



**Information and Privacy  
Commissioner/Ontario**

**Commissaire à l'information  
et à la protection de la vie privée/Ontario**

# **ORDER MO-1479**

**Appeal MA-000330-2**

**Hamilton Police Service**



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## **NATURE OF THE APPEAL:**

This is an appeal from a decision of the Hamilton Police Service (the Police), under the *Municipal Freedom of Information Act* (the Act). The requester, a newspaper, had sought access to all records relating to regional police planning of security and crowd control for the February, 1996 Action Days in Hamilton, including records of all communications with the Ontario Government and its representatives, and with the Ontario Progressive Conservative Party convention organizers, and any records assessing police operations at the events.

The request was made in December of 1999. In December of 2000, the Police provided a decision which states, among other things, that it was expected that the fees permissible under section 45 would be applied to the request, and the estimated fee would be \$6,360.30. The Police requested a deposit of 50% of this amount, being \$3,180.15, prior to proceeding with the request. In the decision, no mention is made of the applicability of any exemptions under the Act or the likelihood of access being granted to the records.

The decision encloses a chart providing a breakdown of the fee estimate, in the following manner:

### **PHOTOCOPYING**

Number of Pages to be Released	4569	
Photocopying Charges per Page	\$0.20	
<b>Total Charge for Photocopying</b>	<b>\$913.18</b>	<b>\$913.80</b>

### **SEARCH TIME**

Total Hours to Locate and Assemble	29.25	
Search Cost per hour	\$30.00	
<b>Total Charge for Search and Assembly of Document</b>	<b>\$877.50</b>	<b>\$877.50</b>

### **PREPARATION TIME**

Total Minutes Required to Prepare Document	9138	
Preparation Time – Charge per minute	\$0.50	
<b>Total Charge to Prepare Document</b>	<b>\$4,569.00</b>	<b>\$4,569.00</b>

### **SHIPPING**

**Total Cost of Shipping Document to Applicant**  
(To be shipped via courier COD)

**TOTAL FEE** **\$6,360.30**

The decision also informed the appellant that all or part of the fee could be waived, and provided an attachment setting out the process for applying to the Police for such a waiver. The appellant did not apply to the Police for a waiver. Rather, the appellant filed an appeal of this decision.

In mediation through this office, the Police have agreed to reduce the fee deposit required to \$1500.00 rather than \$3180.15. No other issues were resolved.

In a Notice of Inquiry sent by me to both the Police and the appellant, I identified three issues raised by the appeal. I asked the Police to submit representations initially on the issue of whether they had issued an adequate interim decision letter (Issue A), and on the issue of the reasonableness of their fee estimate (Issue B). I asked the appellant to submit representations initially on the issue of whether there should be a waiver of all or part of the fees (Issue C).

I received representations by the Police, which were then shared with the appellant. I received no submissions from the appellant at this stage. The appellant was invited to respond to the representations of the Police on Issues A and B, and subsequently provided representations on all three issues.

## **CONCLUSION:**

I find the interim decision of the Police to be inadequate; however, I do not order them to provide a further interim decision. I uphold the fee estimate of the Police, and I make no finding on the issue of whether the fee should be waived in the circumstances of this request.

## **DISCUSSION:**

### **ADEQUACY OF INTERIM DECISION LETTER**

It is apparent from the decision of the Police that no final decision on access to the records has been made. The Police have referred to the difficulty in responding to this request created by the large number of records. In view of this, the procedures outlined in Order 81 for interim decisions are applicable to this situation. In that order Commissioner Linden set out the procedures to be followed where the records are unduly expensive for the institution to produce for review by the head for the purpose of making a decision on access to the records. These procedures contemplate the institution reviewing a representative sample of records, or seeking the advice of knowledgeable staff within the institution who are familiar with the type and content of the records, in order to produce an interim notice containing a fee estimate and an indication of what exemptions might apply. In this regard, dealing with the provincial *Act*, former Commissioner Linden stated:

In my view, the *Act* allows the head to provide the requester with a fees estimate pursuant to subsection 57(2) of the *Act*. This estimate should be accompanied by an "interim" notice pursuant to section 26. This "interim" notice should give the requester an indication of whether he or she is likely to be given access to the requested records, together with a reasonable estimate of any proposed fees. In my view, a requester must be provided with sufficient information to make an informed decision regarding payment of fees, and it is the responsibility of the head to take whatever steps are necessary to ensure that the fees estimate is based on a reasonable understanding of the costs involved in providing access. Anything less, in my view, would compromise and undermine the underlying principles of the *Act*.

How can a head be satisfied that the fees estimate is reasonable without actually inspecting all of the requested records? Familiarity with the scope of the request can be achieved in either of two ways: (1) the head can seek the advice of an employee of the institution who is familiar with the type and contents of the requested records; or (2) the head can base the estimate on a representative (as opposed to a random) sample of the records. Admittedly, the institution will have to bear the costs incurred in obtaining the necessary familiarity with the records, however, this is consistent with other provisions of the *Act*. For example, subsection 57(1)(a) stipulates that the first two hours of manual search time required to locate a record must be absorbed by the institution and cannot be passed on to the requester.

The head's notice to the requester should not only include a breakdown of the estimated fees, but also a clear statement as to how the estimate was calculated (i.e. on the basis of either consultations or a representative sample.) While I would encourage institutions to provide requesters with as much information as possible regarding exemptions which are being contemplated, the head must make a clear statement in the notice that a final decision respecting access has not been made. Because the head has not yet seen all of the requested records, any final decision on access would be premature, and can only properly be made once all of the records are retrieved and reviewed. However, in my view, if no indication is made at the time a fees estimate is presented that access to the record may not be granted, it is reasonable for a requester to infer that the records will be released in their entirety upon payment of the required fees.

Order 81 has been revisited and affirmed in Order M-555.

In this case, the information provided in the decision letter was quite cursory, because it was substantially in chart form. In their submissions, the Police describe the process they followed in responding to this request. Memos were sent to the various Senior Officers within the Police Service that would have been involved with the 1996 Action Days and therefore the requested records. Of five officers that were provided the memo, no records were found (the retention schedule for correspondence is current plus 1 year). The Police then state that a box of computer disks, whose contents were previously unfamiliar and unmarked, were located and printed in their entirety. It is submitted, among other things, that

This Police Service did not have the time nor the personnel to review all of the records and grant a decision based on the records.

Although there are many orders that state that the fee estimate must be accompanied by an interim decision letter, this institution could not provide a fair letter due to the large number of records. As stated the appellant was advised that once a deposit (which this Police Service had lowered) was received, we would then provide some type of list of records. The appellant could then check that list to see what he did and did not require. Once the appellant made a decision from the list, the records would be provided. If in fact, the fees were less, the appellant

would be provided a refund for the difference. It should be noted that in the past the Hamilton Police Service has provided only the fee estimate letter when there are large volumes of records....

Due to the large volume of records, actual costs cannot be calculated until the request is finalized. It was not possible to go through the voluminous records to decide the exemptions that may or may not apply. In this case, once the documents were printed from the disks, I estimated severing time and photocopying charges from a representative sample of the documents. From the sample record, it was determined that the appellant would be granted access to the majority of the records.

The appellant's representations focus for the most part on the unwillingness, in his view, of the Police to engage in discussions with him about "scoping" his request with a view to reducing the number of records which might have to be reviewed. From the representations of both parties, there appears to be a common frustration at not having had more useful dialogue. Further, both sides appear to have made some gestures at resolving these issues informally. Although in this case, these efforts did not succeed, I encourage the parties to have these types of discussions in their future dealings, in that it may result in considerably focusing or narrowing the issues between them. In Order PO-1953-F, for example, Adjudicator Irena Pascoe describes how, following an interim decision but before its final decision, the institution provided the requester with a general description of nine categories of responsive records located. As a result of this description, the number of pages on which a final access decision was required was reduced from 1700 to 1100 pages.

Since the parties were not able to resolve the matter informally, it remains for me to make a determination under the *Act*. Applying the principles in Order 81, I find that the decision letter of the Police was inadequate in achieving the goal of providing the appellant with sufficient information to make an informed decision regarding the payment of fees. Read on its own, the decision does not, for instance, state what the charge for "preparation time" involves. It is only from the representations of the Police that it now becomes apparent that severances will be made to the records. Further, it is not clear from the decision how much of the material located in response to the request will be disclosed. It is not clear whether the result of severance will be that only a small amount of information will be disclosed, or most of the information located. Again, it is only through the representations that the appellant is told that the "majority" of the information in the records will be disclosed.

Finally, the interim decision fails to state how the Police arrived at their estimate of the fees. The position of the Police has been that they are unable to review the records in any detail, and make final decisions about how much material can be disclosed, because of the volume of material. Accordingly, they wished some partial payment of fees before undertaking this work. This in itself is reasonable; it is precisely the situation contemplated by the procedures for interim decisions. However, given that the Police have not conducted a review of all the records, the appellant ought to have been given some information about how the fee estimate has been calculated. Again, the Police have now informed the appellant, in their representations, that they conducted a review of a "representative sample of the records".

In sum, the decision of the Police is flawed. However, the appellant has now been given sufficient information, through a combination of the decision and the representations in this appeal, to make an informed decision as to whether he wishes to pay the deposit required. If the deposit is paid, the Police will presumably proceed to make a final decision on access. The Police have indicated that prior to copying all the records it decides can be disclosed, they will provide the appellant with an opportunity to select only those he wishes to have after reviewing the list of records.

I note that in their representations, the Police appear to have a broader view of their obligations under Order 81 than I have found here. There seems to be the impression, for instance, that a review of all the records is required, even for the purpose of an interim decision. Order 81 does not require this; nor does it require that a comprehensive list of records be generated at the outset. As set out in that decision, it is acceptable that a review of a representative sample of records be performed, and that information be given to the appellant, based on that review, as to the estimated fees and the likelihood of access being granted.

In their representations, the Police also state “it was not possible to go through the voluminous records to decide the exemptions that may or may not apply”. Again, in the interim decision process, they are not required to review all of the records, nor to make a *decision* as to what exemptions may be applied. What is required, after either a review of a representative sample or consultations, is some indication as to the likelihood of access. Obviously, the more information, which can be given at this point about what exemptions may ultimately be claimed, the better. However, it should be clear to all at the interim decision stage that, as stated directly in Order 81, “because the head has not yet seen all of the requested records, any final decision on access would be premature, and can only properly be made once all of the records are retrieved and reviewed”.

In conclusion, I find that the decision of the Police is inadequate; however, in the circumstances, no purpose is served by directing a further interim decision.

#### **FEE ESTIMATE:**

The charging of fees is authorized in section 45 of the *Act*, and more specific provisions regarding fees are found in section 6 of Regulation 823 made under the *Act*. Section 45 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;
- (b) the costs of preparing the record for disclosure;
- (c) computer and other costs incurred in locating, retrieving, processing and copying a record;

- (d) shipping costs; and
- (e) any other costs incurred in responding to a request for access to a record.

Section 6 of Regulation 823 provides that:

The following are the fees that shall be charged for the purposes of subsection 45(1) of the *Act* for access to a record:

1. For photocopies and computer printouts, 20 cents per page.
2. For floppy disks, \$10 for each disk.
3. For manually searching a record, \$7.50 for each 15 minutes spent by any person.
4. For preparing a record for disclosure, including severing a part of the record, \$7.50 for each 15 minutes spent by any person.
5. For developing a computer program or other method of producing a record from machine readable record, \$15 for each 15 minutes spent by any person.
6. The costs, including computer costs, that the institution incurs in locating, retrieving, processing and copying the record if those costs are specified in an invoice that the institution has received.

### ***Search time***

I have set out the representations of the Police on how they arrived at their fee estimate. The appellant submits that the Police estimate is very rough and generalized, reached by applying the maximum rate of two minutes per page to every page. He submits that it is evident in this case that the Freedom of Information Coordinator (the FOIC) for the Police did not assess the records and understand their contents so as to determine whether they can be released. Further, it is said that the Police are trying to pass on the cost of that basic review to the requester. The appellant states that his requests were “not aimed at getting the police to do hours and hours of work only for me to cherry pick a small number of records. The intent was to eliminate the potential for long hours of work by seeking to eliminate from consideration as many records as possible.” The appellant submits that the Police have not provided information about its representative sample, how large it was, and how it was determined. He also states that 30 hours of search time is unreasonable. He notes that the FOIC states that she sent memos to five officers. Then a box was found. The appellant asks where 30 hours accumulates through that process.

In the fee estimate, the Police have claimed 29.25 hours to locate and assemble the records, and propose to charge \$30.00 per hour for this work. The Police have not provided any breakdown of the work included in the 29.25 hours. I find that, on the basis of the description of its search, it would be reasonable to conclude that about three hours were spent in locating the records to be reviewed.

The Police are also entitled to charge for reviewing the records to confirm their responsiveness. Based on the remaining 26.25 hours, by my calculation, the Police are estimating a total of 1575 minutes to review 4569 pages of records, which amounts to a review of about 3 pages per minute.

Based on this, I am satisfied that the fee estimate for search time is reasonable in the circumstances.

### ***Photocopying charges***

I find that the calculation of this cost by the Police is made in accordance with the *Act*.

### ***Preparation time***

Previous orders of this office have found that two minutes per page to sever records is reasonable (see Orders M-811, M-858, MO-1169 and P-1536, for example). In this case, I find that this amount of time is reasonable, in the absence of any unusual circumstances. The amount allowed is, of course, contingent on the number of pages of records ultimately disclosed. Since the Police have indicated that it will provide the appellant with a list of records from which he can select which ones he requires, it is entirely likely that this amount will be substantially lower in the end result.

In conclusion, I find the fee estimate of the Police reasonable in the circumstances of this case.

Notwithstanding my finding, and on the basis of the parties' representations, I take this opportunity to make a recommendation on how to proceed from here. It appears that the appellant would be content, initially, to have a general description of the kinds of records which were located, rather than a comprehensive list. I recommend that the Police consider performing an initial and brief review of the records (no more than a few hours), with a view to providing such a general description. Its description would be only as detailed as such a brief review permits. The appellant would be charged the fees, initially, for this first few hours of search time. After this initial review, the appellant may be in a position to considerably narrow the scope of records for which he requires a complete list and a final access decision.

### **FEE WAIVER**

The provisions of the *Act* relating to fee waiver are found in section 45(4), which states as follows:



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 in the regulations.

Section 8 of the Regulation then prescribes, in part:

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.
- ...

As I have set out earlier, the appellant was provided with information about how to apply for a fee waiver in the interim decision of the Police. The appellant did not follow that procedure. In the Notice of Inquiry, I asked the appellant to provide submissions on whether the fees should be waived in this matter, as this was an issue raised in the appellant's appeal letter. I asked the appellant to provide these submissions at the initial stage of the inquiry, so that the Police might be given a chance to consider the appellant's request. The appellant did not provide these submissions at the initial stage. Rather, the first submissions the appellant has made on the issue of fee waiver came as part of the appellant's response to the submissions of the Police.

In view of the appellant's own actions, I am inclined against considering the issue of fee waiver in this decision. The Police have not had an opportunity to consider the request, because of the lack of diligence by the appellant in making his submissions on this issue (see Order M-858).

The appellant is free to make a fee waiver request to the Police directly, and to appeal the decision on that request if he wishes.

**ORDER:**

I uphold the fee estimate of \$6,360.30.

Original signed by:

Sherry Liang

Adjudicator

October 18, 2001