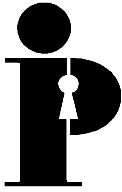

ORDER MO-1969

Appeal MA-040372-2

Toronto Police Services Board

NATURE OF THE APPEAL:

The Toronto Police Services Board (the Police) received the following 16-part request under the *Act*:

> I request all documentation and information including relevant decoding schemes pertaining to TPS [Toronto Police Service] file 2003-EXT-0616 or that I would expect be part of such file. The original accident report is 698109, April 25, 2003, 18:30, Event Number DI 13401. 1 am the complainant and I am a party to the accident. I would expect that the Complaint Coordinator at 14 Division would have most if not all of this information and location information. Specifically but not exhaustive the following:
>
> 1) All correspondence from OCCOPS [Ontario Civilian Commission on Police Services] to TPS regarding my complaint
>
> 2) All Memorandum Book notes and Statements TPS 217 and Telephone Conversations\Interviews used in and not used in the [named individual's] Report of Investigation 2004.0513 front P.C. [named officer and badge number] (likely typo in report pg 19 if so ignore), PC. [named officer and badge number], PC [named officer and badge number], PC. [named officer and badge number], Sergeant [named officer and badge number], Detective [named officer and badge number] and Detective [named officer and badge number]. Including evidence of intact security features to ensure there has been no tampering or irregularities which may require before and after entries.
>
> 3) All Statements from the Accident Investigation and Follow Up Telephone Interviews (audio) from Civilian witness 1, 2, 3, 4.
>
> 4) Policy Service or Conduct Reports TPS 901
>
> 5) Correspondence to Toronto Emergency Medical Services
>
> 6) Assessment Care Report
>
> 7) Correspondence - other (page 20 [named officer's] report)
>
> 8) Statement of Request TPS 649
>
> 9) I\CAD event Detail Report D113401 2003
>
> 10) Investigators Log Notes Det. [named officer]

11) List of telephone contacts I have had with the TPS since Apr 24, 2003

12) Basis and analysis for speculative and derogatory comments towards complainant by Det. [named officer] in [named officer's] Report

13) The [named officer's] Report on page 24 cites a number of cases Davidson v. Duffett 1951, Bristow v. Marko 1949, Arcand v. Kaup and Marhall v. Belhumeur. Please provide the case summaries as used by Det. [named officer] and determined relevance to my complaint and accident

14) All information and analysis TPS has done or caused to be done regarding investigating and analyzing the accident

15) Documents that layout TPS professional standards and code of ethics regarding on scene traffic investigations, relations with the public, handling of complaints and investigations of complaints. Also standards pertaining to confidentiality, privacy, secrecy and conflict of interest.

16) Any other information that would be considered important to the accident and my complaint.

The request was made on October 1, 2004. The Police did not issue a decision within the 30-day period set out in the *Act*. The Police responded on November 1, 2004, stating that they had extended the time for response by an additional 30 days to November 30, 2004. The Police stated that more time was required because their search would involve a large number of records and would interfere with the operations of the institution.

Appeal MA-040372-1 (the "deemed refusal" appeal)

Under the Act, the failure of an institution to notify a requester of its decision on an access request within the statutory time limits is deemed to be a refusal of the request, which can be appealed to this office. Because the Police did not issue an access decision by November 30, 2004, on December 3, 2004, the requester (now the appellant) filed an appeal of this "deemed refusal". As a result, appeal file MA-040372-1 was opened. On December 20, 2004, the Police provided a response to the appellant, and Appeal MA-040372-1 was closed.

Appeal MA-040372-2 (The current appeal)

The decision issued by the Police on December 20, 2004 was divided into Part A and Part B.

Part A

Part A of the letter is entitled "Fee Deposit". It deals solely with item 15 of the appellant's request, in which he asked for certain "standard operating procedures and service standards". The Police stated that they had located the following responsive records: 17 Procedures, 8 Rules and one Vision Statement and "estimated" that 86 pages will be released.

The Police did not provide the appellant with the titles or subject of these documents, state the total number of pages found, or indicate whether any parts of these documents would be withheld. If parts of the material were being withheld, the decision gave the appellant no indication of which portions these were or the reasons for withholding them.

The Police estimated the fee for providing access to these records to be $122.20, consisting of $105.00 for time spent searching for these records and $17.20 for photocopying these documents. The Police required a deposit of $61.10 before proceeding with the request. The letter stated, "You are requested to submit your deposit by 9 January 2005".

Part B

Part B of the letter is entitled "Interim Decision". It appears to deal with items 1 to 14 and 16 of the appellant's request.

This "interim decision" indicated that the Police anticipated that the appellant would be granted partial access to the information requested, but did not give any indication of what information, if any, would be released in relation to items 1 to 14 and item 16 of the request or provide any fee estimate.

The letter then stated that access codes for a secure police database may be denied under sections 8(1)(1) and 38(a); personal information of other individuals may be denied under sections 14(3)(b) and 38(b); the Accident Report and field notes may be denied under section 15(a), and where information relates to "an employment-related matter such as a public complaint of an officer's conduct", access may be denied under section 52(3)3. Unlike the other sections referred to, which are exemptions from the right of access, section 52(3)3 is not an exemption but a provision excluding certain information from the scope of the *Act*. The Police's "interim decision" also stated that access to some information in the records that is not responsive to the request may be denied.

Subsequent Correspondence

On January 12, 2005, the Police wrote a further letter to the appellant:

> In our letter of December 20, 2004, you were requested to provide a fee deposit of $61.10 by January 9, 2005. To date we have not received the fee deposit, nor have we received a request for fee waiver. Therefore your file has been closed.

The appellant wrote to the Police on January 13, 2005 for the purpose of reducing the amount of the fee by narrowing his request. He advised that he was no longer seeking access to the records responsive to item #15 of his request. He asked the Police to, "Please recalculate your costs related to my remaining numbered requests on an itemized basis and mail. If appropriate mail the invoice and requested documents together".

The Police responded on January 18, 2005:

> As indicated in our letter of January 12, 2005, the fee deposit was not received by January 9, 2005, and your file was closed.
>
> In your letter of January 13, 2005, you significantly alter your original request. As a result, your original file will remain closed. However, should you wish to resubmit a request for the new records, you may do so.
>
> Should you choose to resubmit your request, processing will commence upon receipt of the non-waivable fee of $5.00 … .

The Appeal

On January 17, 2005, the appellant appealed the decision of the Police. The appellant contends that the Police should not have closed his file because he submitted his narrowed request within 30 days of the date that they issued the fee estimate/interim access decision. He is also of the view that, since he has narrowed the scope of his request, this should be reflected in the fee he is to be charged.

Under the heading "Details of the Appeal" on the appeal form, the appellant stated:

- Filed amended/reduced request within 30 days
- TPS closed file within 30 day appeal window without sending documents
- TPS decision letter is unclear and prevents specific appeal
- TPS decision letter not in compliance with Dec. 20/04 deadline
- Excess time/charges to find standard operating procedures & service standards
- Need relevant documents, so that I may disagree with and file stmt of disagreement

The appellant also states that the fee estimate letter does not indicate what records will be disclosed or withheld for each part of his request and he would like to have a detailed fee estimate.

When the mediator assigned by this office to assist in resolving the appeal contacted the Police to discuss the fee estimate/interim access decision, they indicated that certain records may be removed from the scope of the *Act* pursuant to section 52(3) of the *Act*. The Police also indicated that a review of all of the records has not been completed and they have not yet made a final decision on access.

According to the mediator's report, the Police also advised the mediator that "the bulk of" the cost of the fee estimate of $122.20 is for producing records responsive to item #15 of the request.

The mediator indicated to the Police that Item #15 relates to "general records" as opposed to "personal information" records. The mediator therefore asked the Police to issue a revised decision since the appellant is no longer seeking access to item #15. However, the Police took the position that the request, after the removal of item #15, is not narrowed or clarified but that it constitutes a new request.

The mediator contacted the appellant to advise him of the above information. He indicated that he wanted to proceed to the inquiry stage of the appeals process. Because mediation did not resolve the issues in this appeal, the appeal entered the inquiry stage. I sent a Notice of Inquiry setting out the facts and issues in this case to the Police together with a request to provide representations and received representations from the Police. For the purposes of this decision, I did not consider it necessary to request representations from the appellant.

DISCUSSION:

The process for responding to access requests is set out in considerable detail in the *Act*. In addition, where it would be unduly expensive to produce the records for inspection before making a final access decision, an alternative procedure involving an interim access decision and fee estimate is set out in Order 81 and subsequent decisions of this office.

This processing of this matter by the Police and the positions they took during mediation do not neatly match the procedures set out in the *Act* or in Order 81 and later orders that follow it. This, combined with the lack of clarity in the Police's response to the request, as outlined above, has made it difficult to frame the issues in this inquiry.

Having reviewed the representations of the parties, I have decided to address the issues in this order under the following headings:

(1) Should the fee in Part A of the Police's access decision be upheld?

(2) Is Part B an adequate interim access decision?

(3) Was the appellant's decision to narrow the scope of his request after receiving the fee estimate in accordance with the *Act*?

(4) In the circumstances of this appeal, is the Police's decision to close the appellant's entire request file in accordance with the *Act*?

(5) What is the appropriate remedy?

Although this way of framing the issues differs somewhat from the Notice of Inquiry, I am satisfied that it provided an opportunity for input on all constituent issues in this appeal.

SHOULD THE FEE IN PART A OF THE POLICE'S ACCESS DECISION BE UPHELD?

As noted earlier, Part A of the Police's decision letter, in which the fee is charged, deals only with item 15 of the request. This view is reinforced by the fact that the only records described in that part of the decision are responsive to item 15. I therefore find as a fact that the fee estimate relates to item 15. That part of the request has been abandoned by the appellant. Accordingly, there is no need to assess whether the fee estimate should be upheld, and I will not address this issue further.

However, I agree with the appellant's characterization of his request as relating to "standard operating procedures and service standards". It is worth noting that one might reasonably expect an institution to have such basic foundational documents readily available.

IS PART B OF THE POLICE'S ACCESS DECISION AN ADEQUATE INTERIM ACCESS DECISION?

The Police characterize Part B of their decision letter, dealing with items 1-14 and 16 of the request, as an "interim decision". The term "interim decision" does not appear in the *Act*, which sets out the procedure for responding to access requests in sections 19 though 22. Those sections contemplate a final access decision.

The concept of an interim access decision arises from Order 81, in which former Commissioner Sidney B. Linden established a procedure that institutions may follow instead of issuing a final access decision within the time limits in sections 19 and 20 where records are unduly expensive to produce for inspection. This undue expense may be caused by the size of the record, the number of records, or the physical location of the records within the institution.

Where the fee is $100 or more, the 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 that case, it must issue an interim access decision, together with a fee estimate. [Order MO-1699]

Where the institution opts to issue an interim access decision and fee estimate, Order 81 indicates that the interim decision and estimate may be based on either: (1) reviewing a representative sample of records, or (2) consulting with a knowledgeable employee.

Assistant Commissioner Tom Mitchinson explained the purpose of this approach in Order PO-2299:

> The purpose of the fee estimate, an interim access decision and deposit process is to provide the requester 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 under time and resources on processing a request that may ultimately be abandoned.

And as Assistant Commissioner Mitchinson further explained in Order M-1123:

> The process outlined in Order 81 (and subsequently reviewed and confirmed in Order M-555) takes into account the interests and obligations of all parties. It allows the institution to determine an estimated fee from a position of knowledge; it gives the requester a basis for assessing the fee calculation, and also a preliminary indication of whether or not access will be granted; and it puts the Commissioner in a position to review the fee estimate should the requester appeal the institution's decision.

An interim access decision must be accompanied by a fee estimate and must contain the following elements:

- a description of the records
- an indication of what exemptions or other provisions the institution might rely on to refuse access
- an estimate of the extent to which access is likely to be granted
- name and position of the institution decision-maker,
- a statement that the decision may be appealed, and
- a statement that the requester may ask the institution to waive all or part of the fee or, if a fee waiver has been requested, a decision on the fee waiver.

[Orders 81, MO-1479, MO-1614]

The entire assumption here is that an interim decision will be issued when the institution needs to assess what fee it will charge, and seeks to avoid the expense of locating and reviewing all of the responsive records in order to do so. As noted previously, the Police indicated during mediation that a review of all records had not yet been completed and they had not yet made a final decision on access. But the interim decision does not include a fee estimate for the records it deals with.

Because the so-called "interim decision" of the Police is not accompanied by a fee estimate, I find that it does not constitute an adequate interim access decision.

WAS THE APPELLANT'S DECISION TO NARROW THE SCOPE OF HIS REQUEST AFTER RECEIVING THE FEE ESTIMATE IN ACCORDANCE WITH THE *ACT*?

In their representations, the Police address this issue by stating:

> It is the position of the TPS that section 45 of the Act does not provide a statutory provision for an appellant to abandon a substantial portion of a request in order to avoid paying search fees for a search which had already been completed.
>
> Where the original request provides sufficient detail to identify the records, where no ambiguity exists as to the scope of the request, the appellant should be not permitted to later abandon a substantial portion of the request simply to avoid fees

> for the search which had already been completed by the TPS in good faith. The appellant's desire to abandon a substantial portion of his request does not alter the fact this appeal rests solely on the reasonableness of the fee estimate.
>
> The purpose of the fee estimate/interim decision letter is to provide an appellant with sufficient information to make an informed decision on whether to pay the fee and proceed with the entire request. It is not an opportunity to pick and choose what portions of the original request they wish to proceed with once the search has been completed.
>
> This purpose is supported at page 3 of the publication "Processing Voluminous Requests, A Best Practice for Institutions", published by the Information and Privacy Commissioner/Ontario in September 2002.
>
> "Where the institution provides a fee estimate of $100.00 or greater, the estimate should be accompanied by an interim notice. An interim notice provides the requester with an indication of whether access is likely to be granted in whole or in part, and what exemptions are likely to apply to the records. This information assists the requester to determine whether he/she wishes to proceed **<u>with the entire request</u>**. While the fee estimate can be appealed, the interim notice is not an access decision under the Act and not subject to appeal. (Only a final access decision can be appealed.)" [emphasis in original].
>
> While page 3 of "Processing Voluminous Requests, A Best Practice for Institutions" goes on to recommend providing a list of the category of records to an appellant to assist in narrowing the scope of their request, this is based on the assumption of conducting a representative sample search for a large volume of records. This is not the case for the appeal at issue. The entire search has already been completed.

With respect, the representations of the Police reflect a fundamental misunderstanding of the rights of citizens and the duties of government in a democracy. The preamble to the Canadian Constitution recognizes that Canada is founded upon the rule of law. The rule of law incorporates the principle that in a democracy, citizens are free to do as they wish unless prohibited by law. In a democracy, our freedom of action is not limited to what is granted by the state. Rather, the rule of law means that a person such as the appellant can take whatever action he wishes unless his freedom to do so has been restricted by a law. In contrast, the head of the Police is a creature of statute (see the definition of "head" at section 2(1) of the *Act*, and see section 3), whose powers are limited to those conferred by statute expressly or necessarily incidental to the exercise of those express powers.

The Police rely on section 45 as their authority for refusing to issue a final access decision on items 1 to 14 and 16 of the appellant's request.

Section 45(1) requires an institution to charge certain fees for requests under the *Act*. Section 45(5) provides for a right of appeal. These sections read:

> (1) 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.
>
> (5) A person who is required to pay a fee under subsection (1) may ask the Commissioner to review the amount of the fee or the head's decision not to waive the fee.

Section 45 of the *Act* simply sets out fee provisions and clarifies that requesters may appeal fees charged by institutions. It does not comment on whether requests, in whole or in part, may be narrowed or withdrawn, and in fact, no section of the *Act* contains any such provision.

Although the Police did not state that they relied on section 7(1) of the Regulation in making their decision, I note that this section states:

> If a head gives a person an estimate of an amount payable under the Act and the estimate is $100 or more, the head may require the person to pay a deposit equal to 50 per cent of the estimate before the head takes any further steps to respond to the request.

I do not interpret this provision to mean that where an institution proposes to charge fees for one part of a multi-part request, and the requester decides to withdraw or abandon that part of the request, the institution has no obligation to deal with the remainder of the request. The provision simply does not contemplate such a situation. It is, moreover, inconsistent with the *Act*'s access-to-information scheme, whose purpose is to confer important rights on the public and to facilitate the transparent and accountable functioning of public organizations.

The objections of the Police in this case appear to arise from the fact that their search has been completed as regards item 15 of the request, and allowing the requester to abandon that part of the request would deprive them of revenue to which they believe they are entitled. In my view, however, this approach overlooks two important aspects of issuing a fee estimate.

First, the fee estimate established by the *Act* implicitly permits requesters to decide that the fee is more than they want to spend for access to records, and on that basis, not to pay the estimated fee, or any remaining fee where a deposit has already been paid. If circumstances were different and the appellant had *only* submitted part 15 of the request, the Police would have had no recourse if he chose not to pay the fee. The fee estimate provisions are clearly intended to protect requesters by giving them a choice as to whether they will spend their money pursuing access.

Second, and just as importantly, where the estimated fee is $100 or more, institutions may protect themselves from unnecessary expenditures by utilizing the interim access decision and fee estimate approach first outlined in Order 81, which was developed for precisely that purpose. This approach is encouraged in "Processing Voluminous Requests: A Best Practice for Institutions", referred to by the Police in their representations. The fact that the Police failed to do so in this case is their own responsibility.

In my view, it was entirely proper for the appellant to withdraw item 15 of his request, and thus avoid the necessity of paying the estimated fee, just as it would have been if that had been the only thing he had requested.

IN THE CIRCUMSTANCES OF THIS APPEAL, IS THE POLICE'S DECISION TO CLOSE THE APPELLANT'S ENTIRE REQUEST FILE IN ACCORDANCE WITH THE *ACT*?

In responding to the appellant's request, the Police have taken the approach, not supported by any section of the *Act*, to require payment of the deposit requested in connection with item 15 of the request by a specific date. The failure of the appellant to pay the deposit by the specified date led to the request file being closed. Once the Police received the appellant's letter narrowing his request, they refused to proceed and advised him that he could submit a new request and pay a further $5.00 request fee.

The basis for this decision appears to be the view, canvassed above, that the appellant should not be permitted, after receiving a fee estimate, to proceed with certain parts of a request and to abandon other parts. I have already rejected that argument.

In my view, in the absence of any statutory authority for doing so, it was not open to the Police to close the entire request file as a consequence of the appellant's failure to pay the deposit on or before a date imposed by the Police, again without any statutory authority, nor was it open to them to refuse to proceed with the remainder of the request once the appellant indicated that he was abandoning part 15 of the request.

The Police are therefore required to respond to parts 1-14 and part 16 of the request. They have not issued a final access decision. I have found, above, that their interim access decision was inadequate. The next question to address is what remedy should be imposed in the circumstances of this appeal.

WHAT IS THE PROPER REMEDY?

Where an interim decision is found to be inadequate, this office may order the institution to:

- issue a revised interim access decision
- undertake additional work for the purpose of issuing a revised interim access decision
- issue a final access decision
- disallow some or all of the fee

[Order MO-1614]

In fashioning a remedy it is appropriate that I consider the history of this matter and the impact on the appellant of the manner in which the Police chose to deal with the request.

The *Act* contemplates a helpful response to requesters by institutions, as signaled by section 17(2), which requires them to "offer assistance" to requesters in reformulating a request so that it provides enough detail to permit the identification of responsive records. That type of helpful response is not in evidence here. The approach taken by the Police in responding to this request and appeal suggest that their purpose was to terminate the request, rather than to assist the appellant.

An example is provided by the Police's interpretation Order 81 and this office's Guideline on "Processing Voluminous Requests" to prohibit requesters from choosing what portions of their request they wish to proceed with once the search for records has been completed. It is clear from reading these documents that the intention is precisely the opposite.

It was also unreasonable for the Police to characterize the appellant's action as abandoning "a substantial portion of his request" and as significantly altering his original request. The appellant abandoned only one of sixteen categories of information requested, and that information, as he points out, is "standard operating procedures and service standards", which should not be unduly onerous to locate. Moreover, to characterize withdrawing one request and leaving fifteen others unchanged is not fairly characterized as "significantly altering" the request.

Nor is it reasonable to state that the appellant altered his request to seek "new records". It is clear from his letter that no new records were requested. He merely requested the Police to proceed with a decision and fee estimate for records he had already requested.

Moreover, having taken eleven weeks to issue a final decision on one portion of the request and an interim decision on the other fifteen, it was not reasonable to give the appellant only 20 days, over the Christmas holiday season, to send the deposit, then close his file with no further follow-up communication for one reason when he failed to meet this deadline (failure to pay the deposit), then subsequently to change the basis upon which it refused to proceed ("you significantly alter your original request"), after receiving a letter from the appellant stating that he no longer wanted the records to which the deposit relates.

Under all the circumstances, fairness dictates that the appellant be given a complete response to his request as soon as possible. I have therefore decided that a final access decision is the appropriate remedy.

Accordingly, I will order the Police to issue a final access decision on items 1 to 14 and 16 of the appellant's request, treating the date of this order as the date of the request, and without recourse to a time extension under section 20. This decision should be accompanied by an index of records that clearly describes each responsive record, states whether access is granted or denied, and for each record or portion of a record to which access is denied, identify the exemption, including the applicable subsection where an exemption has more than one subsection, that is claimed for that record or portion of a record. If the Police are required to give notice to affected persons under section 21, they must do so within the time frames contemplated in that section.

ORDER:

1. I order the Police to produce a final access decision on items 1 to 14 and 16 of the appellant's request, treating the date of this order as the date of the request, and without recourse to a time extension under section 20.

2. I order the Police to provide with this decision an index of records that clearly describes each responsive record, states whether access to each record or portion of a record is granted or denied, and for each record or portion of a record to which access is denied, identifies the exemption, (including the applicable subsection(s) where an exemption has more than one subsection), that is claimed for that record or portion of a record.

3. If notice is required pursuant to section 21 of the *Act*, I specifically order the Police to abide by the time frames stipulated in section 21, and to copy me on their correspondence to affected parties.

4. If any issues arise in the preparation of the final access decision, I may be contacted for directions.

Original signed by: September 23, 2005
John Swaigen
Adjudicator