

**THE NOVA SCOTIA FREEDOM OF INFORMATION
AND PROTECTION OF PRIVACY ACT**

A **REQUEST FOR REVIEW** of a decision of the **CAPE BRETON-VICTORIA REGIONAL SCHOOL BOARD** with respect to a request for statistical information.

REVIEW OFFICER: Darce Fardy

REPORT DATE: January 23, 2006

ISSUE: Whether the fees charged are reasonable and whether a reasonable effort was made to assist the Applicant.

In a Request for Review, under the **Freedom of Information and Protection of Privacy Act (FOIPOP)**, dated August 19, 2005, the Applicant asked for a review of the decision of the Cape Breton-Victoria Regional School Board (CBVRSB) and a review of the fees quoted for providing the requested records.

The information sought by the Applicant includes:

- Average examination grade on the five provincial exams, listed by school, for the last five years.
- Correlative teacher-assigned grades for provincially examined courses, listed by school, for the last five years.
- Average overall grade and number of students enrolled for provincially examined courses, listed by school, for the last five years.

- Percentage or number of grade twelve students with a graduating average of greater than 80 per cent, listed by school, for the last five years.
- A completed listing of the average grade for grade 9 students, listed by school, for the last five years.
- Annual student attendance rates in grades 10, 11, and 12, listed by school, for the last five years.
- Discipline statistics in grades 10, 11, and 12, including but not limited to suspensions and expulsions, listed by school, for the last five years.
- Number of students by postal code in grades 10, 11, and 12, listed by school, for the last five years.

Background:

(While my reviews do not normally identify the Applicant, in this case it is unavoidable if one is to understand the issues. AIMS has agreed to being named.)

The Atlantic Institute for Market Studies (AIMS) has undertaken a project designed to report on high school performance across the four Atlantic Provinces. AIMS has already produced three reports on Atlantic High school performance and is now working on preparing a fourth and fifth.

This Request for Review is equivalent to other requests for reviews of similar decisions made by other school boards in Nova Scotia.

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In its letter of decision the CBVRSB reminded AIMS that Section 11 of *FOIPOP* allows a public body to charge fees for providing records. It said that due to the scope of the request, it is estimated it would take 600 hours to comply with it and at a cost of \$30.00 an hour the total fee would be \$18,000.00. This led the Applicant to appeal for a review by this office.

During this office's mediation process, AIMS reduced the scope of its request. AIMS withdrew its request for the average overall grades and the percentage of grade 12 students with a graduating average of greater than 80 percent. As well, AIMS reduced the time frame for many of the items it requested.

Submission of the Applicant:

AIMS wrote that it volunteered to be the library of record for this kind of information, provided the information is received every year. It also provided a comparison with similar information available from other Atlantic Provinces:

- Newfoundland provided all of the relevant information without recourse to that province's access to information legislation.
- New Brunswick was also willing to provide the information without requiring AIMS to use its access legislation. Most of that province's school districts have produced the information requested.
- Prince Edward Island's three school districts provided all of the information requested at a charge of \$2000.00.

To quote the AIMS submission:

AIMS is mindful that there are key differences governing school boards and districts across these four provinces, but these policy differences ought not impact on the availability of good quality school performance data.

AIMS points out that in this province the separate requests to the school boards resulted in a collective request from them for a meeting between a representative of the Applicant and representatives of the Nova Scotia School Board Association. After a six-month wait, according to AIMS, the school boards “collectively refused to supply any additional information.”

AIMS recalls a criticism, made by the federal Information Commissioner, of federal agencies circumventing the federal information act by failing to keep adequate records. It wrote:

“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 records keeping (as reported by the federal commissioner). With the key differences 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 . . . This omission of a readily accessible format for general public use is even more worrisome when you consider that the 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.”

AIMS provided some examples of such uses and felt it could successfully challenge the way fees were compiled.

AIMS concluded its submission by providing what it called a “minimum request” to recognize that “fulfilling such requests have to be balanced with the core objectives of the affected

public body.” It said it remained open to suggestions from the school boards of alternate measures or timeliness.

On the question of the fees it said that “in light of the eight identical requests in Nova Scotia, and the over \$90,000 in fee estimates already received, it is clear that AIMS is being asked to shoulder an unnecessarily high fee burden.”

AIMS gave the School Board an opportunity to read and comment on its representations.

Submission of the School Board:

The School Board reiterated its difficulty in obtaining some of the requested information. After reviewing the modified request, the School Board provided a fee estimate of \$11,430.00. However, it said “[t]he actual costs could be considerably more.” As well, the School Board indicated that not all information may be available. The School Board suggested that teachers are not required to keep records of marks and some information is available for the current school year only.

CBVRSB concluded that “the process could have been facilitated if the AIMS request was put forth on a go-forward basis.”

Conclusions:

The only role for the Review Officer in any appeal is to determine if the CBVRSB has been living up to its obligations under *FOIPOP*, not whether it’s doing what is expected of school boards.

To do this, I must consider several sections of *FOIPOP* to guide me. (CBVRSB did not cite any of the exemptions that allow a public body to refuse to disclose all or part of the records requested.) The relevant sections are:

Section 2 The purpose of this Act is

- (a) to ensure that public bodies are fully accountable to the public by
 - (i) giving the public a right of access to records,
 - (iii) specifying limited exceptions to the rights of access.

Section 7 (1) Where a request is made pursuant to this Act for access to a record, the head of the public body to which the request is made shall

- (a) make every reasonable effort to assist the applicant and to respond without delay to the applicant openly, accurately and completely.

Section 11 (1) An applicant who makes a request pursuant to Section 6 shall pay to the public body the application fee prescribed by the regulations.

(2) The head of a public body may require an applicant who makes a request pursuant to Section 6 to pay to the public body fees for the following services:

- (a) locating, retrieving and producing the record;
- (b) preparing the record for disclosure;
- (c) shipping and handling the record;
- (d) providing a copy of the record.

(7) 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,

- (b) the record relates to a matter of public interest, including the environment or public health or safety.

With respect to Section 2, it's my view that for a school board to be "**fully accountable**" it should be in a position to provide the type of statistics being requested in this case in a timely fashion and should require schools to provide that kind of information to the school boards.

With respect to Section 7, the CBVRSB could not have been said to have made "a reasonable effort to assist" the Applicant. A public body that requires a fee of \$18,000 should be prepared to offer some alternatives to the Applicant.

Although the imposition of fees is at the discretion of the School Board, the time spent gathering and processing the information should not be the only gauge used in assessing fees. In Report FI-02-47, I recommended that public should consider several questions when determining how much to charge:

- Is the application reasonable and was the applicant open to considering requests to narrow the scope of the application?
- Would improved records management result in lower fees?
- Is the matter one of public interest? (I will discuss public interest later)
- Is the fee so high as to inhibit access to information that a public body agrees could be released in whole or in part?

AIMS fully participated in the mediation process and narrowed the scope of its application. As well, I am convinced that poor record keeping practices are a factor in the high fee estimate.

With regards to public interest, CBVRSB gave no indication it had considered subsection (7) of Section 11.

In other Reviews, I suggested a two-stage process for a public body to follow when deciding whether a matter is one of public interest:

- Has the matter been a subject of recent public debate?
- Does the subject matter relate directly to the environment, health or safety?
- Would the dissemination of the information yield a public benefit by assisting public understanding of an important policy?
- Do the records show how the public body is allocating financial or other resources?

If a public body agrees that the matter is in the public interest it would consider other factors:

- Is the applicant's primary purpose to disseminate the information in a way that could reasonably be expected to benefit the public or serve a private interest?
- Is the applicant able to disseminate the information?

It is not necessary for all these factors to apply in order to encourage a public body to reduce fees. I agree with the British Columbia Information and Privacy Commissioner that

“(a)ny attempt to define exhaustively or finally what is meant by the term ‘public interest’ is doomed to failure.” (Order # 332-1999) This is probably why the drafters of the legislation left it undefined.

However, I think the factors offer a helpful guide.

Even during the review process, discipline and suspension statistics have been generating media attention. Students’ marks have also been discussed in the media, especially when compared to the average marks of subject areas such as mathematics with other provinces. As well, the AIMS report is disseminated not only on its website but also as a Progress magazine insert.

It would seem to be that it would be reasonable for school boards, whose work is so important to the public, to at least consider having this kind of information available to the public.

I am satisfied that much of the information requested relates to matters of public interest.

The CBVRSB would have known of AIMS plans to produce school statistics and should have been better prepared for the application. When the Applicant asked for a breakdown of the fees, AIMS was told, in a letter dated July 14, that because school was out it would not be in a position to provide a breakdown of the hours and work needed until late August at the earliest.

Finally it is noted with concern that CBVRSB purged the attendance rates and postal code data in June 2005. [AIMS requested this information on April 29, 2005]

Recommendations:

That CBVRSB:

- Review the above factors with respect to public interest and consider renegotiating fees with the applicant with a view to reducing them significantly.
- Given that disclosure of discipline statistics and average overall grades of students enrolled for provincially examined courses is in the public interest, that CBVRSB consider such information for routine disclosure, accessible from a central source.
- Specify exactly to AIMS what information is available.
- Put processes in place to provide similar information at a minimal cost in the future and improve its records keeping processes.

Section 40 of the Act requires CBVRSB to make a decision on these recommendations within 30 days of receiving them and to notify the Applicant and the Review Officer, in writing, of that decision. If a written decision is not received within 30 days, CBVRSB is deemed to have refused to follow these recommendations.

Dated at Halifax, Nova Scotia this 23rd day of January, 2006.

Darce Fardy, Review Officer