



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-1869

Appeal MA-040125-1

Toronto Police Services Board



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NATURE OF THE APPEAL:

The Toronto Police Services Board (the Police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The requester sought access to “all expense records”, including any “monthly expense summaries” and “the accompanying background receipts” submitted by the Chief of Police from January 1, 2000 to the date of the request. The requester later amended her request to include only records covering three years of expenses.

The Police issued an interim decision in which they addressed both the original and the amended requests. They also issued a fee estimate in the amount of \$12,600 to cover the cost of four years of records and \$9,450 for three years of expense records and requested a deposit of 50% of these amounts as a down payment. In addition, the Police issued a time extension decision under section 20(1) of the *Act* stating that a time extension of 112 days is required to complete the search for four years of records and 91 days are required to search for three years worth of records. Finally, the Police indicated that some of the requested information may be subject to the discretionary exemption in section 11(d) of the *Act* (economic interests of an institution).

The requester, now the appellant, appealed the decision of the Police to charge a fee and extend the time required to respond to the request. The appellant also requested a fee waiver, which was denied by the Police. During the mediation of the appeal, the appellant withdrew her request for “monthly summaries”, limiting the scope of her request to include only the expense claims and background information for a three or four-year period.

I sought and received the representations of the Police, which were shared, with the exception of one sentence, with the appellant. This deletion was made due to the confidential nature of its contents. The appellant also provided representations in response to the Notice, which were shared in their entirety with the Police. I then invited the Police to make additional submissions by way of reply but did not receive any further response.

DISCUSSION:

SHOULD THE FEE ESTIMATE BE UPHOLD?

Introduction

Where a fee exceeds \$100, an institution may choose to do all the work necessary to respond to the request at the outset. If so, it must issue a final access decision. Alternatively, the institution may choose not to do all of the work necessary to respond to the request, initially. In this case, it must issue an interim access decision, together with a fee estimate [Order MO-1699].

Where the fee is \$100 or more, the fee estimate may be based on either

- the actual work done by the institution to respond to the request, or
- a review of a representative sample of the records and/or the advice of an individual who is familiar with the type and content of the records. [MO-1699]

Also, where the fee is \$100 or more, the institution may require the requester to pay a deposit equal to 50% of the estimate before the institution takes any further steps to respond to the request [section 7 of Regulation 823].

The purpose of the fee estimate, interim access decision and deposit process is to provide the requester with sufficient information to make an informed decision as to whether or not to pay the fee and pursue access, while protecting the institution from expending undue time and resources on processing a request that may ultimately be abandoned [Order MO-1699]. This office may review an institution's fee and determine whether it complies with the fee provisions in the *Act* and Regulation 460, as set out below.

Section 45(1) requires an institution to charge fees for requests under the *Act*. That section reads:

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.

More specific provisions regarding fees are found in sections 6, 6.1, 7 and 9 of Regulation 823. Those sections read:

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:

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.

The parties' submissions

The Police indicate that the fee estimate provided to the appellant was based on information obtained from its Manager of Financial Management (the Manager), "who is an individual familiar with the type and contents of the requested records." The Police add that the advice received from the Manager was that:

. . . there would be approximately 30 boxes per year to be searched, that 30 boxes for each of the 4 years would result in 120 boxes to be searched and that a person from Financial Management experienced with the records would be capable of searching approximately 2 boxes per day in a 7 hour work day.

Searching 120 boxes at 2 boxes per day would equal 60 days of search time; 60 days at 7 hours per day equals 420 hours; 420 hours at \$30.00 per hour equals a fee estimate of \$12,600.00.

In support of that portion of the fee estimate representing search time, the Police submit the following:

Financial records are filed as they are generated. The account numbers associated to the Office of the Chief of Police were identified and would be used by the person conducting the search to assist in narrowing the potentially responsive records.

A full search of all records would be required. Each record would require an initial review to determine the related account number, and only those records identified as relating to the account numbers associated to the Office of the Chief of Police would require a further and more intensive review. Some records may contain multiple account numbers requiring a more thorough review to determine its possible responsiveness.

While expenses for a single individual may be expenses against a particular set of account numbers, each record from these accounts would be required to be more fully reviewed to determine whether the expense related to [the Chief of Police] directly or whether the expense related to a member of his staff or to the office expense.

The Police also indicate that it is anticipated that further expenses would be incurred for photocopying charges that remain unascertained and that there may be costs associated with the preparation of the records for disclosure as they may contain information that is subject to exemption under section 11(d).

The appellant provides three reasons why the fee should not be upheld:

1. First, the Police have provided only the most general submissions justifying the length of time required by its staff to address the request. The Police do not furnish sufficient detail to ascertain whether the work that is allegedly required is of the type that is properly subject to a fee under the *Act*. In our submission, by failing to provide this detail, the fee should be disallowed.
2. Secondly, we question the practice of storing such discrete records, presumably commingled with other documents in 120 boxes, in an apparently un-indexed form. By doing this, the Police impose a *de facto* barrier to information access (contrary to s. 1(a)(i) of the *Act*) by creating an unusually inefficient filing and retrieval system. The records sought do not result in a highly customized or esoteric request. It seems inconceivable that, through a computer search of accounting records, the data is not easily searchable and available. In fact, the Police imply that a computer search will not even be undertaken. . . It is surprising that the Police make no mention of their ability to perform an electronic search for the data/information requested.
3. Finally, even if the efforts set out in the Police submissions are required, there is no suggestion that the request would result in an actual cost to the Police at the end of the day. Rather, it appears that the work would be undertaken by existing staff members.

Findings

In Order MO-1614, upheld on Judicial Review in *Toronto (City) v. Humane Society of Canada [2004] O.J. No. 659* (Div. Ct.), Assistant Commissioner Tom Mitchinson examined a similar situation involving a request made to the City of Toronto that resulted in a fee estimate of \$90,000. The level of detail provided to substantiate such a fee was similar to that provided by

the Police in the present appeal. After reviewing previous decisions of the Commissioner's office where the adequacy of an interim fee estimate was at issue, he found that:

The City's interim decision in this case is not adequate in the circumstances. It appears that in contacting its Animal Services department, the City chose the option of seeking the advice of an employee familiar with the type and contents of the records. In its decision letter, the City states that "Animal Services has estimated that a search of over approximately 120,000 hard copy records and an unknown number of electronic documents for the relevant data will be required". However, there is nothing to indicate how this figure was arrived at, or how this volume of records "would translate to one full time staff member taking approximately 26 months to complete the search and compile the relevant records".

In my view, an estimate of this magnitude cannot be justified on the basis of this little detail or substantiation. It was, or should have been, clear to the City that a fee estimate of \$90,000 would be daunting to any requester, and particularly so in this case where the appellant had specifically pointed to its status as a registered charity seeking a fee waiver. At a minimum, I would expect the City to have either entered into detailed discussions with the appellant in an effort to clarify and narrow the scope of the request, or to provide a detailed and comprehensive outline of how the required search activities for the various components of the request were calculated. Although I am not suggesting that the City intended its fee estimate to act as a deterrent to the appellant in proceeding with his request, in my view, that outcome could certainly have occurred.

After concluding that the City's interim decision was inadequate for several reasons, including the fact that "it did not provide sufficient detail to substantiate the magnitude of the fee estimate" he went on to make a determination as to the appropriate remedy to be fashioned in such circumstances. Again, Assistant Commissioner Mitchinson reviewed a number of previous decisions of this office to assist him in deciding how to address the situation where an interim fee estimate is inadequate in its contents. This discussion is reproduced in its entirety as it represents a useful review of the different approaches taken in the IPC's decisions:

In Order MO-1479, Adjudicator Liang found that the institution's decision letter was inadequate, but that the appellant had been given sufficient information, through a combination of the decision letter and representations shared during the inquiry process, to make an informed decision about paying the fee. Accordingly, she did not order the institution to provide a new interim decision letter, and proceeded to deal with the appeal on the basis of the issues identified in her Notice of Inquiry.

In Order MO-1367, Adjudicator Laurel Cropley found that the institution had gone part way in its interim decision obligations by performing a sample

computer search, but had not taken the next step of performing a sample manual review of the computer-generated records in order to provide the appellant with an idea of how many responsive records existed. Adjudicator Cropley ordered the institution to provide the appellant with a revised interim decision and fee estimate.

In Order MO-1336, Adjudicator Cropley found that the institution had not provided a proper interim access decision, nor was the fee estimate adequate for the purposes of advising the appellant. Although during the inquiry process the institution confirmed that it would provide the appellant full access, because the institution's original fee estimate did not deal with preparation charges or photocopying costs, Adjudicator Cropley found that these fees could not be claimed at the inquiry stage, and ordered the institution to disclose the records free of charge.

In Order M-1123, I dealt with a situation where the institution responded to a request by providing some records, and issuing a fee estimate to cover other possible responsive records not yet identified. However, the institution did not provide an interim access decision to accompany the fee estimate:

By not complying with Order 81, none of the benefits of the process identified in that order are present in this case. The Board does not have the benefit of a representative sample of records or the expertise of a knowledgeable employee in calculating a fee estimate, and has not provided the appellant with any indication as to whether these records will be disclosed. The appellant does not have the benefit of an interim access decision. Finally, the Commissioner's office has not been provided with the type of information required in order to assess the reasonableness of the fee estimate. Although the Board has provided information relating to the amount of search activity required in order to identify responsive information, it has provided no description as to the steps required to accomplish the various tasks involved in identifying, searching and retrieving the responsive records, nor has it provided an explanation of the way in which the information is stored. Although the Board is entitled to charge for preparation time, which normally relates to severance activity, without a proper interim access decision I cannot determine whether these charges are incorporated into the fee estimate. Further, the Board indicates that it is prepared to create a new record to respond to the request, but it is not clear whether charges for this activity are included in the fee estimate.

I disallowed the fee and ordered the institution to issue a final access decision to the appellant.

In Order MO-1294, Adjudicator Holly Big Canoe also disallowed the institution's fee estimate. Adjudicator Big Canoe found:

Other than indicating during mediation that the tender documents are kept "in a back storage room", the Township has not provided representations in support of its search charges.

...

In this appeal, the Township acknowledges that it could have shortened the required search time by referring the appellant to the Council minutes to identify where the records she was requesting appeared. Additionally, the Township did not provide the appellant or this office with a detailed breakdown of the fee estimate, did not comply with the interim notice requirements, and did not provide representations which explained what other activities, if any, were necessary to locate the records. In the circumstances, I do not uphold the Township's search charges.

The different approaches followed in these cases make it clear that the appropriate remedy is dependent on the facts and circumstances of a particular appeal.

As far as the present appeal is concerned, the City did not provide the appellant with a proper interim access decision.

As far as the fee estimate is concerned, the City's justification for its search fees in its initial decision letter to the appellant was inadequate. However, applying Adjudicator Liang's approach from Order MO-1497, in my view, it is also relevant for me to consider the extent to which additional details provided to the appellant during the subsequent appeal remedied this deficiency.

Assistant Commissioner Mitchinson then reviewed the representations of the parties to that appeal and pointed out the deficiencies in the submissions made by the City, particularly with respect to providing a detailed explanation of the actual work to be performed in the conduct of its searches. The Assistant Commissioner came to the following conclusion:

From the City's representations I am left with the overall impression that the required searches for records would be a long and arduous process, but I am not persuaded, based on the representations provided by the City, that it would cost \$90,000 in search fees. I also find that, unlike the situation in Order MO-1497,

despite having the benefit of the City's representations, the appellant still does not have sufficient information to make an informed decision about paying the fee.

In order to resolve this impasse fairly and expeditiously, Assistant Commissioner Mitchinson crafted a remedy that, in his words, "will attempt to balance the rights and expectations of the appellant to a substantive decision under the *Act*, with the City's right to recover some of its costs for locating the large and varied records responsive to the appellant's request." The order provisions of Order MO-1614 required the City to provide the appellant with three separate decision letters relative to three separate and distinct aspects of the request and disallowed the charging of a fee for two of those areas. In my view, the present appeal calls for a similarly customized and unique approach.

I find that the interim fee estimate provided by the Police to the appellant, as well as the representations provided in this inquiry to me that were shared with the appellant, do not adequately describe the nature and extent of the searches required. I find that the Police have not addressed whether there may exist some other computerized method of identifying expense claims submitted by the Chief of Police, nor have they provided an explanation as to why the record-holdings of the Office of the Chief of Police were not searched, as suggested by the appellant during the mediation and adjudication of the appeal.

In addition, I find that the Police failed to examine a representative sample of the responsive records in order to determine whether or to what extent access to those records would likely be granted to the appellant. As a result, I find that the appellant "still does not have sufficient information to make an informed decision about paying the fee", as was the case in Order MO-1614.

Because of these deficiencies in the fee estimate and the representations provided by the Police in support of it, I too am unable to properly assess whether it is reasonable. As was the case in Order MO-1614, a representative sampling of the records would have greatly assisted the Police in being better able to determine the nature of the records being searched and to identify any difficulties that a search in the boxed record-holdings for the specific documents sought might have entailed. It is unclear to me from the representations of the Police what else is stored in the 120 boxes of records that must be examined, page by page, in order to locate the responsive records. A search of a representative sample of these records could have provided an answer to that question. As was the case in Order MO-1614, I am not persuaded, based on the representations of the Police, that \$12,600 (for 4 years of records) or \$9,450 (for 3 years of records) in search fees is warranted.

Accordingly, I will order the Police to review a representative sampling of documents from the responsive 120 boxes of financial records and provide the appellant with an interim decision on access, along with a fee estimate, within 10 days of the date of this decision.

In addition, the Police have not indicated whether a search of the record-holdings of the Office of the Chief of Police was undertaken and if so, what were the results of such a search. Nor was I

provided with any information as to the possibility of conducting a search of the electronic accounting records maintained by the Police for such information. I will, therefore, require that the Police provide the appellant with the results of searches conducted of these two sources within the time frame set forth in section 19 of the *Act*, treating the date of this order as the date of the request.

TIME EXTENSION

The Police indicated in their decision letter of March 30, 2004 that they required a time extension of either 112 days (if the appellant sought 4 years of records) or 91 days (if the appellant sought 3 years of records) under section 20(1), which provides that:

A head may extend the time limit set out in section 19 for a period of time that is reasonable in the circumstances, if,

- (a) the request is for a large number of records or necessitates a search through a large number of records and meeting the time limit would unreasonably interfere with the operations of the institution; or
- (b) consultations with a person outside the institution are necessary to comply with the request and cannot reasonably be completed within the time limit.

The Police submit that “meeting the time limit in section 19 would most assuredly interfere with the operations of the TPS [Toronto Police Service].” The Police indicate that the searches required for responsive records are estimated to take some 60 working days to conduct, which taking into account non-working time on weekends, would require 84 calendar days. They also estimate that the review and preparation of the actual records to be disclosed would require some 20 working days, or a total of 28 calendar days.

In my discussion above, I indicated that I would order the Police to conduct additional searches of their electronic databases and the Office of the Chief of Police and to issue a further interim decision letter to the appellant within the time frames mandated in the *Act*. Accordingly, in my view, it is not necessary for me to determine the appropriateness of the time extension decision that is the subject of part of this appeal. Should the Police maintain their position that a time extension under section 20(1) is necessary when they issue their final decision on access, that decision may be appealed and this office will address the question of the appropriateness of a time extension at that time.

FEE WAIVER

The appellant requested that the Police consider granting a fee waiver under section 45(4) of the *Act*, which reads:

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.

Without the benefit of the final decision of the Police on whether it intends to grant the appellant a fee waiver, it is premature for me to make a determination on this issue. I will, however, assume that the appellant continues to seek a waiver of any fees that may be charged by the Police when they issue their final decision and ask that the Police make such a determination and to inform the appellant of their position in their final decision, when it is issued.

ORDER:

1. I order the Police to provide the appellant with an interim access decision and a fee estimate following the completion of their review of a representative sampling from the identified 120 boxes of financial records by **December 2, 2004**.
2. I also order the Police to conduct a search of the record-holdings of the Office of the Chief of Police and the electronic accounting records which they maintain and provide the appellant with an interim access decision and fee estimate, in accordance with the provisions of sections 19, 21 and 22 of the *Act*, by **December 22, 2004**.
3. I order the Police to provide me with a copy of the decision letters referred to in Provisions 1 and 2 of this order.

Original Signed By: _____
Donald Hale
Adjudicator

November 22, 2004