



**Information and Privacy  
Commissioner/Ontario**

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

# **INTERIM ORDER MO-2099-I**

**Appeal MA-030422-2**

**Toronto Police Services Board**



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## **NATURE OF THE APPEAL:**

This is a further interim order dealing with the outstanding issues in this appeal remaining from Interim Order MO-1985-I.

### **Background**

The Toronto Police Services Board (the Police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the Act) for the following information:

1. Complete listing of all Private Parking Enforcement Agencies which prepare and/or issue any documents which have been approved by the Chief of Police pursuant to section B(8)(c) of article 3 Paragraph 150-5 of City of Toronto by-law 465-2001 in relation to vehicles parked, stopped or standing on private property other than a "Parking Infraction Notice or a "Certificate of Parking Infraction" issued under part 2 of the Provincial Offences Act or a "Toronto Police Service Tow Card" since January 1, 2002.
2. Provide a copy of any such approved document and the specific criteria on which such a decision was based.

In response, the Police issued a final decision that denied access to the information in Part 1 of the request on the basis that no record exists containing a list of such agencies.

In relation to Part 2 of the request, the Police issued an "interim decision" on access and provided a fee estimate of \$30,495 for searching for responsive records. They also denied a fee waiver request submitted by the requester.

The requester appealed the Police's decisions to this office. Following mediation, this office sought and received representations from the parties on the following issues:

- Search for responsive records – Did the Police conduct a reasonable search for the records responsive to Part 1 of the request?
- Fees – Should the fee of \$30,495 in relation to Part 2 of the request be upheld?
- Fee waiver – Should the fee be waived?

After receiving representations from the parties, this office issued Interim Order MO-1985-I. This order found that the Police had not conducted a reasonable search for the records sought by the appellant in Part 1 of his request. It expressed particular concern that the Police were proposing to search through 61,000 paper records for a class of records that may not exist when a more reasonable approach would be to first ask the Chief of Police or delegated staff whether the power to approve such records had ever been exercised.

With respect to whether the Police's fee decision of \$30,495 in relation to Part 2 of the request should be upheld, this office found that the search proposed by the Police that would result in

this fee was unnecessary and quite possibly ineffective. Consequently, it did not uphold the fee at that time. Given that the Police's fee estimate was not upheld, it was not necessary to address the fee waiver issue in the interim order.

The interim order contained a series of provisions that directed the Police to answer further questions on the issue of reasonable search. The Police submitted representations in response to the interim order and also issued a new decision letter to the appellant.

I then sent the Police's representations to the appellant and invited him to submit reply representations and explain what actions he took, if any, in response to the Police's new decision letter. The appellant did not submit any reply representations or write to this office to explain what actions he took in response to the Police's new decision letter.

## **DISCUSSION:**

### **REASONABLE SEARCH**

#### **Did the Police conduct a reasonable search for the records responsive to Part 1 of the request?**

Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17 of the *Act* [Orders P-85, P-221, PO-1954-I]. If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [Order P-624].

A reasonable search would be one in which an experienced employee expending reasonable effort conducts a search to identify any records that are reasonably related to the request [Order M-909].

Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.

#### **Interim Order MO-1985-I**

The issue of reasonable search arises under Part 1 of the request because the Police claim that no list of agencies that prepare or issue the documents described by the appellant exists and it has no duty to create one under the *Act*.

In Interim Order MO-1985-I, this office accepted the representations of the Police that no list exists of Private Parking Enforcement Agencies that have prepared or issued approved documents. However, it stated that section 17 of the *Act* gives requesters a right (subject to the exemptions contained in the *Act*) to the “raw material” which would answer all or part of a request (Order 50). Consequently, it must be determined whether the Police have conducted a reasonable search for the records that the appellant could use to compile his own list of agencies that have prepared or issued approved documents.

In their representations in the inquiry leading to the interim order, the Police stated that the paper files that they would need to search through to create such a list pursuant to Part 1 of the appellant’s request are substantially the same set of records that they would need to search to retrieve records responsive to part 2 of the request (i.e., any documents approved by the Chief of Police and the specific criteria on which such an approval decision was made). Furthermore, they stated that the paper records are filed in cabinet drawers and boxes and they would need to search through 61,000 agency records.

The interim order stated that this was not a reasonable way to identify and locate the “raw material” that the appellant could use to compile his own list. The order indicated that an alternative approach to searching through every record is to ask the individuals responsible for creating such records or other knowledgeable individuals whether records exist [Order MO-1930-I].

The interim order found that it would not be reasonable for the Police to conduct a search of 61,000 records and charge a fee of more than \$30,000 without first taking the simple step of asking the Chief or other delegated staff whether they have ever approved any individual documents or classes of documents that may be prepared and issued by Private Parking Enforcement Agencies. Moreover, if the Chief has delegated this function to the Supervisor of the Contract Services Section, then a reasonable search might include asking this individual whether he has ever approved such documents.

### **Order provisions**

Interim Order MO-1985-I contained a series of provisions that directed the Police to provide further evidence on the issue of reasonable search. In particular, the provisions ordered the Police to provide an affidavit from an authoritative source (e.g. the Chief of Police or the Supervisor of the Contract Services Section) that answered a series of questions, which can be summarized as follows:

- Did you approve any individual documents or classes of documents that may be prepared and issued by Private Parking Enforcement Agencies pursuant to section 150-5, B.(8)(c) of City of Toronto By-law 465-2001? [order provision 1(a)]

- Did you authorize or approve any specific Private Parking Enforcement Agency to prepare or issue any individual documents or classes of documents pursuant to the above by-law provision? [order provision 1(b)]
- If you approved any documents for preparation or issuance by Private Parking Enforcement Agencies or approved any such agencies to prepare or issue documents referred to above, what criteria were used in making these decisions? (order provision 1(e))
- Do the record holdings, either computerized, on paper or in any other form, of the Office of the Chief of Police, contain any information relevant to these matters, and if so, what information, in what location, and in what form, to the best of his or her knowledge and belief? (order provision 1(f))

Order provision 4 stated that if as a result of the further inquiries, the Police identified records responsive to the request, the Police must provide a decision letter to the appellant regarding access to these records in accordance with sections 19, 21 and 22 of the *Act*, considering the date of the interim order as the date of the request.

### **The representations of the Police**

The Police submitted representations in response to the interim order, including an affidavit from the Supervisor of its Contract Services Section (the Supervisor).

In response to order provision 1(a), the Supervisor stated in his affidavit that he is the individual to whom the Chief has delegated the authority to approve any documents that may be prepared and issued by Private Parking Enforcement Agencies pursuant to section 150-5, B.(8)(c) of City of Toronto By-law 465-2001.

In response to order provision 1(b), the Supervisor stated in his affidavit that, "Several documents were approved for issuance by Private Parking Enforcement Agencies."

In response to order provision 1(e), the Supervisor stated in his affidavit that there are no written criteria for the purpose of approving these documents. However, there are five common, mandatory elements that have been observed in each case (e.g., all approved documents shall not resemble an official [*Provincial Offences Act*] ticket." Further, they stated that the rationale for leaving the criteria open is that each enforcement agency and each property have specific situations that are unique to their needs. Provided that the five elements are observed, each application is considered on its own merits.

In response to order provision 1(f), the Supervisor stated in his affidavit that:

The VIP system does not provide for noting such information since it predates the By-law and the existence of any alternate document to be issued by private

agencies. In order to locate these approved documents, a physical search of each company file would have to be conducted. However, I have located a folder with six examples of documents sent in for review and approval. These examples do not specify that they have been approved. The “exact” number of approved documents cannot be verified without a thorough search of all paper records.

In response to order provision 4, the Police issued a new decision letter to the appellant, stating that after conducting an additional search of its Parking Enforcement Unit, a file was located which contained six “examples” of potentially approved documents. It determined that only three of these documents were approved, and advised the appellant that the access fee was \$15.60, and upon payment, copies of the three records would be forwarded to him.

The new decision letter revised the “estimated search fee” down from \$30,495 to \$9,360 for conducting a search of all agency files. It also provided an “interim decision” that stated the Police anticipated that upon completion of the full search of all agency files, the appellant would be provided with access to any further approved documents which may be located from that search.

### **Representations of the appellant**

After the Police’s response to the interim order was received, I sent the Police’s representations, including the affidavit from the Supervisor, to the appellant and invited him to submit reply representations. I also invited the appellant to explain what actions he took, if any, in response to the Police’s new decision letter.

The appellant did not submit any reply representations in response to the Police’s representations or explain what actions he took in response to the Police’s new decision letter.

The only representations that the appellant has submitted in this appeal were in response to the initial Notice of Inquiry. In those representations, he made the following submissions about the role of the Supervisor and what knowledge this individual may have with respect to the records sought by the appellant:

On November 19, 2004, [a named official], the “Section Supervisor of Contract Services” for over 5 years, confirmed that he establishes the criteria and that he is the person that would approve any such a document as described in the request for information. This confirmation was provided in evidence given in a legal proceeding between [a named corporation] and the City of Toronto [emphasis in original].

The Contract Services Section consists of [a named official], 1 supervisor, 3 clerks, and 10 uniformed officers. It deals with 80 agencies and the approved document requirements only came into existence in 2002. [The Section

Supervisor of Contract Services] is the designated person to approve all alternative documents and he appears to easily recall relevant information.

### **Analysis and findings**

Section 150-5, B.(8) of Article III of the City of Toronto By-law 465-2001, provides:

(8) Neither the person nor any other individual associated with the licensed Private Parking Enforcement Agency that the person is an employee, officer or principal of shall prepare or issue any document in relation to a vehicle parked, stopped or standing on private property or municipal property other than:

(a) A certificate of parking infraction and parking infraction notice issued under Part II of the *Provincial Offences Act*;

(b) A Toronto Police Service tow card; and

(c) *Other documents, if any, approved by the Chief* [emphasis added].

Interim Order MO-1985-I stated that since subsections (a) and (b) of this provision relate to the power to issue documents used in exercising significant law enforcement powers, namely, the ticketing and towing of vehicles, presumably the phrase, “other documents ... approved by the Chief” relates either to other documents used in issuing parking tickets and authorizing towing, or documents used for other parking-related enforcement activities.

As noted above, the Supervisor states that although there are no written criteria for approving such documents, there are five common mandatory elements that have been observed in each case. Provided that these five elements are observed, each application is considered on its merits. Consequently, it appears that Private Parking Enforcement Agencies submit documents to the Police for approval. The Supervisor then applies the five common mandatory elements. If those are observed, the Police proceed to determine whether to grant the application to approve the submitted documents by examining the “merits” of the application.

The Police maintain paper files on Private Parking Enforcement Agencies that are organized alphabetically in cabinets and boxes. Consequently, if the Supervisor has approved any documents for issuance by Private Parking Enforcement Agencies, the approved documents would presumably be found in these cabinets and boxes, along with other records that document the Supervisor’s approval of such documents.

This office’s primary concern in Interim Order MO-1985-I was that the Police were proposing to search through 61,000 agency records for records that may not exist when a more reasonable approach would be to first ask the Chief of Police or delegated staff whether the power to approve such records had ever been exercised. Consequently, the Police were directed to answer

a series of questions relating to the approval of individual documents or classes of documents that may be prepared and issued by Private Parking Enforcement Agencies.

The Police have now confirmed that the Supervisor of the Contract Services Section is the individual to whom the Chief has delegated the authority to approve any documents that may be prepared and issued by Private Parking Enforcement Agencies pursuant to section 150-5, B.(8)(c) of City of Toronto By-law 465-2001. Further, as noted above, the Supervisor indicated in his affidavit that he has approved "several documents" for issuance by Private Parking Enforcement Agencies.

In short, the Police have now taken the preliminary step of asking a knowledgeable individual (i.e., the person who approves documents for issuance by Private Parking Enforcement Agencies) whether the records exist. This individual, the Supervisor, has confirmed that the "raw material" that the appellant could use to compile his own list of Private Parking Enforcement Agencies in fact exists in the thousands of agency records held by the Police.

Moreover, the Supervisor apparently conducted a search and located a folder containing six examples of documents sent in for review and approval. Ultimately, it was determined that only three of these documents were responsive to the appellant's request. The Police then issued a new decision letter to the appellant that contained an access decision on these records.

I appreciate that the Police have now acknowledged that records exist that are responsive to the appellant's request and have made an effort to locate and identify some of those records. In my view, however, the Police have yet not submitted sufficient evidence to demonstrate that they have conducted a reasonable search for these records.

The Police submit that they would need to conduct a physical search of all Private Parking Enforcement Agency files for a revised fee of \$9,360 to locate all approved documents. Clearly, a search through all files would not be necessary or could be narrowed if the Supervisor has some form of records management system in place for tracking the approval of documents for issuance by such agencies. Similarly, if the Supervisor has only approved a small number of documents, and he or his staff recall the names of the specific agencies for which such documents were approved, additional records could be readily located in specific agency files and disclosed to the appellant before conducting a search of all agency files.

The approval of documents that may be prepared and issued by Private Parking Enforcement Agencies is a significant exercise of power. Toronto City Council deemed the approval of such documents to be of sufficient importance that it provided in a bylaw that the approval of the Chief of Police is required. Given that the Chief has delegated this power to the Supervisor, it is reasonable to expect that the Supervisor may have put in place some form of records management system to track such approvals, particularly if the Chief, in the interest of accountability, asked the Supervisor to provide detailed information about how the Supervisor was exercising this delegated power.



According to the Supervisor's affidavit, "the VIP system does not provide for noting such information since it predates the By-law and the existence of any alternate document to be issued by private agencies." I accept that the Police's databases may not be capable of tracking the approval of documents for issuance by Private Parking Enforcement Agencies. However, I find it odd that the Supervisor would have no other system in place for tracking such approvals, particularly given that he is presumably accountable to the Chief for exercising this delegated approval power in a responsible manner.

The Supervisor's affidavit does not explain why a folder exists that contains six examples of documents sent in for review and approval. It is not clear whether the folder contains documents that were submitted by Private Parking Enforcement Agencies during a specific time period (e.g., 2003), and whether other similar folders exist for other time periods. Similarly, the existence of this folder raises the question of whether the Supervisor has some form of paper-based records management system in place for tracking the approval of documents for issuance by Private Parking Enforcement Agencies. A search through all agency files may not be necessary or could be narrowed if the Supervisor has a series of folders that contain all documents that were submitted by agencies for review and approval during specific time periods.

Furthermore, it is also not clear how many times the Supervisor has exercised the delegated power to approve documents for issuance by Private Parking Enforcement Agencies, or whether he or his staff recall the names of any specific agencies for which documents have been approved. As noted above, if the Supervisor has only approved a small number of documents, and he or his staff recall the names of the specific agencies for which such documents were approved, additional records could be readily located in specific agency files and disclosed to the appellant before conducting a search of all agency files.

However, the Supervisor simply provided the terse and vague statement in his affidavit that he has approved "several documents" for issuance by Private Parking Enforcement Agencies. The *Oxford Concise Dictionary* defines "several" as "more than two but not many." In other words, it does not appear, at first glance, that the Supervisor has approved a voluminous number of documents for issuance by Private Parking Enforcement Agencies. If this is the case, it is reasonable to expect that the Supervisor or his staff may recall most or all instances of approving such documents and the names of the specific agencies involved.

In Order PO-1857-I, Adjudicator Sherry Liang stated that it must be remembered that an appellant is rarely in a position to challenge or substantiate the information given by an institution about its search process. An institution is usually the only source of information on this issue, and significant reliance is accordingly placed on its information. The more detailed the information provided by an institution, and the more direct the evidence, the greater is the likelihood that this office will be satisfied that a reasonable search was conducted.

I agree with Adjudicator Liang. In the circumstances of this appeal, I find that the Police have not yet provided sufficient evidence to show that they have made reasonable efforts to identify and locate responsive records. Consequently, I will be ordering the Police to provide a further

affidavit from the Supervisor that provides additional evidence relating to the searches conducted for records responsive to the appellant's request. The more detailed the information provided by the Police, and the more direct the evidence, the greater is the likelihood that this office will be satisfied that a reasonable search was conducted.

### **FEE ESTIMATE AND FEE WAIVER**

In their original decision letter, the Police issued an interim access decision and provided a fee estimate of \$30,495 for searching for responsive records with respect to Part 2 of the appellant's request. The appellant appealed the Police's fee estimate decision to this office.

In addition, the appellant filed a fee waiver request with the Police which was denied. Consequently, the appellant also appealed the decision to deny the fee waiver request to this office.

In Interim Order MO-1985-I, this office did not uphold the Police's fee decision of \$30,495. On the issue of whether the Police's decision to refuse the appellant a fee waiver should be upheld, this office stated that because it had not upheld the Police's fee estimate, it was not necessary at that time to address the issue of fee waiver.

After receiving Interim Order MO-1985-I, the Police issued a new decision letter that revised the "estimated search fee" down from \$30,495 to \$9,360. It stated that the Police would proceed with searching for remaining paper records only after receiving the appellant's written acceptance of this payment, along with a deposit of \$4,680. It further advised the appellant that if he wished to seek a fee waiver, he would have to put his request in writing to the Police and state the reasons for seeking a waiver.

The Police's fee decision may change, depending on whether it conducts any further searches in response to this order. Consequently, it is not necessary to address the issues relating to fees in this interim order. I will make a final determination with respect to the Police's fee estimate and fee waiver decisions in the final order that will be issued in this appeal.

### **ORDER:**

1. I order the Police to provide me, within 30 days of this interim order, a further affidavit from the Supervisor of the Contract Services Section that provides detailed answers to the following questions:
  - (a) What is the purpose of the folder containing six "examples" of potentially approved documents? Does this folder contain examples of documents sent in by various Private Parking Enforcement Agencies for review and approval during a specific time period (e.g., 2003)? If so, do other similar folders exist that cover other time periods?

- (b) Do you have any paper-based records management system in place for tracking the approval of documents that may be prepared and issued by Private Parking Enforcement Agencies pursuant to section 150-5, B.(8)(c) of City of Toronto By-law 465-2001?
  - (c) On or about what date did you begin to exercise the power to approve documents for issuance by specific Private Parking Enforcement Agencies pursuant to section 150-5, B.(8)(c) of City of Toronto By-law 465-2001? How many times have you exercised this power since that date? If you do not recall the specific number of times you have exercised this power, please provide an estimate.
  - (d) Do you recall approving any other documents for issuance by specific Private Parking Enforcement Agencies pursuant to section 150-5, B.(8)(c) of City of Toronto By-law 465-2001? Does any of your staff recall approving such documents? If so, please identify the specific names of the Private Parking Enforcement Agencies for which you have approved such documents.
2. If, as a result of the further inquiries, the Police identify additional records responsive to the request, I order the Police to provide a decision letter to the appellant regarding access to these records in accordance with sections 19, 21 and 22 of the *Act*, considering the date of this interim order as the date of the request.
  3. I order the Police to provide me with a copy of the three approved documents referred to in the decision letter of December 6, 2005 that was issued to the appellant.
  4. I may decide to share your representations, including the Supervisor's affidavit, with the appellant, unless there is an overriding confidentiality concern. Please clearly indicate whether you consent to the sharing of these representations with the appellant, in their entirety. The procedure for the submitting and sharing of representations is set out in IPC Practice Direction 7.
  5. This office remains seized of all matters with respect to compliance with this interim order and any other outstanding issues arising from this appeal.

Original signed by: \_\_\_\_\_  
Colin Bhattacharjee  
Adjudicator

October 13, 2006 \_\_\_\_\_