



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER MO-2358

Appeal MA07-175

Halton Catholic District School Board



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BACKGROUND:

The requester is the father of a child (the child) who was attending grade 4 at a named elementary school within the Halton Catholic District School Board (the Board) during the 2006-2007 academic year. At that time, the child was nine years old. In November 2006 the requester states that he received news that his mother, who was residing in Buenos Aires, Argentina, was experiencing a downward turn in her health. The requester proceeded to make urgent arrangements to visit with his mother for an extended period of time.

According to the requester, he and his wife wrestled with what was best for their child in light of this development. The requester and his wife do not have family in Canada and they were concerned about leaving their child with friends for an extended period of time. As well, the requester considered making the trip to Buenos Aires alone and leaving the child behind with his wife. However, this was ruled out because the requester's wife cannot be left alone for extended periods of time due to health issues. A decision was ultimately made that the requester would remove his child from school and travel with him and his wife to Buenos Aires.

The Board states that in an effort to assist the child, his teachers prepared a six-page detailed document, which included areas of study and homework to be completed by the child during his absence. The Board also states that it assured the requester that child would be tested and subsequently graded on only the information contained in this six-page document.

Upon the requester's return, he made a verbal request for copies of all educational materials that were delivered during his child's absence. This was followed by a written request to the school.

When the school refused to provide copies of the written materials, the requester submitted a freedom of information request under the *Municipal Freedom of Information and Protection of Privacy Act* (the Act).

NATURE OF THE APPEAL:

The requester submitted a request under the Act to the Board for

[a]ll written educational materials delivered to students in the Fourth Grade ...of [a named elementary school]... between the dates of December 12, 2006 and February 7, 2007. Such materials are typically delivered as photocopies in the form of stand-alone pages and/or stapled leaflets. Materials are typically either consumables (e.g. pages containing exercises) or lessons (e.g. pages describing topics). Requested materials do NOT include complete printed textbooks or tests. The following curricular topics should be reviewed to ascertain if material was delivered: Mathematics, Religion, Health, Creative Writing, Edit/WOW, Grammar, Journal, Science, Social Sciences, French, Spelling IRP and Art.

The Board issued a fee estimate in the amount of \$372.00, comprised of search time and photocopying charges.

The requester then requested a fee waiver, which the Board denied.

The requester (now the appellant) appealed both the fee and the denial of the fee waiver.

The parties were unable to resolve these issues during the mediation stage of the appeal process and the file was transferred to the adjudication stage for an inquiry.

I commenced my inquiry by issuing a Notice of Inquiry and seeking representations from the Board, which submitted representations in response.

I then sought representations from the appellant and included with my Notice of Inquiry a complete copy of the Board's representations. The appellant submitted representations in response.

The representations received from the appellant raised issues in response to those received from the Board. Accordingly, I provided the Board with a severed copy of the appellant's submissions and sought reply representations from the Board. Portions of the appellant's representations were severed due to confidentiality concerns.

The Board submitted reply representations, in which it indicated that it had determined a final fee in the amount of \$380.40, comprised of \$360.00 in search time and \$20.40 in photocopying charges. I shared the Board's reply representations with the appellant and invited him to respond to them by way of sur-reply. The appellant submitted further representations.

DISCUSSION:

FEES

I will first determine whether the Board's final fee in the amount of \$380.40 should be upheld.

Section 45(1) requires an institution to charge fees for requests under the *Act*. That section reads:

A head shall require the person who makes a request for access to a record to pay fees in the amounts prescribed by the regulations for,

- (a) the costs of every hour of manual search required to locate a record;
- (b) the costs of preparing the record for disclosure;
- (c) computer and other costs incurred in locating, retrieving, processing and copying a record;
- (d) shipping costs; and
- (e) any other costs incurred in responding to a request for access to a record.

More specific provisions regarding fees are found in sections 6, 6.1, 7 and 9 of Regulation 823. Those sections read:

6. The following are the fees that shall be charged for the purposes of subsection 45(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.

6.1 The following are the fees that shall be charged for the purposes of subsection 45(1) of the Act for access to personal information about the individual making the request for access:

1. For photocopies and computer printouts, 20 cents per page.
2. For records provided on CD-ROMs, \$10 for each CD-ROM.
3. 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.
4. 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.

7. (1) If a head gives a person an estimate of an amount payable under the Act and the estimate is \$100 or more, the head may require the person to pay a deposit

equal to 50 per cent of the estimate before the head takes any further steps to respond to the request.

(2) A head shall refund any amount paid under Subsection (1) that is subsequently waived.

9. If a person is required to pay a fee for access to a record, the head may require the person to do so before giving the person access to the record.

Where the fee exceeds \$25, an institution must provide the requester with a fee estimate.

Where the fee is \$100 or more, the fee estimate may be based on either

- the actual work done by the institution to respond to the request, or
- a review of a representative sample of the records and/or the advice of an individual who is familiar with the type and content of the records.

[MO-1699]

The purpose of a fee estimate is to give the requester sufficient information to make an informed decision on whether or not to pay the fee and pursue access [Orders P-81, MO-1367, MO-1479, MO-1614, MO-1699].

The fee estimate also assists requesters to decide whether to narrow the scope of a request in order to reduce the fees [Order MO-1520-I].

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

This office may review an institution's fee and determine whether it complies with the fee provisions in the *Act* and Regulation 823, as set out below.

Calculation of fee

Parties' representations

The Board has provided detailed representations that document its search methodology and the actual searches conducted by Board employees in this case.

The Board states that the records sought by the appellant are handouts that were given to students for the six week teaching period between December 12, 2006 and February 7, 2007. The Board notes that there were no classes during the two week break between December 24, 2006 and January 7, 2007, and so this period was not included in the search.

The Board states that upon reviewing the appellant's request, it concluded that the request concerned two individuals, the regular classroom teacher (the Classroom Teacher) and the French teacher (the French Teacher). The Board states that it asked both teachers to conduct a search for records for a five day school period (one week) and to document the time that it took to complete the search and the number of records that were found. The Board states that the one week period that was searched fell into the time frame specified by the appellant in his request.

The Board states that the Classroom Teacher indicated that it took her 2 hours for the initial one week search, but felt that a better estimate might be in the range of 1.5 to 2 hours per week based on the time of year of the request. The Board submits that the French Teacher indicated that it took her approximately 0.5 hours to complete her search for the initial one week period. The Board states that it was advised that a total of 10 responsive records were located for this one week sample period. The Board concluded that based on this representative one week sample, the estimated weekly search time was 2.5 hours per week with a total of 10 records generated per week.

The Board states while it could have applied this methodology in the determination of its fee estimate, it chose to use the Classroom Teacher's lower estimate of 1.5 hours and the French Teacher's time of 0.5 hours for a weekly total of 2 hours, in order to ensure that the appellant was provided with a "fair and reasonable estimate".

The Board states that in each of the six teaching weeks there are 35 different and distinct lessons that are taught to the students, with each lesson comprised of a lesson and handouts that are distributed to the students. The Board indicates that in order for the search to be thorough the teachers had to review each of the 35 lessons in each week. The Board submits that the Classroom Teacher reviewed 30 lessons per week while the French teacher reviewed 5 lessons per week. The Board states that the location of the lessons may vary depending on the lesson taught and the handouts to be distributed to the students. Some lessons were kept in binders while others were kept in folders. The Board submits that original copies of the handouts may be kept with the corresponding lesson plans while others had to be copied from text books.

The Board provides the following breakdown of a typical teaching week by lesson:

Music Drama	1 lesson/week
Math	6 lessons/week
Social Studies/Science	4 lessons/week
Language Arts	8 lessons/week
Physical Education	2 lessons/week
French	5 lessons/week
Religion	4 lessons/week
Health	1 lesson/week
Computers	1 lesson/week
Art	2 lessons/week
Library	1 lesson/week
TOTAL	35 lessons/week

Based on its search time benchmark of 2 hours per week, resulting in the recovery of 10 records per week, the Board determined its weekly search cost to be \$62.00, broken down as follows:

2 hours per week search time	X	\$30.00 per hour search time (\$7.50 per 15 minutes)
10 records	X	20 cents per page
TOTAL		\$62.00 per week

To arrive at its initial \$372.00 fee estimate, the Board then took the \$62.00 per week search cost and multiplied it by six (to capture the six week teaching period specified by the appellant in his request).

In arriving at its final fee of \$380.40, the Board has not diverted from the methodology set out above. The Board states that a total of 12 hours was expended in search time for the six week period (5 hours for the Classroom Teacher and 7 hours for the French Teacher) for a total of \$360.00 in actual search time. The difference between the fee estimate total and the final fee total seems to be based on the actual number of records retrieved. While the Board based its fee estimate on the recovery of 10 records per week for a total of 60 records and a total estimated photocopying charge of \$12.00, its final fee indicates that a total of 166 records were found (the Classroom Teacher located 64 records and the French Teacher located 102 records). The Board has indicated the actual photocopying cost to produce the 166 records is \$20.40, accounting for the \$8.40 differential between the fee estimate and the final fee totals. In fact, it appears that the Board has made an arithmetical error in arriving at the final photocopying charge. If the actual number of records located is 166 then the total photocopying charge should be \$33.20 not \$20.40 and the Board's final fee should be \$393.20 not \$382.40.

The appellant has provided unusually lengthy and detailed representations on both the fee and fee waiver issues, totalling 83 pages, plus an additional 200 pages (or more) of appendices. The appellant's representations on the fee issue alone are 47 pages in length plus appendices. The appellant also provided additional 22 pages of representations in sur-reply plus several pages of appendices.

The main thrust of the appellant's representations can be summarized as follows:

- The Head failed to follow-up on information provided by the appellant prior to conducting its search.
- At the initial decision stage, the Board failed to provide a clear statement of what was searched and how the search was conducted.
- At the initial decision stage, the Board's fee estimate breakdown does not provide sufficient information to discern how the fee estimate was calculated.

- The Board makes reference in its initial decision letter to having followed its “usual practice” in determining a “reasonable fee” in this case. The appellant argues that the Board failed to provide evidence of its use of this “usual practice” in the processing of other past requests and questions whether the search methods followed in this case were reasonable, appropriate and unbiased.
- With reference to the principles enunciated by former Commissioner Sydney Linden in Order 81, the Head failed to take “whatever steps are necessary” to ensure that the fee estimate was based on an “unbiased” and “reasonable understanding of the costs involved in providing access”. The appellant asserts that the Head had an obligation to perform “due diligence” to determine whether the search process undertaken was unbiased. The appellant argues that there is no evidence to suggest that the Head undertook such an exercise. Accordingly, he concludes that the fee estimate is biased.
- The cost of processing the request should be minimal since the requested records would be segregated in and readily identifiable from student notebooks, binders or duo-tang folders to which the teacher has direct and daily access.
- The records would be well known to the teachers and, therefore, easily identifiable since they are reused year after year.

The Board responds to some of the appellant’s submissions in reply. With regard to the appellant’s assertion that the Board could search other students’ binders or duo-tang folders, it states that this is not a “normal or acceptable practice” since not all student binders and duo-tangs would be consistent with regard to their contents due to absence from certain lessons for various reasons. The Board suggests that searching in this way would have been more expensive since the teachers would have had to search several student binders and duo-tangs to ensure that all handouts were accounted for. The Board also adds that curriculum guidelines can change year to year and that a lesson taught in one year may change significantly in the following year. Accordingly, the Board argues that the information at issue may be new to the teachers, necessitating a thorough search of each lesson taught during the child’s absence.

Analysis and findings

The issues before me are confined to whether the Board’s search and photocopying fees should be upheld. There is no apparent issue in this case regarding the charging of fees for preparing the records for disclosure, since it would appear that the Board is prepared to disclose the records in full to the appellant upon payment of its final fee.

I am perplexed and troubled by the Board’s decision to force the appellant to file an access request and, in that context, to charge a fee for records that would otherwise have been given to the child had he been in attendance at school during the relevant period. I do not doubt that some amount of search time would be required to search for and retrieve the records sought by the appellant. However, in my view, the final fee sought by the Board is not justified under the *Act* and Regulation, based on the evidence before me.

While the Board has provided a breakdown of its search methodology, including the basis for the sample that was used to determine the weekly search and photocopying costs for first the fee estimate and, ultimately, the final fee, it has not provided detailed information regarding the work actually completed by the teachers in performing their searches, including the specifics of how and where they file their handouts and exercises and the actual steps they took to search for the records requested. Without this information, I am left to wonder how two teachers, who should be very familiar with the records in question based on their use of them, would not have easy access to them.

I acknowledge the Board's view that it may be impractical to ask the teachers to review the binders and duo-tangs of a few of the other students to determine what handouts were distributed. However, in my view, this should not be necessary in any event. Whether these handouts were used for the first time or had been used in the past, it is reasonable to expect that the teachers would have had some process in place for cataloguing lessons, handouts and exercises for easy reference and possible future teaching use. Accordingly, I question why it would take two teachers a total of 12 hours to locate 166 records that they are familiar with and utilize regularly as part of their teaching curriculum.

In this case, applying the principles under section 45(1) of the *Act* and Regulation 823, I find that a more reasonable charge for search time would be \$90.00 (based on weekly search fee of \$15.00 extended over a 6 week period).

Dealing with the photocopying charges, I accept that the Board recovered 166 pages of responsive records and that, pursuant to Regulation 823 under the *Act*, the applicable charge is 20 cents per page for photocopying. As indicated above, it would seem that the Board has made an arithmetic error in calculating the fee for photocopying. I will accept that the correct photocopying charges are \$33.20 (based on 166 pages at 20 cents per page).

Therefore, absent any other factors, the Board would otherwise be entitled to collect a fee of \$123.20, comprised of \$90.00 for search time and \$33.20 for photocopying, for the processing of the appellant's request. However, in the circumstances of this case, I find that the charging of any fee would be unfair and unreasonable.

Outside the context of fee waiver (provided for in section 45(4)), a decision to deny an institution's right to charge a fee that would otherwise comply with the *Act* and Regulation is an extraordinary remedy, but in my view it is justifiable in the unique circumstances of this case.

The appellant's child was enrolled as a student in the grade 4 program at the named funded elementary school. This is a publicly funded educational institution. The child had the same right to receive all handouts as any other student enrolled in grade 4. In my view, it was inappropriate to place the appellant in the position where his only option to obtain the requested records from the school in which his child was enrolled, that were in fact classroom materials distributed during the year, was to make an access request under the *Act*. I find the Board's refusal to simply provide these materials as part of the child's education, to the best of its ability, to be unreasonable and inconsistent with the Board's duties as a provider of public education.

This course of conduct by the Board has imposed an unnecessary administrative burden on the appellant, since he had to make a request under the *Act*, followed by an appeal. The processing of this unnecessary appeal has also consumed significant resources of this office.

As well, in my view, the provisions of section 50 of the *Act* are relevant and should have been taken into account by the Board in this case. This section states:

(1) If a head may give access to information under this Act, nothing in this Act prevents the head from giving access to that information in response to an oral request or in the absence of a request.

(2) This Act shall not be applied to preclude access to information that is not personal information and to which access by the public was available by statute, custom or practice immediately before the 1st day of January, 1991.

I would hope that the practice of informal sharing of information such as that which was requested in this case would continue to be the norm as between school boards and parents with a child or children enrolled in a school, despite the enactment of the *Act*.

Accordingly, in the unique circumstances of this case, I will order the Board to provide the appellant with the records requested without the payment of a fee.

ORDER:

I order the Board to disclose the records requested to the appellant, without the payment of a fee, by **November 20, 2008**.

Original signed by: _____
Bernard Morrow
Adjudicator

_____ October 30, 2008