

IN THE SUPREME COURT OF NOVA SCOTIA
And
IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 41 OF THE FREEDOM
OF INFORMATION AND PROTECTION OF PRIVACY ACT,
S.N.S. 1993, c.5

Between:

ATLANTIC INSTITUTE FOR MARKET STUDIES

Appellant/
Applicant for Information

AND

HALIFAX REGIONAL SCHOOL BOARD

Respondent



AFFIDAVIT

I, Charles Cirtwill, of Halifax, Halifax Regional Municipality, Province of Nova Scotia, hereby make oath and say as follows:

1. THAT I am Vice President of the Atlantic Institute for Market Studies, and as such have personal knowledge of matters hereinafter deposed, except as stated to be based upon information and belief, all of which I do verily believe.
2. THAT the Atlantic Institute for Market Studies (AIMS) is a non-profit, non-partisan, charitable organization based in Halifax, that provides a distinct Atlantic Canadian voice on public policy in a regional, national, and international setting. The goals of AIMS are to: help Canadians understand how governments operate and make decisions, make taxation fairer, and build an economy that benefits everyone. AIMS publishes research papers, books, reports, commentaries, and background papers, as well as distributing educational materials and organizing workshops and seminars. Areas of research include economic and social policy issues such as health care, education, equalization, employment insurance (EI), fisheries, and social welfare. The Institute also publishes Ideas Matter, a collection of research and commentaries, as well as AIMS On-line, which profiles the Institute's current work and projects.
3. THAT on April 29, 2005, the Atlantic Institute for Market Studies sent a request to the Halifax Regional District School Board (attached to this my Affidavit as Exhibit "A") for

school averages of provincial exam results, teacher assigned grades, attendance rates, discipline statistics, and postal codes for high school students, as well as Grade 9 average grades in the Board's jurisdiction.

4. THAT on June 28, 2005, the Halifax Regional School Board responded to our request with a fee estimate of \$24,120.00 to collect the information. (Attached to this my Affidavit as Exhibit "B")
5. On November 2, 2005, AIMS sent a request to the Nova Scotia Freedom of Information and Protection of Privacy (FOIPOP) Review Office for a review of the request on the basis that the fees involved were exorbitant. A true copy of that request is attached to this my Affidavit as Exhibit "C".
6. THAT at the same time, AIMS requested reviews of similar requests to five other school boards in the province – Cape Breton Victoria Regional School Board, Conseil scolaire acadien provincial, South Shore Regional School Board, Strait Regional School Board, and Tri-County Regional School Board.
7. THAT on January 23, 2006, Nova Scotia FOIPOP Review Officer Darce Fardy released his review of the Halifax Regional School Board decision, along with reviews of four other school board decisions on AIMS' requests for information. True copies of those review reports are attached to this my Affidavit as Exhibits "D", "E", "F", "G" and "H".
8. In his review of the HRSB decision (Exhibit "D"), Mr. Fardy recommended that the HRSB:
 - a. Review the above factors with respect to public interest and consider renegotiating fees with the applicant with a view to reducing them significantly;
 - b. Consider such information for routine disclosure, accessible from a central source, given that disclosure of discipline statistics and average overall grades of students enrolled for provincially examined courses is in the public interest;
 - c. Specify exactly to AIMS what information is available;
 - d. Put processes in place to provide similar information at a minimal cost in the future and improve its records keeping processes.
9. THAT in response to the Review Officer's recommendations, HRSB agreed to meet with AIMS to discuss lowering the fees associated with collect the requested data. On March 9, 2006, a revised estimate of \$5,670.00 was forwarded to AIMS by HRSB. (Attached to this my Affidavit "I").
10. THAT meanwhile, the other School Boards responded to the Review Officer's recommendations by waiving fees immediately or upon meeting with AIMS to discuss the fee estimates, including Cape Breton-Victoria Regional School Board, South Shore

Regional School Board, and Conseil scolaire acadien provincial. Subsequent requests to both Strait Regional School Board and Chignecto Central Regional School Board were also completed with no fees required in light of the Review Officers' recommendations. Tri-County Regional School Board forwarded the information it was able to provide without fees while indicating other data were not available (given the records exist in all other schools in the province, AIMS is seeking clarification on this final point from Tri-County).

11. THAT additionally, the Nova Scotia Department of Education, recognizing the public interest of information requested by AIMS, agreed to collect all of the information in AIMS request on an ongoing basis starting with the 2005-2006 school year, and make the data available to the public at no charge. This decision is outlined in a letter from Deputy Minister Dennis Cochrane dated June 29, 2006, a true copy of which is attached to this my Affidavit as Exhibit "J". The Department has indicated that the school boards will remain responsible for filling requests for historical data.
12. THAT six of the seven school boards within the province have recognized the public interest of the information in AIMS' request and have agreed to waive all fees associated with our request. The Provincial Department of Education has agreed to collect future data and make it available to the public for free. Having regard to these considerations and others, AIMS reiterated its request that the HRSB waive their fees associated with AIMS' request, most recently by letter dated September 19, 2006, a true copy of which is attached to this my Affidavit as Exhibit "K". To date we have received no reply to that request.
13. THAT I verily believe that AIMS' request for data from Nova Scotia schools is not outrageous or onerous to HRSB. We are requesting the same data that is readily available in other jurisdictions and used by those jurisdictions to assess and improve their education systems for their children.
14. THAT the Atlantic Institute for Market Studies ("AIMS") has undertaken a large scale project designed to report on high school performance across the four Atlantic Provinces. The original Freedom of Information requests made of the Nova Scotia school boards account for a modest fraction of the total data required to complete and accentuate this annual study. To date, AIMS has produced four reports on Atlantic high school performance and is currently in the process of preparing the fifth edition of this report.
15. THAT the wide release of AIMS' previous high school performance evaluations generated a great deal of interest throughout the region. A version of the report is scheduled to be published in *Progress Magazine*, along with detailed school by school comparisons that will be available to all Nova Scotians by accessing our web-site. In the previous three years the site received 187,000, 137,000 and 122,000 page views in the first month of the report's release (approximately three to four times our usual site traffic). Last year the site received over a quarter of a million hits in just the two days following the release. This and other feedback indicates that a substantial portion of the

public clearly considers this information of interest and value and finds it readily accessible on the AIMS website.

16. THAT I have been told by several individuals and organizations, and verily believe that for many parents, and Nova Scotians, the AIMS report has become an important tool in ensuring quality education for their children and their community. AIMS has committed to provide detailed information to schools, parents and community groups to assist in developing plans to improve school performance. AIMS high school report project is providing a valuable public service to all Nova Scotians.
17. THAT subsection 7B of Section 11 of the Nova Scotia FOIPOP Act states: "On request of the applicant, the head of a public body may excuse an applicant from paying all or part of a fee referred to in subsection (2) if, in the head's opinion, the record relates to a matter of public interest, including the environment or public health or safety." The FOIPOP Review Officer stated in his review that the information requested was clearly in the public interest, and as such should be released at minimal cost.
18. THAT since the review of AIMS' request, I have received and read a recent Nova Scotia FOIPOP Review Decision (FI-06-12 dated July 12, 2006, attached to this my Affidavit as Exhibit "L"), which included recommendations relevant to public interest issues in this Appeal. In his decision, the Review Officer stated "that the records in question conform to the 'public interest' envisioned by the FOIPOP Act and therefore recommended a fee waiver and reimbursement of any fees previously paid in relation to this request". In that case, the designated public interest of the information in the request not only called for the fees to be waived, but also recommended reimbursement of any fees paid to date, indicating that information deemed to be in the public interest should be released to the public without cost to the applicant.
19. THAT I verily believe from my review of relevant decisions that designating the information to be in the public interest would also indicate that it should be available to the public at no cost. I have read and attached another recent review report (FI-06-25, attached to this my Affidavit as Exhibit "M") in which the Review Officer stated that, "With respect to the ability to pay, it is important to note the issue of the Applicant's ability to pay (s. 11(7) (a)) is separate from the matter of public interest". In this regard the resources of the applicant are subordinate to the public interest of the information.

Comparisons with available information in other jurisdictions

20. THAT in addition to requesting data from Nova Scotia School Boards, AIMS also surveyed the other Atlantic jurisdictions for available measures of high school performance. Many of the important statistics are either readily available or can be accessed by way of informal requests for this information.
21. For instance, in Newfoundland, all of the relevant high school measures have been provided without use of that province's Freedom of Information legislation, (although information on post-secondary performance has required the Act's use). In New

Brunswick, Freedom of Information legislation was not required to access any similar information. Most of that province's school districts have provided similar data to what was requested of the Nova Scotia school boards. Again, this occurred without the use of any Freedom of Information request. In the case of PEI, almost identical requests were made of the Island's three school boards as were made of the Nova Scotia boards, and at present the required information is being provided to AIMS, for a total cost of less than \$2,000.

22. THAT I am not aware of any conditions or attributes (including educational, demographic, economic, political or other) unique to Nova Scotia as compared to other Atlantic Canadian provinces that would readily explain why those other jurisdictions can provide the same information with much greater ease than in Nova Scotia, or within HRSB in particular. AIMS is mindful that there are differences governing school boards and districts across these four provinces, but these policy differences ought not and need not necessarily impact on the availability of good quality school performance data.

Circumventing the Act by keeping poor records

23. THAT in recent years I have read numerous comments and accounts of John Reid, Federal Information Commissioner, including most of his office's Annual Reports since 2001, in which he has been critical of federal agencies and officials that have effectively circumvented the federal Access to Information Act by failing to keep adequate records. Reid is confronting a challenge whereby records simply do not exist. I have read and believe that similar concerns are echoed in the Response to the Government's Action Plan for Reform of the *Access to Information Act*, and the Discussion Paper of April 11, 2006 concerning the proposed *Federal Accountability Act: "Strengthening the Access to Information Act"*). In the case of Nova Scotia's school boards, the difficulty in collecting some of the requested records is a similar type of omission of record keeping. With the key difference that a version of the records are available, but in general they have not been kept in a format that is conducive to easy reporting and retrieval. Although the Act does not require the creation of new records, HRSB's claimed absence of an accessible version of the record, or undue difficulty in retrieving these records is tantamount to the same sort of omission decried by Mr. Reid.
24. THAT published accounts from various public sources in the media indicate that requested records are available and are being used by the Boards for various purposes, including: reporting to the province, school improvement planning, and commenting to the media. Attached to this my Affidavit as Exhibits "N" and "O", "P", "Q" and "R" (as part of the enclosed Request for Review dated November 2, 2005) are samples of such uses, specifically:
- a. A CBC interview from October 17, 2005 with Education Minister Jamie Muir where he states categorically that the province does not centrally collect the results on the provincial exams because school level data is available from the Boards (Exhibit "N");

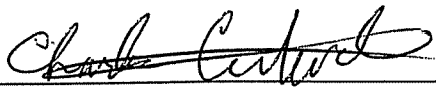
- b. A piece from CBC online from February 10, 2004, where exam results are specifically referenced for both Sir John A Macdonald High School and Horton High (Exhibit "O");
- c. An excerpt from the November 2003 "Planning for Student Achievement" document from Cole Harbour High where pass/fail rates and Grade 12 exam scores are both listed as measures used for evaluation of results (Exhibit "P");
- d. A similar document from the 2005-2006 Business Plan for the Annapolis Valley Regional School Board referencing the appropriate collection, use and distribution of student achievement results (Exhibit "Q");
- e. A page from a Halifax Regional School Board presentation on their "Planning for Improvement" process indicating that they have compiled and released school by school neighbourhood data based on exactly the postal code data we have requested (Exhibit "R").

25. THAT I have also read a recent FOIPOP Review report which addressed the issue of high costs in light of records that are considered difficult to retrieve by a public body. In FI-02-25, the Review Officer stated "We must be careful to ensure fees associated with access to information requests are not designed as a cost recovery mechanism, nor as a barrier to public access to information." That based on responses provided by HRSB and other Boards, I verily believe that AIMS is being asked to pay the public body's costs in accessing the information that has been designated in the public interest, and therefore already available.

26. THAT based on my experience in relation to this and related requests as described above, I verily believe that the records requested here represent fundamental measures that should be readily available to those delivering the most critical work in society – educating our children. I verily believe that the information requested (such as what level of discipline is applied at the school, and what were the average grades achieved by your students) is or should be ordinarily available and is directly relevant to effective management of public schools and delivery of their service to the public.

SWORN TO at Dartmouth, in the,)
 Province of Nova Scotia, this 6th day of)
 October, 2006, before me:)
 _____)
 Cynthia M. Scott)
 A Barrister of the Supreme Court)
 of Nova Scotia)

Cynthia M. Scott
 Barrister of The
 Supreme Court of Nova Scotia



 Charles Cirtwill