this order, and to recalculate the fee, if any, based on its decision and provide a breakdown of any fees and an explanation of how they were calculated , but to limit the fees that may be charged to the appellant to a maximum of $6,000.

2. For greater certainty, the above provision is without prejudice to the appellant's right to appeal any fee estimate in that decision of $6,000 or less, and to make a further request for a fee waiver.

3. I order the Board to provide with its decision to me, and subject to any confidentiality concerns, to the appellant, an index of records that clearly describes each responsive

record, states whether access to it is granted or denied, and for each record or portion of a record to which access is denied, identifies the exemption (including applicable subsection(s) where an exemption has more than one subsection), that is claimed for that record or portion of a record.

Original Signed By: October 14, 2005
John Swaigen
Adjudicator