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

ORDER MO-2355

Appeal MA07-296-2

Upper Canada District School Board

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NATURE OF THE APPEAL:

The Upper Canada District School Board (the Board) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information related to fees levied on students for credit courses at each secondary school in the district.

After a 30 day extension agreed to by the requester, the Board issued a final decision to the requester granting full access to the responsive records. In addition, the Board explained the calculation of a fee for processing the request, as follows:

> At the outset of this request, each school was asked to document and provide me with the amount of time spent collecting this information. Eleven schools out of twenty-four provided an accounting of person hours. The total expended at the eleven schools was 42.25 hours. Since this would result in a fee of over $1,200.00, I have made adjustments to the person hour totals per school in order to reduce the total fee. Where person hours exceeded 2 hours they were reduced to two hours. Totals of 2 hours or less were not changed. The result of these reductions is outlined below:
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> | | | |
> |---|---|---|
> | 19.5 hours @ $30/hour | $585.00 | |
> | Less first two hours | -60.00 | $525.00 |
> | Less first $25 | | -25.00 |
> | | | |
> | Final Total: | | $500.00 |

The Board also advised the requester that:

> Under section 9 of the General Regulation under the *Act*, the FOI Head may withhold requested records until payment of the fee has been received. I choose not to exercise this right with regard to your request and am releasing the records prior to payment of the fee. I request, however, that you submit a cheque in the amount of $500.00 payable to [the Board] at your earliest convenience.

The requester responded by writing to the Board and requesting a fee waiver because the Board had not provided a fee estimate prior to issuing the final decision granting access to the records. The Board declined to grant a fee waiver.

The requester, now the appellant, appealed the Board's decision.

This office appointed a mediator to try to resolve the issues between the parties. During mediation, the appellant clarified that the basis of his request for a fee waiver was that the Board had failed to provide a fee estimate before sending him the records, which denied him the opportunity to make an informed decision on how best to proceed with his request. The appellant expressed concern that he did not have the chance to narrow or revise his request in an effort to reduce the fee. The appellant advised that he is not appealing the fee calculation.

The Board acknowledged during mediation that no interim decision or fee estimate was provided to the appellant, although the Board professed awareness of this office's practices with regard to

fees and fee estimates. The Board explained that no fee estimate was provided because it wanted to expedite the appellant's request and ensure that he received the records prior to the beginning of the school year, as he had wished. The fee waiver issue could not be resolved at mediation and the appeal was transferred to adjudication, where it was assigned to me to conduct an inquiry.

I sent a Notice of Inquiry setting out the facts and issues to the Board, initially, to seek representations on the issues surrounding the fee levied in this case.

When I sent the Notice to the Board, I noted that I had reviewed the Board's decision letters, as well as the Board's letter to the mediator, and other mediation materials not subject to mediation privilege, as there had been considerable discussion around the issues at that time. I asked the Board to focus its representations on the tests and questions highlighted by the Notice, including consideration of past orders of this office. I enclosed a copy of Interim Order MO-1520-I, and quoted a selected excerpt from that order in the Notice of Inquiry. I received representations from the Board, which included an affidavit provided by the FOI and Privacy Coordinator.

Next, I sent a modified Notice of Inquiry to the appellant, along with the Board's representations, inviting his submissions in response, and with specific reference to the findings in Order MO-1520-I. The appellant provided representations for my consideration.

DISCUSSION:

FEE ESTIMATE

This office may review an institution's fee and determine whether it complies with the fee provisions in the *Act* and Regulation 823. Section 45(1) requires an institution to charge fees for requests under the *Act*. More specific provisions regarding fees are found in sections 6 and 6.1 of Regulation 823. It is not necessary to outline these provisions in greater detail for the purposes of this order.

Section 45(3) of the *Act* is mandatory and provides that the head shall give the requester a "reasonable" estimate of the fee to be charged. That section 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].

The relevant provisions of Regulation 823 under the *Act* state:

> 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.

> 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.

These provisions of the *Act* are discretionary, which means that the Board had the choice of requiring a deposit or payment from the appellant before proceeding with the request, or giving access, respectively.

Order MO-1520-I

In Order MO-1520-I (Town of Caledon), former Adjudicator Sherry Liang canvassed the issue of fee estimates within the context of final and interim access decisions. I set out the following excerpt from Adjudicator Liang's reasons in the Notice of Inquiry for this appeal and asked the parties to provide representations on the possible implications of it in the present appeal:

> An additional issue raised by the appellant is whether the Town ought to be precluded from recovering any of the fees set out in its letter of January 31, on the basis that the Town did not comply with the provisions of section 45(3). As set out above, section 45(3) requires an institution to provide an estimate of charges that will exceed $25, prior to providing access. The appellant submits that the "charges demanded by the Town of Caledon in its January 31, 2001 decision letter are improper because they make a demand for payment which was not, as required by section 45(3) for any amount of $25, preceded by a 'reasonable estimate'." In response, the Town states, among other things, that it discussed the matter of fees early in the process with the appellant and was told that "fees are not an issue". This is disputed by the appellant.
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> Beyond the requirement that it be done "before giving access to a record", section 45(3) does not specify a time for providing a fee estimate. However, where fees can be anticipated to substantially exceed the $25 threshold, it is to the benefit of both the requester and the institution that such an estimate be given early in the process. Indeed, since section 7(1) of Regulation 823 permits an institution to combine a fee estimate with a request for a deposit in certain circumstances, it is a common practice amongst institutions covered by the *Act* to provide such estimates and requests for deposits at the early stages of responding to requests. **The issue the appellant raises is whether a fee "invoice" based on work already performed, and given as part of a final decision, meets the requirement to provide an estimate in section 45(3). Further, the appellant also raises an issue about what might be an appropriate remedy where an institution has failed to comply with section 45(3)** [emphasis added at Notice of Inquiry stage].
>
> It is not necessary for me to determine whether the fees detailed in the Town's letter of January 31, 2001 can be characterized as an "estimate" for the purposes of section 45(3). Even if they are not, and the Town should have provided some

> earlier indication of the amount of anticipated fees, I do not find that this leads to the remedy requested by the appellant, which is the disallowance of the fees claimed in that letter.
>
> In the circumstances of this case, I find it unlikely that this appellant could have been caught by surprise by the costs associated with responding to his access request. The appellant and his client were participants in the resource study and discussions over the amendment to the Town's Official Plan which are the focus of this request, and are also involved in the OMB proceeding arising out of that amendment. The appellant is in a position to have a reasonable understanding of the scope of his request and the time that might be required to respond to it. Further, the appellant has not suggested that had he been given an earlier indication of the likely costs of his request, he might have narrowed the scope of that request. There is therefore no suggestion that the lack of an early fee estimate has prejudiced the appellant in the sense of depriving him of the opportunity to narrow his request to achieve a lower fee, or led to any other consequence that would support the remedy requested by the appellant.
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> Further, I am obliged to take into account section 45(1) of the Act, which requires the recovery of fees by an institution. In this case, I have found that a portion of the fees claimed by the Town is reasonable. The effect of the appellant's position would be to divest section 45(1) of any significance, simply on the basis of a failure to provide an early fee estimate, and despite a lack of prejudice.
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> Given the above, while I do not preclude the possibility that there may be situations where a failure to provide a fee estimate under section 45(3) may warrant a remedy, particularly where real prejudice is shown, I am not persuaded that this is such a case.

Representations

The Board submits that it complied with section 45(3) of the *Act* and provides the following context for its actions:

> In this case, the first notification of a fee requirement was contained in the decision letter of July 23, 2007. However, the Board also chose to provide access to the requested records at the same time. This decision was made to meet [the appellant's] own emphasized timelines.

The Board states that it recognizes the value of providing a fee estimate in the context of an interim decision based on prior orders of this office. The Board takes the position that had it withheld the records at the time of the July 23, 2007 decision pending payment of the fee, "section 45(3) would have been complied with as the estimate fee would have been provided 'before giving access to a record'."

> The Board submits that it should not be found to have violated section 45(3) simply because it chose to provide the records to [the appellant] at the same time as issuing its decision and related fee requirement so as to ensure that he had timely access to the requested records. Such a result is at odds with the spirit of the statue with which the Board was attempting to act consistently.

In her affidavit, the FOI and Privacy Coordinator states:

> On two separate occasions, I spoke to [the appellant]; once, to extend the time for responding to the request and again, to discuss completion of the request. On each occasion, [the appellant] emphasized that it was important to him to receive the requested information before the next school year began [in September]. On neither occasion did I discuss the question of fees with [the appellant], nor did I provide him with a fee estimate prior to the letter of July 23, 2007. ...

The Board also provided representations on the issue of whether it should be permitted to charge a fee in the event that I find that it breached section 45(3). In the Board's submission, the fundamental starting point for the determination of this issue is recognition of the user-pay principle enshrined in the *Act* whereby requesters are required to pay reasonable fees for access to information. The Board continues by stating:

> As recognized above, the usual approach is for an institution to provide a fee estimate in the context of an interim decision. This saves resources and permits requesters to cancel or amend their requests or to challenge the estimated fee before too many resources are expended.
>
> However, while these purposes are important, they are not absolute, and should not be interpreted in a manner to completely undermine the primary "user pay" principle. [Adjudicator] Liang recognized this in her reasons where she stated (on page 12):
>
> > The effect of the appellant's position would be to divest section 45(1) of any significance, simply on the basis of a failure to provide an early fee estimate, and despite a lack of prejudice.

The Board refers to the necessity of considering relevant factors in determining the effect of a failure to provide an advance fee estimate, including the element of surprise, and prejudice, to the appellant. With specific reference to the facts of this appeal, the Board mentions that the appellant is an experienced user of the access to information regime and has made approximately 11 previous access requests. The Board reiterates that the appellant advised that he "required" the information prior to the start of the next school year, and that his request was received at a very busy time of the school year. The Board adds:

> Against this background, and the understanding that the information was being requested to prepare for a presentation to the Board's trustees, the provision of a fee estimate would very likely have resulted in the Requester not receiving the requested records in a timely fashion. …
>
> Thus, the greater prejudice in this case for [the appellant] would have resulted if a fee estimate had been provided in advance of his request being processed, as it would very likely have denied him the timely access to the records he was seeking.
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> … [The appellant] could have refused to accept the records provided by the Board pending the resolution of the fee dispute, but he chose not to do so. Thus, in this context, a finding that a violation of section 45(3) means that a fee cannot be levied will not only undermine the "user pay" principle of section 45(1), but it will result in a manifestly unfair result as the Requester will have had the benefit of the Board's expenditure of time and effort, but at no cost to him.

The appellant's letter of appeal to this office contained an excerpt from Order MO-1980. As I understand it, the quote is intended to frame the appellant's objection to what he perceives to be the Board's failure to comply with section 45(3) of the *Act*. This excerpt reads:

> … 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.

In the representations provided during my inquiry into this appeal, the appellant refers to his historical involvement in the subject matter of his request, and his previous dealings with the Board for access to information related to the subject. The appellant asserts that a precedent of non-payment was established by a previous request he submitted to the Board in 2005. The appellant notes that there was no discussion of fees or fee estimates during the processing of his 2005 request and that he was not charged for access to that data.

As to the Board's submission that it did not provide a fee estimate so as to expedite the processing of the appellant's May 27, 2007 request for his benefit, the appellant states:

> While I requested that the data be provided before the commencement of the school year, there was adequate time and opportunity for the Board to advise me of an intended fee and, if necessary, provide a fee estimate in accordance with section 45(3) of the *Act*. A fee estimate could have been generated expeditiously in June 2007 using the results of the previous, similar FOI request (August 25, 2005) that had already been fulfilled by the Board. Further, the data and decision

> letter were both provided to me on July 23, 2007, two months after the submission of my request and more than six weeks before data delivery had been requested.
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> Given these circumstances, I was taken by surprise when I received the decision letter on July 23, 2007 advising me of the $500 fee for the data that was provided simultaneously. I expressed this surprise in my response to the Board…

The appellant described how he subsequently wrote to the Board and requested that the $500 fee be waived on the grounds that the Board could, and should, have sent a fee estimate. He states:

> The Board was in a position to provide a fee estimate as early as June 2007 and, had it done so, I would have been in a position to evaluate my options. I could have accepted the estimate, paid it and received the request in due course. I could have suggested modifications to the request to reduce the fee and if accepted paid the new fee. I could have rejected the fee, appealed it and accepted that I was not going to receive the data in the timeline that was desirable. These options were **my responsibility** to consider and I was denied them [emphasis in original].

The appellant also points out several features of this appeal that are, in his submission, "materially different" from the circumstances of Order MO-1520-I, mainly related to the undisputed point that fees were not discussed prior to the payment request sent with the decision letter, which led to the appellant's "surprise" upon being invoiced. The appellant submits that Adjudicator Liang's decision in Order MO-1520-I contemplates that there may be situations in which a failure to provide a fee estimate may warrant a remedy. In the appellant's view, this is such a case, and he argues that the fee should be disallowed.

Having been invited to provide representations on the issue of fee waiver, the appellant conceded that none of the listed factors apply in this case. However, the appellant states:

> I recognize that the *Act* is clear in its assertion that the access system operates in a user-pay regime. But it is a user-pay regime with checks and balances and clearly defined procedures. No institution should have the right to pick and choose how it charges for public information.
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> To reason that because a requester asks for records to be delivered as quickly as possible allows the institution to circumvent the rules, expect payment on receipt of records and deny the requester the opportunity to modify the request or withdraw it, without any substantive reason defies the intention of the *Act* and any test of logic.
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> …
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> The circumstances are sufficient, I believe, to allow a remedy that would waive the fee. It is my opinion that the IPC recognizes that the procedure of giving fee

> estimates is an important, often used part of the *Act*, that it drives fairness and equity for both the requester and the public institution and that it should not be treated as a technicality to be side-stepped for any convenience, perception or expediency.

Analysis and Findings

This appeal presented a rather unique set of circumstances within which to consider the fee estimate issue. I have carefully considered the representations of the parties, and past orders of this office, and for the following reasons, I find that the Board has not met the requirements of section 45(3) of the *Act*.

In initiating his appeal with this office, the appellant quoted from Order MO-1980 in which Adjudicator John Swaigen addressed the fee and fee estimate issues. The adjudicator provided a clear summary of the general principles governing fee estimates, and I will set out the larger excerpt to add emphasis to my findings in this order:

> 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)).
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> 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].

In addition, the following excerpt from Order PO-2299, a decision of former Assistant Commissioner Tom Mitchinson, conveys the balancing of interests inherent in the fee structure outlined in section 45 of the *Act*, taken together with Regulation 823:

> 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.

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

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

I agree with former Assistant Commissioner Mitchinson and Adjudicator Swaigen regarding the importance of the fee estimate process, and have taken their comments into consideration in my decision in this appeal.

From the evidence before me, it appears as though the Board and the appellant had developed a satisfactory working relationship over the course of several years, during which time the appellant had submitted numerous access requests to the Board, which it, in turn, had processed in a positive spirit of cooperation.

The Board, in its representations, referred to the appellant having made 11 previous requests for information, although only one more recently submitted in 2005 was described in any great detail by either of the parties. It is relevant, in my view, that the Board had never before charged the appellant for processing these requests. Moreover, I also accept that with the passage of time, the Board came to realize that not charging fees for these requests did not accord with the user-pay principle enshrined in the *Act*, or with best financial practices for the Board itself. And so it seems that with this particular request, the Board decided that it would charge a fee to the appellant, as indeed it is required to do under section 45(1) of the *Act*. It is worth noting that this is the provision that embodies the intention of the Legislature to include a "user-pay" principle in the *Act*. Based on a plain reading of the mandatory fee structure set out in section 45(1), the fact that the Board had not previously charged for similar information has little bearing on its decision to charge fees in this case. However in my view, it *is* relevant in the context of the Board's failure to comply with section 45(3) of the *Act*.

As the Board has presented its position, it was in response to the appellant's need to receive the information expeditiously that the Board moved to grant full access to the responsive records *concurrently* with advising him that it would require a fee for processing the request. The Board's July 23, 2007 decision letter reflects the desire to assist the appellant in expediting access to the requested records. In the letter, the Board remarks that pursuant to section 9 of Regulation 823 of the *Act*, it could choose to withhold the records pending payment of the fee, but that it was instead exercising its discretion to release the records without requiring payment

of the fees. However, the inescapable truth is that while requiring a deposit prior to disclosure of records is discretionary, the issuing of a fee estimate prior to actually giving access to the records, when the fee is more than $25, is *mandatory*. The head must give the requester a "reasonable" estimate of the fee to be charged.

Under the wording of section 45(3), it was not, in my view, open to the Board to present the appellant with the records *and* what was effectively an invoice for their disclosure at the same time. In my view, this is a major point of distinction between the facts in this appeal and those before Adjudicator Liang in Order MO-1520-I, since denial of access was at issue in that appeal.

In order to meet the requirements of section 45(3), the Board was required to inform the appellant of the amount of the fee estimate at the time it determined that it would be charging a fee, and prior to providing access. As the appellant suggests, this may have happened earlier in the process, before all the work to process the request was complete, and could have been based on the Board's knowledge of the effort required to process the 2005 request.

The Board did not do so. Instead, it informed the appellant of the actual amount required to be paid under the *Act*, as opposed to a "reasonable estimate." While it was not inappropriate for the Board to quote a figure based on actual knowledge of the cost of processing of the request, sending the records at the same time certainly did not have the effect of putting the parties in a reciprocal position of knowledge regarding their options in moving ahead with the request, as contemplated by section 45(3).

Moreover, although the Board may have proceeded in this manner to - as they saw it - expedite the appellant's receipt of the records, this step had the perhaps unintended effect of prejudicing the appellant under the *Act*. In my view, the appellant was placed in the untenable position of having been given full access to the records along with the unexpected invoice, and without the opportunity to decide whether or not to proceed with the request in its entirety in view of the applicable fees. To argue now, as the Board does, that the appellant could have returned the records pending resolution of the fee dispute suggests, in my view, an inappropriate shift of the responsibility for compliance with the *Act* from the Board, as an institution bound by the statute, to a requester. In addition, I agree with the appellant that the Board's professed intention to provide him with access to the records in the most expeditious manner is not curative, and does not lessen the impact of its failure to comply with section 45(3).

Moreover, in my view, the circumstances of the present appeal vary sufficiently from those before Adjudicator Liang in Order 1520-I that a different result is dictated. The appropriate remedy in this appeal must acknowledge the prejudice the appellant has experienced as a result of the Board's failure to comply with section 45(3), while still recognizing the significance of section 45(1) within the user-pay fee structure of the *Act*.

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 Mitchinson considered the appropriate remedy in a situation where the institution's interim decision was found to be

inadequate. After reviewing past orders of this office, the Assistant Commissioner concluded that the chosen remedy must be determined first by the facts and circumstances of a particular appeal and, second, must be crafted to try 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. The former Assistant Commissioner found that one of the available remedies is that this office may disallow some or all of the fee [see also Order MO-1980].

In the circumstances of this appeal, and based on my finding that the Board did not comply with section 45(3) of the *Act*, I consider an appropriate remedy to be an order requiring the Board to limit the fees that may be charged to the appellant for this request to $25. I concluded that this amount was appropriate because it is the maximum allowable where the mandatory fee estimate provisions of section 45(3) are not triggered.

ORDER:

1. I disallow the Board's fee of $500, but permit it to charge the appellant $25 for the cost of processing the request.

Original signed by: October 28, 2008
Daphne Loukidelis
Adjudicator