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

ORDER MO-2586

Appeals MA07-338, MA07-424 and MA08-52

London Public Library Board

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NATURE OF THE APPEAL:

The London Public Library Board (the Board) received three requests under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for information relating to the Board's use of internet filtering software on library workstations maintained by the Board for public use. The internet filtering software referred to in the request is provided by a third party business, referred to in this order as the "affected party." Several of the requests are inter-referenced and each one contains a number of parts.

The Board located responsive records and issued three separate decision letters in which it granted partial access, and also claimed fees for access.

With respect to part 4 of the request in Appeal MA07-338 and part 16 of the request in Appeal MA08-52, the Board stated that it did not have custody or control of any records other than those that it had agreed to disclose and also stated that, if other records exist, they are not in its custody or control. The Board also denied the appellant's claim to continuing access in relation to various parts of the requests and it denied the appellant's request for a fee waiver in Appeal MA08-52.

The appellant appealed the Board's decisions to this office and three separate appeal files were opened. The appeals were assigned to a mediator, who worked to resolve the issues between the parties. As a result of mediation, many of the issues arising from the Board's decisions were resolved.

The issues remaining in dispute at the conclusion of mediation were:

- whether the Board has custody or control of any additional records with respect to part 4 of the request in Appeal MA07-338 and part 16 of the request in Appeal MA08-52;

- whether the Board conducted a reasonable search in relation to part 16 of the request in Appeal MA08-52,

- whether the fees claimed for search time in two invoices in Appeal MA08-52 and one invoice in Appeal MA07-424, should be upheld;

- whether a fee waiver should be granted in Appeal MA08-52; and

- the issue of continuing access.

The appeals were moved to the adjudication stage of the appeal process, in which an adjudicator conducts an inquiry under the *Act*. The assigned adjudicator decided that the three appeals should be dealt with together, and invited representations from the Board, the affected party and the appellant in relation to the issues in all three appeals. She received representations from the parties. The Board also provided affidavit evidence with exhibits sworn by the Director of

Quality Improvement (Director). The representations and affidavit were shared among the parties in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction 7*.

This file was subsequently transferred to me to complete the inquiry.

The appellant's representations state that he is no longer pursing the claim to continuing access. This was subsequently confirmed by staff of this office and therefore, continuing access is no longer an issue. The appellant also notified this office that he was withdrawing his appeal as it relates to the proposed fee of $327.91 set out in the draft invoice dated May 2, 2008 in Appeal MA08-52. As a result, the only fees at issue are the $210.00 claimed for search time set out in the invoice dated November 8, 2007 (Appeal MA07-424) and the $120.00 charge for search time set out in the invoice dated April 29, 2008 (Appeal MA08-52). To be clear, the appellant's claim to a waiver of the fee in the latter invoice also remains an issue.

As the three appeals have been joined, I have decided to issue one order that will dispose of the issues in all three appeals. In this order, I uphold the search conducted by the Board as reasonable, and I also conclude that the Board does not have custody or control of any additional records responsive to part 4 of the request in Appeal MA07-338 and part 16 of the request in Appeal MA08-52. I uphold the search fee of $210 in Appeal MA07-424 and the search fee of $120 in Appeal MA08-52. Finally, I uphold the decision of the Board to deny a fee waiver.

DISCUSSION:

The issues to be determined in this appeal are:

1. Did the Board conduct a reasonable search for records responsive to part 16 of the request in Appeal MA08-52?

2. Does the Board have custody or control of additional records responsive to part 4 of the request in Appeal MA07-338 and part 16 of the request in Appeal MA08-52?

3. Do the search fees of $210 in Appeal MA07-424 and $120 in Appeal MA08-52, comply with the *Act*?

4. Is the appellant entitled to a fee waiver?

SEARCH FOR RESPONSIVE RECORDS

The appellant claims that additional records responsive to part 16 of the request in Appeal MA08-52 should exist. This part was a request for access to:

> [a]ny documentation showing the procedures that are utilized by the LPL and [the affected party] when any person or entity requests that a URL that has been blocked be unblocked, or where any URL that is unblocked be blocked.

Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17 (Orders P-85, P-221 and PO-1954-I). If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

Section 17 states:

> A person seeking access to a record shall,
>
> > (a) make a request in writing to the institution that the person believes has custody or control of the record;
> >
> > (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record; and
> >
> > (c) at the time of making the request, pay the fee prescribed by the regulations for that purpose.

Section 17 should be read in conjunction with section 4(1) which states, in part:

> Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless,
>
> > (a) the record or the part of the record falls within one of the exemptions under sections 6 to 15; . . .

A number of previous orders have identified the requirements in reasonable search appeals (see Orders M-282, P-458, P-535, M-909, PO-1744 and PO-1920). In Order PO-1744, Acting-Adjudicator Mumtaz Jiwan made the following statement with respect to the requirement to conduct a reasonable search:

> … the *Act* does not require the Ministry to prove with absolute certainty that records do not exist. The Ministry must, however, provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records. A reasonable search is one in which an experienced employee expends a reasonable effort to locate records which are reasonably related to the request (Order M-909).

I agree with Acting-Adjudicator Jiwan's statement and will adopt the same approach here.

Where a requester provides sufficient detail about the records that he/she is seeking and the institution indicates that records or further records do not exist, it is my responsibility to ensure that the institution has made a reasonable search to identify any records that are responsive to the request. The *Act* does not require the institution to prove with absolute certainty that records or further records do not exist. However, in my view, in order to properly discharge its obligations

under the *Act*, the institution must provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request.

Although an appellant will rarely be in a position to indicate precisely which records have not been identified in an institution's response, the appellant must, nevertheless, provide a reasonable basis for concluding that such records exist.

The Board's evidence relating to this issue is contained in the affidavit sworn by the Director. Attached to the affidavit is a log of time spent and efforts made by the Board in responding to the request in Appeal MA08-52. Read together, the affidavit and the log include the following information:

- The Director was responsible for overseeing the search for records responsive to the request and she maintained a log of activities relating to the search for records.

- The following staff conducted searches for records of 15 minutes each: Manager of Services and Branch Operations, Senior Manager of Services and Branch Operations, Chief Executive Officer, Director of Information Technology and Director of Marketing and Development.

- The Director spent 5 hours searching for paper records, searching the website, reviewing the documentation for relevancy and searching the Board's intranet for internal and external communiqués.

- The Director also contacted [the affected party] to discuss the availability of records and was told that [the affected party] was not prepared to disclose any additional information other than what it had previously disclosed regarding its filtering systems.

The Board states:

> The Library contacted [the affected party] in an attempt to gather any additional relevant information and was provided with two zip files which were subsequently provided to the appellant. Despite the reasonable efforts of the Library, [the affected party] has refused to provide any further information in response to this request. Apart from the source code, the Library has no specific knowledge of any further records.

The appellant does not specifically comment on the details of the Board's searches. He states that he does not dispute the time spent conducting the search and the scope of the search for "internal" records but states that the search for records should include the affected party's records. He states:

> Appellant accepts the general proposition that the records in question implicate a third party and that the proper procedure for the Library to resist the production of these records is through the 10(1) exemption. But given the facts of this case, the

> nature of the records sought and their relationship to a core function of a public library, it is submitted that the Commissioner should order the production of additional records that are responsive to the requests.

In his representations relating to the reasonableness of the search, the appellant states:

> This problem is related to those discussed above and for the purposes of simplifying this procedure, the Appellant will not provide further representations on this issue other than to reiterate that the Library cannot evade its responsibility to provide the public with a transparent collection management procedure including a challenged process by utilizing a technological system that is provided by an outside vendor.

In its representations in reply, the Board repeats that it conducted a reasonable search for records and that "all internal documents in its possession have been provided." It also states:

> The Library can only argue that a significant amount of information has already been disclosed to the appellant including all relevant internal Library documents, [the affected party's] training manuals, current and up to date categories and their definitions, as well as public presentations by the Chief Technical Officer of [the affected party], which was facilitated by the Library.

As noted above, section 17 requires an institution to conduct a reasonable search for records. Read in conjunction with section 4(1) of the *Act*, the requirement to conduct a reasonable search is only in relation to records in its custody or under its control. The appellant's representations specifically directed at the issue of reasonable search are brief, and I have considered his other submissions, including the passage reproduced above, in deciding this issue. The appellant has provided little evidence to support a finding that additional records in the custody or under the control of the Board exist. I cannot order the Board to search for records outside its custody or control. In this regard, my findings below on the issue of custody or control are also relevant here.

Having carefully reviewed all of the representations and the other documentary evidence provided to me, I am satisfied that knowledgeable staff at the Board made reasonable efforts to identify and locate responsive records in its custody or under its control. Consequently, I find that the Board has conducted a reasonable search for records as required by section 17 of the *Act*.

Having found that the search for responsive records was reasonable, I now turn to consider the question of whether there are any records in the custody or under the control of the Board that are responsive to part 4 of the request in Appeal MA07-338 and part 16 of the request in Appeal MA08-52 that have not previously been identified as responsive records.

CUSTODY OR CONTROL

The Board states that it does not have custody or control of any records responsive to part 4 of the first request and part 16 of the third request, other than those records that were previously disclosed to the appellant. Part 4 of the request in Appeal MA07-338 seeks access to:

> Any records documenting how or by what method the [the affected party's] system assigns websites to categories.

Part 16 of the request in Appeal MA08-52 seeks access to:

> Any documentation showing the procedures utilized by the LPL and [the affected party] when any person or entity requests that a URL that has been blocked be unblocked, or where any URL that is unblocked be blocked.

For ease of reference, I will set out the text of section 4(1) again here. It states, in part:

> Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless
>
> (a) the record or the part of the record falls within one of the exemptions under sections 6 to 15; or
>
> (b) the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

Under section 4(1), the *Act* applies only to records that are in the custody or under the control of an institution. If an institution's custody or control of a record is established, the right of access under section 4(1) applies, subject to the exceptions in paragraphs (a) and (b). The courts and this office have applied a broad and liberal approach to the custody or control question (*Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 4072 *Canada Post Corp. v. Canada (Minister of Public Works)* (1995), 30 Admin. L.R. (2d) 242 (Fed. C.A.) and Order MO-1251).

Factors relevant to determining "custody or control"

Based on the above approach, this office has developed a list of factors to consider in determining whether or not a record is in the custody or under the control of an institution (Orders 120 and MO-1251). The list is not intended to be exhaustive. Some of the listed factors may not apply in a specific case, while other unlisted factors may apply. The list is as follows:

- Was the record created by an officer or employee of the institution? (Order P-120)
- What use did the creator intend to make of the record? (Orders P-120 and P-239)

- Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the record? (Order P-912, upheld in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner), supra)*

- Is the activity in question a "core", "central" or "basic" function of the institution? (Order P-912)

- Does the content of the record relate to the institution's mandate and functions? (Orders P-120 and P-239]

- Does the institution have physical possession of the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement? (Orders P-120 and P-239)

- If the institution does not have possession of the record, is it being held by an officer or employee of the institution for the purposes of his or her duties as an officer or employee? (Orders P-120 and P-239)

- Does the institution have a right to possession of the record? (Orders P-120 and P-239)

- Does the institution have the authority to regulate the record's use and disposal? (Orders P-120 and P-239)

- Are there any limits on the use to which the institution may put the record, what are those limits, and why do they apply to the record?

- To what extent has the institution relied upon the record? (Orders P-120 and P-239)

- How closely is the record integrated with other records held by the institution? (Orders P-120 and P-239)

- What is the customary practice of the institution and institutions similar to the institution in relation to possession or control of records of this nature, in similar circumstances? (Order MO-1251)

The following factors may apply where an individual or organization other than the institution holds the record:

- If the record is not in the physical possession of the institution, who has possession of the record, and why?

- Is the individual, agency or group who or which has physical possession of the record an "institution" for the purposes of the *Act*?

- Who owns the record? (Order M-315)

- Who paid for the creation of the record? (Order M-506)

- What are the circumstances surrounding the creation, use and retention of the record?

- Are there any provisions in any contracts between the institution and the individual who created the record in relation to the activity that resulted in the creation of the record, which expressly or by implication give the institution the right to possess or otherwise control the record? [*Greater Vancouver Mental Health Service Society v. British Columbia (Information and Privacy Commissioner),* [1999] B.C.J. No. 198 (S.C.)]

- Was there an understanding or agreement between the institution, the individual who created the record or any other party that the record was not to be disclosed to the institution? (Order M-165) If so, what were the precise undertakings of confidentiality given by the individual who created the record, to whom were they given, when, why and in what form?

- Is there any other contract, practice, procedure or circumstance that affects the control, retention or disposal of the record by the institution?

- Was the individual who created the record an agent of the institution for the purposes of the activity in question? If so, what was the scope of that agency, and did it carry with it a right of the institution to possess or otherwise control the records? [*Walmsley v. Ontario (Attorney General)* (1997), 34 O.R. (3d) 611 (C.A.)]

- What is the customary practice of the individual who created the record and others in a similar trade, calling or profession in relation to possession or control of records of this nature, in similar circumstances? (Order MO-1251)

- To what extent, if any, should the fact that the individual or organization that created the record has refused to provide the institution with a copy of the record determine the control issue? (Order MO-1251)

As noted, the Board denies that it has custody or control of any records responsive to the request other than the records that it has already provided to the appellant. Some of those previously disclosed records include: Computer Use and Internet Access policy, procedures and guidelines; Internet Policy Review: filtering - Customer Relations Tools; and Internet Policy Review – Filtering Pilot, May 2007; and "current and up to date categories and their definitions and training manuals" relating to the affected party's filtering system that were provided to the appellant in a zipped electronic format.

The Board states:

> Further, the Library has also done its due diligence in following up with [the affected party] to obtain requested information. As the correspondence from representatives of [the affected party] evidences, [the affected party] was not prepared to release any further technical information regarding its filtering systems. Emails evidencing [the affected party]'s position in this regard were provided as part of the Library's response to the 002-07 appeal and are attached at Tab "1" for your reference.

The affected party's representations include a detailed explanation of its services. It states that there are two methods to categorize URL's referred to as Automatic Recognition and Master List of URL's. With respect to Automatic Recognition, it explains:

> When a request is made to the [affected party's] Master Categorization Service (MCNS), [the affected party] first checks whether or not the URL is currently categorized. If the URL has not been categorized [the affected party] will download web content and process it through multiple AI (Artificial Intelligence) engines which will return category information for storage. The automatic categorization techniques and algorithms used are proprietary to [the affected party]. When a URL is downloaded, categorized and stored, no user information is required or stored.

With respect to the Master Lists of URL's, it explains:

> [The affected party] also makes use of Master lists. The use of these lists is at the customer's discretion. These lists fall into two categories; one, [the affected party's] maintained lists and two, third party lists. An example of at third party list would be the Internet Watch Foundation (IWF) list. The description of the IWF from their website is:
>
> > IWF was established in 1996 by the UK internet industry to provide the UK internet Hotline for the public and IT professionals to report potentially illegal online content within our remit and to be the notice and take down body for this content. We work in partnership with the online industry, law enforcement, government, the education sector, charities, international partners and the public to minimize the availability of this content, specifically, child sexual abuse content hosted anywhere in the world and criminally obscene and incitement to racial hatred content hosted in the UK.
>
> These third party lists provide an additional source of URL categorization which [the affected party's] customers can choose to make use of.

The affected party also provided additional detailed representations explaining how categorization is assessed and evaluated for accuracy and the steps that a customer can take if he or she is of the view that a URL has been inaccurately categorized.

The affected party submits that any information about this subject beyond what it provided in its representations above, and previously agreed to disclose, is proprietary, technical and confidential commercial information, and a trade secret.

I note that there is a written agreement between the Board and the affected party, a copy of which was shared with the appellant. This contract has a direct bearing on what information the Board is entitled to obtain from the affected party concerning the operation of the software. Pursuant to the contract, the affected party provides its filtering product which includes software, technical and customer support, system maintenance and URL database updates. The system filters content received via the internet onto a networked server running the software.

The contract is a licensing agreement that gives the Board *the right to use the software and the services*. Paragraphs 1(b)(ii) and 5 of the contract are relevant:

> 1(b) (ii) Client shall have no right of access, request delivery of, or use the … software source code and other proprietary information related to the function of the System.
>
> 5. **Proprietary Content.** [The affected party] will, through the provision of its System, provide the Client the use of its proprietary URL database. The Client expressly acknowledges that all proprietary interests in the System or Software or any modifications, enhancements, or improvements thereto shall be the sole and exclusive property of [the affected party], and that no term of this Agreement shall be construed to convey title in the System or Software to the Client.

As previously noted, the appellant states that he understands that the records he seeks access to "implicate a third party" and he is of the view that the issue in this appeal should be whether those records are exempt pursuant to section 10 (third party information). He submits:

> As a matter of public policy in the context of public library services, appellant submits [the argument that further responsive records are not in the custody or control of the Library] must be rejected out of hand and the determination about what records should be disclosed should be dealt with in terms of a third party exemption.

He also states:

> The question of how the [affected party's] software goes about making the decision of what classification to assign any particular website is a point of central importance, and the ambiguity of this process is the root source for many of the issues remaining on this appeal.

In his representations on custody or control, the appellant also refers to his interest in obtaining information about "how the … system assigns websites to categories" and the "procedures that are utilized when a person requests that a URL that has been blocked be unblocked and vice versa.

I recognize that the appellant is not in a position to indicate precisely which records in the possession of the affected party he views as responsive and in the custody or control of the Board. His representations refer to "the subject records" and he clarifies that he is not seeking access to "source code." Beyond this, he indicates that he wants "a general description of how the system works."

The appellant points to the following factors as relevant to the issue of custody or control:

- In his view, the "subject records" are central and basic to the core function of the Board which is to provide patrons with access to information resources, or to facilitate access to all sources of information which may be of assistance to library users.

- The Board has a custom and practice of providing the public with a clear, transparent and accountable policy with respect to removing challenged items from the library collection and it is not credible to suggest that in the case of internet access, the Board does not have custody or control over the means by which such a challenge is processed. He adds that the Board can not evade its responsibilities by contracting out this process.

- The contract with the third party does not support the Library's position on custody and control. The request does not ask for source code. He states that "what is at issue is a general description of how the system operates." The reference to other proprietary information in the contact is ambiguous and it should be interpreted in light of the Library's transparent and accountable collections policy.

The appellant concludes by stating:

> It is understandable that a private software vendor wishes to disclose as little as possible about how their software operates. But the vendor must appreciate the difference between entering into a contract with a private entity and a public service such as a library. In other words, given the ambiguities in the contract, it would not be unreasonable to interpret it in light of the mission of the public library, a fact which even a private software vendor should be held to understand at least to some degree.
>
> As a result, the Commissioner should reject the library's claim that they lack custody or control of subject records and the inquiry should then turn on the applicability of the exemption under section 10(1).

In the Board's reply representations it repeats that it does not have custody or control over any additional responsive records of the affected party; that it has provided all responsive information to the appellant in relation to the request; and it has made all reasonable efforts to obtain further information from the affected party. It adds that the affected party refuses to provide any further information on the grounds that to do so would be to divulge its intellectual property, and it denies that the contract between it and the affected party is ambiguous.

I have carefully reviewed the Board's representations, the appellant's representations and the other documentation provided to this office. I have also carefully reviewed the representations of the affected party, which were provided to the appellant and include a detailed explanation of how the affected party's filtering system works. In my view, the latter information, when read together with the information previously disclosed by the Board (including filter categories and training manuals produced and used by the affected party), provides significant and richly textured details about the affected party's software program and services. This includes information about subjects specifically referenced by the appellant such as how websites are categorized, and the steps to be followed if a user disagrees with a website being blocked.

I also note that the affected party states that the only additional responsive information in its possession is "source code" or other information that qualifies as its own confidential and proprietary information.

I have considered the factors referred to above as relevant to determining the issue of custody or control. With respect to additional records that may be in the possession of the affected party, I note that these records, if they exist, were created by the affected party and not the Board and are related to the affected party's internet filtering product, which is available for use by interested parties for a licensing fee.

In addition, the rights of the Board in relation to the software, supporting tools and any other records in the possession of the affected party or in its own possession are limited by the contract referred to above. The contract provides that the user shall have no right of access to source code and other proprietary information related to the function of its system and that the user only has the use of its database. The contract is clear and unambiguous in that respect.

Before leaving the analysis of the factors relating to custody or control, however, I also note that the appellant's representations focus to a significant degree on his view that information about internet filtering relates to a "core," "central" or "basic" function of the Board. I agree that the question of what content should be provided in a library relates to a core function of the Board, but the appellant has already been provided with significant information in this regard. In my view, the technical means used by the affected party to accomplish its filtering of internet content is separate from the question of what content to filter, and I am not satisfied that the technical aspect of the system does, in fact, relate to the Board's core functions.

Having considered the circumstances of this appeal, I find that, even applying a broad and liberal interpretation, the Board has no more than bare possession of any additional responsive records that may exist. In that regard, the terms of the contract are significant, and I also accept the

evidence of the affected party that any additional information that has not previously been disclosed would qualify as proprietary information to which the Board does not have access.

I would also not characterize the contract between the Board and the affected party as "contracting out of" the *Act* because, as already noted, the technical means of accomplishing the filtering does not relate to the Board's core functions.

Therefore, having considered all of the relevant factors, and for the reasons set out above, I conclude that the evidence before me does not support a finding that the Board has custody or control of other records that may be responsive to part 4 of the request in Appeal MA07-338 or part 16 of the request in Appeal MA08-52.

In view of my findings relating to custody or control, it is not necessary for me to consider the Board's alternative claim that any additional responsive information is exempt pursuant to section 10(1). I now turn to consider the issues relating to fees for access to the records that were disclosed to the appellant.

FEE

As noted above, at the close of mediation, the appellant clarified that he was only appealing the search component of the fee charged by the Board in three invoices. At the inquiry stage, the appellant advised that he was withdrawing the appeal as it relates to the invoice dated May 2, 2007. As a result, I will only make a determination on the search aspect of the fees in the two remaining invoices, which were: (1) the $210 search fees in Appeal MA07-424 (item 3 of the invoice of November 8, 2007) and (2) the $120 search fees in Appeal MA08-52 (items 2 and 3 of the invoice of April 29, 2008).

Section 45(1) requires an institution to charge fees for requests under the *Act*. Section 45(1)(a) states:

> 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;

More specific provisions regarding fees are found in sections 6 of Regulation 823. That section states, in part:

> 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:
>
> 3. For manually searching a record, $7.50 for each 15 minutes spent by any person.

In all cases, the institution must include a detailed breakdown of the fee, and a detailed statement as to how the fee was calculated (Orders P-81 and MO-1614). This office may review an institution's fee and determine whether it complies with the fee provisions in the *Act* and Regulation 823.

The Board states that all of the fees claimed in the two invoices are consistent with the *Act* and are based on the actual work carried out to respond to the requests. In support, the Board provided evidence relating to the searches in the affidavit of the Director. Attached to the affidavit is a copy of one of the invoices and a "log" of activities to which the invoice relates. The other invoice and supporting log were provided to this office and the appellant at the mediation stage.

The appellant's representations do not address the specific details of the searches. He argues that all of the costs associated with finding and retrieving the responsive records should be borne by the Board. The basis for his argument is as follows:

- The records at issue relate to a broader public interest in the rights of library users under the *Charter of Rights and Freedoms* and "library standards."

- The records were required in any event to be provided to the Board by the Library in order to inform the Board about the filtering issue and the cost of making these records available should not be passed on to the appellant. In the words of the appellant, the issue is whether "these records were reasonably likely to be relevant to a determination before the Board" and, if the answer is yes, then he should not be compelled to pay the costs associated with the searches.

- He states that his objection to the use of internet filtering prevailed as the filtering program was discontinued, which should be a factor that weighs in favour of reducing the search fees.

- He adds that in his view it is not credible that it took the Board "any serious amount of time to find things such as patron complaints" as they were "no doubt being compiled in separate files as they were coming in given the heightened scrutiny the entire Internet filtering project was receiving from the public and the Board."

Despite the fact that the appellant took the position that search fees were the only issue with respect to these invoices, he made argument in his representations regarding section 45(b), which relates to the costs of preparing records for disclosure. As search was the only fee-related issue at the close of mediation, the question of section 45(b) is not properly before me in this appeal and I will not comment any further on preparation charges.

I will begin my analysis with a review of the appellant's arguments that these records were required for the purposes of a Board meeting; that there is a public interest in the records; and the fact that his position before the Board regarding the use of the filtering system prevailed. In my view, and subject to the application of the fee waiver provision, the appellant is required to pay a

fee for searches regardless of any obligation that the Board may have to provide these records in other contexts and regardless of the public interest in the issues. The *Act* creates a user pay system for access to records. The fact that a requester files a request which he feels is based on a broader public interest or that relates to matters that were under discussion by the Board does not impact on the actual calculation of fees based on documented search time, and in the circumstances of this case, it is not a basis to support a finding that the costs associated with searching for the records should be borne by the Board.

In this context, I now turn specifically to the search fees claimed in relation to Appeal MA08-52. The invoice at issue is dated April 29, 2008 and it totals $139.02. The Board claimed $120 for four hours of search time, which includes a charge for 15 minutes of search time conducted by each of five different staff and 2.75 hours for searches conducted by the Director.

Having carefully reviewed the invoice, the affidavit and the attached log, I find that the amount claimed by the Board for search time in this invoice is reasonable and is in compliance with the *Act*.

In that regard, I note that the Director indicates in her affidavit, and in the attached log, that she spent a total of five hours responding to the request and it is clear that part of that time was for searches that she carried out. In my view, there is sufficient evidence in the log to support an allocation of 2.75 hours for searches conducted by her given the complexity of the request and the diverse nature of the records and the record holdings in which these records would be found.

The responsive records are diverse, including emails with third parties, members of the public, and members of the Board. They also include brochures, reports, press releases, incident logs, surveys, and minutes of meetings of the Board. In addition, the wording of the requests was broad and required a search of multiple sources in order to find responsive records. For example, part 13 was for "any documents evidencing any changes made in the configuration of any computer terminals in any Board facility." This latter part of the request could reasonably be expected to have involved searches in multiple record retention locations.

I also believe that it is reasonable to expect that other staff would be required to search their record holdings for information in response to this lengthy and complex request, as was done in this case. In particular, these staff members could have received emails that were responsive to parts of this request and, therefore, at a minimum, they were required to search their own email accounts for records. I find that 15 minutes of search time for each of five employees is reasonable.

Consequently, I will uphold the search fee of $120.00 in Appeal MA08-52.

I now turn to the search fees claimed in relation to the invoice dated November 8, 2007 in Appeal MA07-424. The total amount of the invoice was $306.71.

During mediation, the Board provided a log of time spent in responding to the request, and the appellant confirmed that his only objection to the fee was in relation to the seven hours claimed for search time, in the amount of $210.

The related log sets out the following information. On October 25, 2007 seven staff members spent 15 minutes each searching their files for a total of 1.75 hours and the Director spent 3.5 hours searching paper files, electronic records, emails, communiqués to the Board, staff and Board reports. On November 5, 2007 further searches were conducted by the Director which included the sources mentioned above and searches for incident reports, URL denied memos and staff reports of public inquiries for a total of two hours. Consequently, the total amount of time spent searching for the records was 7.25 hours, which represents 15 minutes more than what was claimed.

There were 99 pages of records found as a result of the search in relation to this 16 part request. As is the case with the previous invoice, the responsive records were varied in nature and included emails; library internal policies relating to patron records and financial management; emails from members of the public; and Board reports, minutes, and agendas.

Having regard to all of the evidence before me, I accept the evidence of the Board regarding the searches that were carried out and are claimed in this invoice. Given the diverse nature of the responsive records, and the complexities associated with responding to a 16 part request with issues that overlapped with other requests, I find that seven hours of search time is reasonable and I will uphold the fee of $210 in the order provisions below.

In summary, I will uphold the fees claimed for searches in the invoices dated April 29, 2008 and November 8, 2007.

FEE WAIVER

The appellant requested a fee waiver in relation to the invoices dated April 29, 2008 and May 2, 2008 issued in Appeal MA08-52. To be clear, although the appellant disputed the fee in relation to MA07-424, as analysed in the preceding section of this order, that fee has been paid and the appellant did not ask that it be waived.

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.

Section 8 of Regulation 460 sets out additional matters for a head to consider in deciding whether to waive a fee:

> 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.

As previously stated, the fee provisions in the *Act* establish a user pay principle which is founded on the premise that requesters should be expected to carry at least a portion of the cost of processing a request unless it is fair and equitable that they not do so. The fees referred to in section 45(1) and outlined in section 8 of Regulation 460 are mandatory unless the requester can present a persuasive argument that a fee waiver is justified. While the burden of proof rests with the Board to establish that the fees charged are reasonable, and calculated in accordance with the *Act* and Regulations, the burden of proof that a fee waiver should be granted rests with the appellant (Orders M-429, M-598, and MO-2495).

As is evident from the wording of the fee waiver provisions, there are two parts to my review of the Board's decision under section 45(4) of the *Act*. I must first determine whether the appellant has established the basis for a fee waiver under the criteria listed in subsection (4). If I find that a basis has been established, I must then determine whether it would be fair and equitable for the fee, or part of it, to be waived (Order MO-1243).

The appellant's representations do not specifically address the criteria set out in section 45(4). However, the appellant stated in his initial request for access that the fees should be waived "as the dissemination of the requested information is in the public interest and should be undertaken by the [Board] in any event regardless of the pendency of a MFIPPA request."

In his representations, he states that in filing this request he did so as a representative acting on behalf of a broader public interest. He states:

> The requests pertain to an overall policy of the Board, a policy which goes to the very central core of the provision of library services, and a policy which implicates the rights of library users under the Charter and the various library standards.

The only evidence provided by the appellant in support of his claim for a fee waiver relates to what he considers a public interest in the records. However, this does not meet the criteria for the application of a fee waiver set out in section 45(4). Specifically, the appellant does not claim any of the criteria identified in section 45(4). He does not, for example, suggest that the cost of processing the request varies from the amount payable by the appellant [45(4)(a)], that payment of the fee will cause financial hardship [45(4)(b)], or that dissemination of the records will benefit public health or safety [45(4)(c)]. Nor is there sufficient evidence to support a finding that section 8 of Regulation 460 applies.

With respect to section 45(4)(c), previous orders have found that it is not sufficient that there is a "public interest" in the records or that the public has a "right to know". Rather, there must be some connection between the public interest and a public health and safety issue (Orders MO-1336, MO-2071, PO-2592 and PO-2726). I agree with this approach and I will apply it here.

Having carefully reviewed all of the evidence provided by the appellant, I find that he has not established the basis for a fee waiver under section 45(4). Consequently, it is not necessary for me to consider whether it would be "fair and equitable" for the fee, or part of it, to be waived under section 45(4). I uphold the Board's denial of a fee waiver.

ORDER:

1. I find that the Board conducted a reasonable search for records responsive to part 16 of the request in Appeal MA08-52.

2. I find that the Board does not have custody or control of any additional records responsive to part 4 of the request in Appeal MA07-338 or part 16 of the request in Appeal MA08-52.

3. I uphold the search fees of $210 in Appeal MA07-424 and $120 in Appeal MA08-52.

4. I uphold the decision of the Board to deny the appellant's request for a waiver of fees.

Original signed by: December 24, 2010
John Higgins
Senior Adjudicator