

ALBERTA

INFORMATION AND PRIVACY COMMISSIONER

ORDER 99-014

June 21, 1999

ALBERTA EDUCATION

Review Number 1482

I. BACKGROUND

[para 1.] The Student Evaluation Branch of Alberta Education (the "Public Body") prepares, administers and reports the results of achievement tests given to Grades 3, 6 and 9 students in Alberta. The achievement tests are primarily intended to improve instruction by communicating standards and providing information regarding achievement to teachers, principals, superintendents and the Public Body.

[para 2.] On March 20, 1998, the Applicant made an access request under the *Freedom of Information and Protection of Privacy Act* (the "Act") for individual school provincial achievement raw test data for the years 1995, 1996 and 1997 from schools where five or more students had written the exams.

[para 3.] The Public Body provided the Applicant with a fee estimate on April 30, 1998, and another more detailed fee estimate on May 8, 1998.

[para 4.] On July 15, 1998, the Public Body and the Applicant met to discuss the request. As a result of this meeting, the Applicant altered the request. The Applicant's revised request asked for two sets of information. The first request was for individual student achievement

raw test results for the years 1995, 1996 and 1997, which did not include the school and jurisdiction codes. The second request was for the same information, but included school and jurisdiction codes.

[para 5.] On August 4, 1998, the Public Body provided the Applicant with an estimate for each request. Only the estimate for the first request is at issue in this inquiry.

[para 6.] The components of the first fee estimate were as follows:

Data and program preparation (file location, variable field checking, extraction program development and checking):	6 hours
Data extraction: 36 files @ 20 minutes:	<u>12 hours</u> 18 hours
Total 18 hours @ \$40.00/hr	\$720.00
Less initial fees submitted	<u>\$ 25.00</u>
Total	\$695.00

[para 7.] On September 8, 1998, the Applicant requested I review this fee estimate. Mediation was unsuccessful and the matter was set down for a written inquiry.

II. ISSUE

[para 8.] There is one issue in this inquiry: Did the Public Body reasonably calculate the fee for service?

III. BURDEN OF PROOF

[para 9.] Section 67 outlines the burden of proof in regard to an access request. However, the Act is silent regarding the burden of proof when an applicant requests a review of a fee estimate. I must therefore determine who has the burden of proof.

[para 10.] In Order 97-004, I held that when the Act is silent as to burden of proof, I will generally consider the following criteria:

- (i) Who raised the issue; and
- (ii) Who is in the best position to meet the burden of proof?

[para 11.] After reviewing these criteria, I find that the Public Body has the burden of proof. Although the Applicant raised the issues in this inquiry, the nature of this inquiry is such that only the Public Body could meet the burden of proof. Only the Public Body knows the processes and standards that it used to calculate the fee for service. However, I note that notwithstanding the Public Body's burden of proof, it is still incumbent, and in the Applicant's best interest, to provide arguments and evidence regarding these issues.

IV. DISCUSSION

Did the Public Body reasonably calculate the fee for service?

[para 12.] There are two types of fees under the Act: initial fees and fees for service. Initial fees are fees that an applicant must pay before a public body begins to process the access request. Fees for service include fees for the time and cost required to locate, retrieve and prepare a record, copy or ship a record, the cost of supervising an applicant who wishes to examine an original record, as well as the cost of computer time involved in locating, copying, and reprogramming to create a new record: see Schedule 2 of the *Freedom of Information and Protection of Privacy Regulation, Alta. Reg. 200/95* (the "Regulation").

[para 13.] Section 87(1) of the Act and section 10(4) of the Regulation make it clear that the public body has a discretion or choice as to whether it charges a fee for service. However, section 10(5) of the Regulation states that if a public body decides to charge a fee for service that is estimated to exceed \$150, it must charge the total amount. Furthermore, section 87(3) states that if a fee for service will be charged, a public body must give the applicant an estimate of the total fee before providing the services. Section 12(1) of the Regulation sets out the contents of the fee estimate, while Schedule 2 of the Regulation sets out the maximum amount a public body may charge for each service it provides.

[para 14.] The relevant portions of section 87 of the Act read as follows:

87(1) The head of the public body may require an applicant to pay to the public body fees for services as provided for in the regulations.

(3) If an applicant is required to pay fees for services under subsection (1), the public body must give the applicant an estimate of the total fee before providing the services.

(5) The fees referred to in subsection (1) must not exceed the actual costs of the services.

[para 15.] The relevant sections of the Regulations read as follows:

Section 9

9 Where an applicant is required to pay a fee for services, the fee is payable in accordance with sections 10, 11, 12 and 13.

Section 10

10(1) This section applies to a request for access to a record that is not a record of the personal information of the applicant.

(2) An applicant is required to pay

(a) an initial fee of \$25 when a non-continuing request is made, or

(b) an initial fee of \$50 when a continuing request is made.

(3) Processing of the request will not commence until the initial fee has been paid.

(4) In addition to the initial fee, fees in accordance with Schedule 2 may be charged if the amount of the fees, as estimated by the public body to which the request has been made, exceeds \$150.

(5) Where the amount estimated exceeds \$150, the total amount is to be charged.

(6) A fee may not be charged for the time spent in reviewing a record.

Section 12(1)

12(1) An estimate provided under section 87(3) of the Act must set out

(a) the time and cost required

(i) to search, locate and retrieve the record;

(ii) to prepare the record for disclosure;

(a.1) the cost of copying the record

(b) the cost of computer time involved in locating and copying the record or, if necessary, re-programming to create a new record;

(c) the cost of supervising an applicant who wishes to examine the original record, when applicable;

(d) the cost of shipping the record or a copy of the record.

Section 13(3)

(3) Fees, other than an initial fee, or any part of those fees will be refunded if the amount paid is higher than the actual fees required to be paid.

Schedule 2, Item 2

The amount of the fees set out in this Schedule are the maximum amounts that can be charged to applicants...

2 For producing a record from an electronic record

<i>(a) Computer processing and related charges</i>	<i>Actual amount charged to the public body</i>
<i>(b) Computer programming</i>	<i>\$10.00 per ¼ hour.</i>

[para 16.] In deciding whether the Public Body reasonably calculated the fee for service, I will address the following three sub-issues:

(i) Was the Public Body's record-generating process reasonable?

(ii) Was the Public Body's time estimate reasonable?

(iii) Was the Public Body's hourly rate reasonable?

(i) Was the Public Body's record-generating process reasonable?

[para 17.] The Public Body states that its record-generating process was reasonable. The Public Body states that in preparing the data and the program that is used to generate the record, the Public Body must locate the file, and then complete a verification and checking process to ensure the information is accurate and complete. The verification process involves comparing data, resolving differences and repeating processes until an agreement is reached. The Public Body also states its verification and checking process is the recommended industry practice according to the U.S. National Institute of Standards and Technology (NIST) and, in support, includes the NIST's mission statement, as well as a description of the NIST standards for software verification and validation.

[para 18.] Conversely, the Applicant states that the Public Body's verification process was excessive. The Applicant does not, however, suggest another verification procedure that would adhere to an accepted national standard.

[para 19.] After carefully reviewing the submissions of both parties, it is my opinion that the process used by the Public Body was reasonable. In support, I refer to section 9(2) of the Act which reads:

(2) The head of a public body must create a record for an applicant if

(a) the record can be created from a record that is in electronic form and in the custody or under the control of the public body, using its normal computer hardware and software and technical expertise, and

(b) creating the record would not unreasonably interfere with the operations of the public body.

[para 20.] This section states that when a public body creates a record from a record in electronic form, the public body may use the resources that it has available at the time, including its technical expertise. In my opinion, this means that as long as a public body is using a reasonable process to generate the records, there is no obligation on a public body to change its process simply because an applicant believes a faster or more efficient method to complete the task may exist. In coming to this conclusion, I also took into account the fact that the Public Body has a responsibility to ensure "quality control" or, in other words, ensure that

the records generated accurately reflect the raw scores stored on the Public Body's database.

ii) Was the Public Body's time estimate reasonable?

[para 21.] The Public Body states that the time estimate was reasonable. In support of the estimate, it submitted the results of a trial extraction of the 1996 Grade 6 English Language Arts course. This trial extraction took 39 minutes per file, which was 30% longer than the 30 minutes estimated in the August 4, 1998, fee estimate. Although the Public Body acknowledges that modifying the programs for other courses may take up to 10-15 minutes less time than was needed for this first development, it also estimates that other unforeseen difficulties may negate any repetitive efficiencies.

[para 22.] Conversely, the Applicant states that the time estimate was unreasonable. In support of the Applicant's position, the Applicant submitted the results of a trial run that the Applicant conducted with a sample database. The Applicant states that in its trial run it used a database that had approximately twice the number of records as the Public Body's database, but that the total time for extraction, checking and preparing for shipment in this trial run was significantly less than the Public Body's estimate. Furthermore, the Applicant argues that the inconsistency of the Public Body's data fields for the 1995 – 1997 years would not be a critical costing factor because the aggregate results for these years is already publicly available.

[para 23.] I also note that the Applicant offered to provide me with a presentation of its trial run. However, after reviewing the description of the trial run, I determined that the parameters (discussed below) were significantly different as to make it impossible to effectively compare it with the Public Body's trial run. Therefore, I did not feel a presentation was necessary in order to come to a proper determination of the issues.

[para 24.] After carefully reviewing the submissions of the parties, it is my opinion that the Public Body has fulfilled its burden of proof and has proven that its time estimate was reasonable. Although the Applicant's trial run took a much shorter period of time than the Public Body's trial run, the length and complexity of the database in the Applicant's trial run was not the same as the Public Body's database, its trial run did not take into account the inconsistency of the field names in the Public Body's database, nor did the verification method in its trial run adhere to an acceptable national standard.

(iii) Was the Public Body's hourly rate reasonable?

[para 25.] The Public Body charged \$40.00 per hour to produce the records. The Public Body states that this hourly rate was a reasonable amount because it fell within the maximum allowable amount found within Schedule 2 of the Regulation.

[para 26.] Conversely, the Applicant states that the \$40.00 hourly rate was excessive. The Applicant states that, given the type of extraction required, a \$25.00 hourly rate would have been more appropriate.

[para 27.] After reviewing the arguments and evidence before me, it is my opinion that the \$40.00 hourly rate was reasonable. In coming to this conclusion, I note that this hourly rate fell within the maximum allowable amount set out in the Schedule 2 of the Regulation, and did not exceed an amount which I believe is a reasonable expenditure to ensure the results of the data extraction are accurate. Furthermore, section 87(5) of the Act prevents the Public Body from collecting a fee that exceeds the actual cost of the service it provides. If the Public Body collects a fee that exceeds its actual costs, section 13(3) of the Regulation states that the Public Body must refund that portion of the fee.

(iv) Conclusion

[para 28.] I find that the Public Body has met its burden of proof and proven that it reasonably calculated the fee for service. In coming to this determination, I have carefully reviewed the evidence and submissions before me. I also note that although I did not feel that it was necessary to consult an outside expert in this inquiry, I would consider consulting such an expert in future inquiries if I thought it was necessary to decide the issues before me.

V. ORDER

[para 29.] I make the following order under section 68 of the Act.

[para 30.] For the reasons stated in this order, I find that the Public Body reasonably calculated the fee for service.

Robert C. Clark
Information and Privacy Commissioner