Information and Privacy Commissioner,
Ontario, Canada

Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER MO-3360

Appeal MA14-30-2

Niagara District Airport Commission

September 28, 2016

Summary: The appellant made a request to the Niagara District Airport Commission (the commission) for a number of categories of records relating to his dealings with it. The commission claimed that the request was frivolous or vexatious, a claim that was not upheld in Order MO-3131, which ordered the commission to produce an access decision. In response to Order MO-3131, the commission produced an interim access decision and fee estimate.

In this appeal, the appellant claims that the interim access decision is inadequate, and disputes the fees charged in the estimate. During mediation of the appeal, the commission produced a revised fee estimate. In this order, the adjudicator finds that the interim access decision is inadequate, in part because of the flawed nature of the representative sample of records on which it is based, and in part because it does not indicate whether any exemptions will be claimed. The adjudicator also finds that the fee estimate is flawed because the commission did not consider that some of the records contain the appellant's personal information, which would mean that those records are subject to a different fee structure than the one applied by the commission.

The adjudicator does not uphold the commission's estimated fees for search time and disallows the fees for preparation of the records. In the circumstances, the adjudicator orders the commission to prepare a final access decision and statement of fees. The commission is ordered to consult the appellant during the preparation of the final access decision. The commission is not to charge fees for search or preparation time but may charge for CD-ROMS and photocopies containing the records to be disclosed.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 1(a)(i), 2(1) (definition of "personal information"), 19(a), 45(1), 45(4) and 45(5); Regulation 823, sections 6 and 6.1

Orders and Investigation Reports Considered: M-514, M-555, M-1123, MO-1285, MO-1367, MO-3131, P-81 and PO-2225.

OVERVIEW:

The Request and the Appeal

[1] On December 3, 2013, the appellant submitted a request to the Niagara District Airport Commission (the commission) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*):

> This request is for access to general records and own personal information relating to [name of the appellant] for the period from 1990 to present.
>
> To assist in the production, the records requested by the Applicant . . . include; but are not necessarily limited to:-
>
>> 1. All records that have been directly or indirectly referred to in correspondence from Airport Commission Chair [named individual] to [name of the appellant] or the office of the Information and Privacy Commissioner of Ontario relating to [name of the appellant] or on behalf of any corporation to be formed by [name of the appellant].
>>
>> 2. All records that have been directly or indirectly referred to in records that are referred to in paragraph [1].
>>
>> 3. This request also includes communications between the Niagara District Airport Commission and any third parties that relate to [name of the appellant] or on behalf of any corporation to be formed by [name of the appellant].
>>
>> 4. Records to include; but are not limited to, hand written notes, correspondence, reports, electronic files, emails, voicemail messages, handwritten notes, telephone logs or any record of any type that refers to [the name of the appellant] or on behalf of any corporation to be formed by [name of the appellant].

[2] The commission responded by claiming that the request was frivolous or vexatious within the meaning of section 4(1) of the *Act.*

[3] The appellant filed an appeal of that decision with this office, and Appeal MA14-

30 was opened. On November 27, 2014, MA14-30 was decided by Order MO-3131, in which the adjudicator did not uphold the commission's decision that the request was frivolous or vexatious and she ordered it to issue an access decision to the appellant respecting any responsive records.

[4] On December 4, 2014, the commission passed a by-law purporting to double the amount chargeable for photocopies in Regulation 823, and to increase the hourly rates allowed in Regulation 823 for search and preparation time.[1]

[5] On December 9, 2014, the commission issued an interim access decision to the appellant. It included a fee estimate, based on the by-law, in the amount of $15,203. The commission also requested that the appellant pay a deposit of $7,601.50.

[6] The appellant then filed an appeal of the fee estimate, in which he also objected to the interim access decision, alleging, in part, that it did not comply with the requirements of Order MO-3131. Appeal MA14-30-2, which is the subject of this order, was opened.

[7] In his notice of appeal, the appellant claims that the interim decision and fee estimate are deficient in the following respects:

- the fee estimate does not take account of his statement in the original request that "[t]he preferred method of access to records is to examine original documents and receive copies of selected items" [emphasis in original].
- Instead of complying with Order MO-3131's requirement to issue a decision concerning access to the records, the commission instead provided a "letter containing what is described as a fee estimate and interim access decision." The letter is on blank paper and does not provide any contact information. However, the appellant acknowledges that he can only appeal the fee estimate as no final access decision was made.
- As the commission did not set out any exemptions, the appellant believes that it is reasonable to infer that all records will be released in their entirety upon payment of the fee.
- The fee estimate is excessive and not in compliance with section 6.1 of Regulation 823. The commission is charging twice the allowable rate for photocopies.

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[1] Fees to be charged under the *Act* are prescribed in section 45(1) of the *Act* and in sections 6 and 6.1 of Regulation 823.

- The commission has failed to provide a description of all types of responsive records in the sample it produced, and accordingly, the appellant is unable to make an informed decision regarding the payment of fees.

- The commission "has inflated the number of pages by including public records, IPC submissions, copies of by-laws, inter-municipal invoices, minutes of public meetings along with responsive records that should have been disclosed in the appellant's previous requests [emphasis added]."

- The interim access decision fails to inform the appellant of his right to request a fee waiver, and by referring the appellant to this office, has implied a denial of a fee waiver.

- The commission has not demonstrated any level of cooperation and has made numerous attempts to frustrate the appellant's ability to access personal information.

- The commission did not make any attempt to narrow or clarify the request in order to reduce the fee.

- The appellant reaffirms his willingness to work with the commission; to reduce costs by viewing originals; to accept copies on computer disk; and to pay $0.20 per page for copies of any paper records he selects after viewing the originals.

[8] The relief requested by the appellant in his notice of appeal is as follows:

1. An order not upholding the commission's fees, other than those enumerated in section 6.1 of regulation 823.

2. An order requiring the commission to provide to the appellant, on computer disk, all records depicted as being in the airport manager's and executive assistant's computers in the commission's fee estimate of December 9, 2014.

3. An order requiring the commission to waive the fee to supply the disk and remaining photocopies as fair and equitable under the circumstances.

[9] As the appellant points out in his notice of appeal, the interim access decision does not give any indication of whether or not he will be given access if he pays the fee, or to what extent access would be granted, or what exemptions might be claimed. The decision letter is written on blank paper with no contact information, and although it is signed by an identified official, it does not indicate who made the decision it sets out. The appellant was also not informed that he could ask for a fee waiver. All of these factors raise the issue of whether the interim access decision is adequate.

Results of Mediation

[10] Before this appeal came to the adjudication stage of the process, it was referred to a mediator to attempt to settle the issues. During mediation, the appellant advised that he was appealing the calculation of the fee for the following reasons:

- the fees charged by the commission are not in accordance with the regulations under the *Act,* such as the hourly rates for search and preparation and the photocopying charges;
- the search and preparation times are excessive; and
- the information he requested is personal information, and as a result the commission should not have charged a fee for search or preparation time.

[11] The commission acknowledged that the search, preparation and photocopying fees were not in accordance with the *Act* and Regulation 823, and agreed the fee should be revised. The amended fee estimate, which was completed during mediation, states as follows:

> The *Act* contemplates a user-pay principle. Based on my review of a representative sample of the records obtained from the Airport Manager's Computer, the Executive's Assistance's computer, the Executive Assistants' office files and the Archives room. I estimate that there are approximately 5570 pages of records responsive to your request and the total fees to process your request will be approximately **$8,891.00.** The fee estimate is broken down as follows:
>
> **Airport Manager's Computer**
>
> Search: 9.75 hours at @$30.00 per hour = **$292.50**
>
> Preparation: 123.5 hours @ $30.00 per hour = **$3,705.00**
>
> Photocopying: 3705 pages @ $0.20 per page = **$741.00**
>
> Based on a search of the representative sample, the following *types of records* were identified as responsive to your request:
>
> Item 1 of Request
>
> - Municipal Agreement
> - Complaint Form
> - Correspondence between [the appellant] and Airport Manager

- IPC Information documents and correspondence

Airport Executive Assistant's Computer

Search: 3.5 hours at @$30.00 an hour = **$105.00**

Preparation: 32.5 @ $30.00 per hour = **$975.00**

Photocopying: 980 pages @ $0.20 per page = **$196.00**

Based on a search of the representative sample, the following *types of records* were identified as responsive to your request:

Item 1 of Request

- Correspondence between [the appellant] and Airport Manager
- Niagara-on-the-Lake Bylaw No. 4316B-09
- Airport invoice #391561 from Niagara Region

Airport Executive Assistant's Files

Search: 2 hours at @ $30.00 an hour = **$60.00**

Preparation: 10 @ $30 per hour = **$300.00**

Photocopying: 300 pages @ $0.20 per page = **$60.00**

Based on a search of the representative sample, the following types of records identified as responsive to your request:

Item 1 of Request

- Personal references
- Certificate of Liability Insurance
- Correspondence between [the appellant] and Airport Staff
- Correspondence between [the appellant] and Airport

  Commissioners

- Copies of Airport Commissioners meetings
- Correspondence between [the appellant] and [named individual]

- Airport Land Lease Application

Airport Archives Room

Search: 58.5 hours @$30.00 hour = **$1,755.00**

Preparation 19.5 hours @ $30.00 per hour = **$585.00**

Photocopying: 585 pages @ $0.20 = **$117.00**

Based on a search of the representative sample, the following types of records identified as responsive to your request:

Item 1 of Request

- Aircraft parking invoices to [the appellant]

[12] The commission explained that the search and preparation fees are just estimates, but the commission believes they are accurate estimates. In order to arrive at its fee estimate the commission advised that it searched for a representative sample of records, which included a search of the Airport Manager's computer, the Airport Executive Assistant's computer, Airport Executive Assistant's office files, and the Airport archives room.

[13] The commission also takes the position that the records are not the personal information of the appellant. The commission believes that the records do not relate to the appellant in a private or confidential capacity, but relate to the appellant's business activities with the airport. The appellant disagrees with the commission's position.

Issues for adjudication

[14] The appeal has now moved on to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry under the *Act*.

[15] Based on my review of the appeal file, I added the issue of the adequacy of the commission's interim access decision, which is addressed under Issue A, below. Because fee calculations under the *Act* and Regulation 823 are impacted by the question of whether the records contain the appellant's personal information, this issue is addressed below under Issue B. The question of whether the fee estimate is in accordance with the *Act* and Regulation 823 is addressed under Issue C. Fee waiver is addressed under Issue D. The subject of what remedy to impose is dealt with under Issue E.

Brief outline of conclusions

[16] It was open to the commission to respond to Order MO-3131 by issuing an interim access decision and fee estimate. However, the interim access decision and fee

estimate that the commission issued was deficient in that (1) the representative samples were inadequate; (2) the interim access decision does not identify whether any exemptions may apply; (3) it does not sufficiently describe the classes of responsive records in order to permit the appellant to decide whether to pay the fee or reduce the scope of the records; (4) it does not inform the appellant of his right to a fee waiver; and (5) it does not explicitly identify the name and position title of the decision-maker.

[17] Because of deficiencies (1), (2), and (3), as well as issues identified in relation to the fees charged, and because some of the records clearly contain the appellant's personal information, the fees claimed for search time are not upheld. Preparation time usually relates to severing records, but in this case, there is no indication that any exemptions will be claimed, so no severing is foreseeable, and absent any other basis for preparation charges, the claim for preparation time is disallowed. Deficiencies (4) and (5) do not require a specific remedy.

[18] This order requires the commission to issue a final access decision and statement of fees on or before **December 30, 2016.** The appellant is to be consulted by the commission during the preparation of the final access decision concerning which records he would like to receive copies of. No fees may be charged for search or preparation time. Fees may be charged for the number of photocopies and CD-ROMS that are used to disclose the records. Records being disclosed that exist in electronic form are to be disclosed on CD-ROM. Records being disclosed that exist only in hard copy are to be disclosed in the form of photocopies.

ISSUES:

A. Is the commission's interim access decision adequate?

B. Should the fee reflect a request by the appellant for his own personal information?

C. Is the fee estimate in accordance with the *Act* and Regulation?

D. Should all or part of the fee be waived?

E. What is the appropriate remedy?

DISCUSSION:

Issue A. Is the commission's interim access decision adequate?

[19] 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.[2]

[20] The interim decision process also assists requesters to decide whether to narrow the scope of a request in order to reduce the fees.[3]

[21] An interim access decision is based on a review of a representative sample of the requested records and/or the advice of an individual who is familiar with the type and content of the records. 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.[4]

[22] In his letter of appeal, the appellant has raised the following specific issues in relation to the interim access decision (not including issues that pertain to the *amount* of fees or the way they were calculated, which are addressed under Issues B and C):

- issuing an interim access decision, as opposed to a final decision, does not comply with Order MO-3131;
- the decision gives no indication of which exemptions may apply;
- the decision does not sufficiently describe the classes of responsive records in order to permit the appellant to decide whether to pay the fee or reduce the scope of the records;
- the decision does not inform the appellant of his right to seek a fee waiver; and

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[2] Orders MO-1699 and PO-2634.

[3] Order MO-1520-I.

[4] Orders 81, MO-1479, MO-1614 and PO-2634. Order 81 is also sometimes referred to as Order P-81.

- the decision does not provide "contact information" – *i.e.* it does not identify the name of the decision-maker or the office held by that individual.

[23] In addition, my review of the records selected as "representative" samples raises concerns about the nature and quality of these samples, and whether or not they are "representative." This is a central issue in the analysis of whether the interim access decision is adequate.

Does issuing an interim access decision and fee estimate comply with Order MO-3131?

[24] Order MO-3131 contains the following order provisions:

> 1. I do not uphold the commission's decision that the request is frivolous or vexatious under the *Act*.
>
> 2. I order the commission to *issue a decision* to the appellant respecting access to the responsive records, treating the date of this order as the date of the request, and without recourse to a time extension under section 20 of the *Act*. [Emphasis added.]

[25] Under normal circumstances, 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 this case, it must issue an interim access decision, together with a fee estimate.[5]

[26] 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 (see section 7 of Regulation 823).

Representations

[27] Although the Notice of Inquiry indicated the appellant's position that the commission's interim access decision and fee estimate do not comply with the requirement in Order MO-3131 to issue an access decision, the commission does not address this particular claim in its initial representations. In reply, the commission submits:

> . . . that MO-3131 ordered that the [commission] issue a decision to the appellant respecting access to the responsive records, treating the date of the order as the date of the request. As those fees with respect to the

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[5] Order MO-1699.

> request would be in excess of $100, the [commission] was ***required*** to provide an Interim Access Decision and Fee Estimate in order to provide the requestor with the appropriate costs to allow an informed decision to be made. The Interim Access Decision and Fee Estimate has now become the subject matter of this Appeal. The [commission] has fully complied with Order MO-3131 in providing the Appellant with its response via the Interim Access Decision and Fee Estimate. [Emphasis in original.]

[28] The appellant submits that:

> . . . Order MO-3131 issued by Adjudicator Wai is clear. The institution was required to provide the appellant a decision on access to responsive records and does not have the benefit of the extension or choice not to do all the work and issue an interim access decision. This order was made after Adjudicator Wai reviewed the submissions made by the appellant and the institution.

[29] The appellant also refers to the comment made in several previous orders of this office – that that the provisions of interim access decisions relating to whether any exemptions will likely apply may not be appealed – as proof that the interim access decision and fee estimate do not constitute compliance with Order MO-3131.[6] These decisions also indicate that the fee estimate component may be appealed.

[30] In his sur-reply representations, the appellant argues that the commission's claim that it was "required" to provide an interim decision is without merit. He also states that Adjudicator Wai did not refer to a fee estimate being part of the decision.

Analysis

[31] The *Act* does not specifically contemplate interim access decisions. Rather, section 19(a) of the *Act* requires that institutions, ". . . within thirty days after the request is received, . . . give written notice to the person who made the request as to whether access to the record or part of it will be given. . . ."[7]

[32] The rationale for adding the option of an interim access decision is explained in Order M-555 as follows:

> The concept of an "interim" access decision to accompany a fee estimate was first discussed in Order 81. In that order, former Commissioner

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[6] Orders P-81 and M-555.

[7] As noted in section 19(a), its requirements are "subject to sections 20, 21 and 45." Section 20 permits time extensions in some circumstances. Section 21 provides for notice to affected persons, where required. Section 45 requires payment of fees.

> Sidney B. Linden established that an interim access decision may be issued to accompany a fee estimate "... where the institution is experiencing a problem because a record is unduly expensive to produce for inspection by the head in making a decision." Order 81 goes on to indicate that the undue expense may be caused by "... the size of the record, the number of records or the physical location of the record within the institution". It also sets out guidelines for the contents of interim access decisions and the preparation of fee estimates.

[33] Order 81 further provides that the interim access decision and fee estimate may be arrived at in one 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.

[34] In this case, the commission employed the second of these two options in developing its fee estimate.

[35] The purpose for providing the option of an interim access decision is 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.

[36] While I agree with the appellant that the institution was not "required" to issue an interim access decision and fee estimate,[8] I do not agree that the commission has failed to comply with Order MO-3131 because it has done so. The requirement of Order MO-3131 to "issue a decision to the appellant respecting access to the responsive records" is akin to the requirement in section 19(a) to "give written notice to the person who made the request as to whether access to the record or part of it will be given" within thirty days. It was open to the commission to respond to Order MO-3131 by issuing an interim access decision and fee estimate, just as this would be a permissible step in meeting an institution's obligations under section 19(a) of the *Act*.

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[8] As noted above in the quote from Order M-555, "an interim access decision *may* be issued . . ." [Emphasis added.]

[37] I therefore find that the commission complied with Order MO-3131 by issuing an interim access decision and fee estimate. I now turn to address other issues concerning the adequacy of the interim access decision.

Adequacy of the "representative" sample

[38] As already noted, Order 81 and subsequent decisions of this office indicate that an interim access decision is based on the advice of an individual who is familiar with the type and content of the records, or a representative sample of the requested records. In this case, the commission relies on representative samples derived from four distinct search areas.

[39] Where an institution relies on a representative sample as the basis for its interim access decision and fee estimate, significant deficiencies in the sample could give rise to a conclusion that the interim decision is inadequate and the fee estimate should not be upheld. The representative sampling process must be conducted reasonably, and must include a reasonable assessment of which records are responsive, including any necessary clarification[9] with the requester.

[40] The question of whether the representative sampling process was conducted reasonably in a given case will depend on its unique facts and circumstances. For example, a small sampling rate may indicate in one case that the sampling was not conducted reasonably, but a similar sampling rate may be considered reasonable in another case, depending on the nature of the records and the size of the record pool from which the samples are drawn.

[41] In this case, it is necessary to review the contents of the representative samples in order to assess their adequacy.

Sample from Airport Manager's computer

[42] This sample includes the following records:

- appellant's submissions in Appeal MA14-30 (arising from the same request that is at issue in this appeal) and covering email (3 copies)
- commission's first decision letter to the appellant (responding to the access request that is at issue in this appeal) dated January 2, 2014 (5 copies)
- email from appellant to the mayor of St. Catharines dated January 7, 2014 (2 copies)
- letter from the commission to the IPC dated December 21, 2013 (3 copies)

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[9] see section 17(2) of the *Act*.

- email from appellant to the IPC dated January 7, 2014 (2 copies)
- appellant's supplementary submissions in a previous appeal (3 copies)
- letter from the commission to the appellant concerning aviation service proposals, dated February 28, 2013 (3 copies)
- email from appellant to IPC concerning a previous appeal, dated December 16, 2013 (3 copies)
- complaint form under the *Act* submitted by the appellant on December 16, 2013 (3 copies)
- decision letter from the commission on a previous request under the *Act*, dated October 16, 2013, and one enclosed record (an agreement between three municipalities concerning the commission) (2 copies of both documents, plus two additional copies of the letter for a total of 4 copies of the letter and 2 copies of the enclosure)
- covering email from appellant to IPC re complaint form (3 copies)
- email correspondence between commission and appellant re an invoice.

[43] The commission states that this sample represents 95 pages of an estimated 3,705 pages. This is already a very low sampling rate (just over 2.5%), and is reduced even further when the astounding number of duplicates found in the sample are removed. As noted, there are 5 copies of the commission's first decision letter in this case; 3 copies of the appellant's submissions on an earlier appeal involving this same request; and other duplicates as noted above. When the duplicates are removed, the size of the sample is reduced to 35 pages, or less than 1% of the estimated total. There is no reason to include multiple copies that are exact duplicates of each other, as the disclosure of more than one such copy would be redundant.

[44] The commission relies on this sample to justify fees of $4,738.50. The breakdown of this fee is as follows:

- search time: $292.50
- preparation time: $3,705.00
- photocopies: $741.00.

[45] In its decision letter, the commission requests a deposit of 50% of the total fee, which would include 50% of this set of fees, as provided for in section 7(1) of Regulation 823, made under the *Act*.

[46] In my opinion, however, a decision to charge $4,738.50 in fees, including search

time, preparation time and photocopies, based on a very small representative sample comprising records that are over 60% duplicates, is untenable. Moreover, as already noted, the representative sample includes, as responsive, records relating to the request itself, and the appeals that it generated. In my opinion, including these records as responsive, without clarifying their status with the appellant, further undermines the credibility of this representative sample.

[47] My analysis of this sample reveals serious deficiencies that ought to have been self-evident when the original estimate was produced, and when the revised estimate was produced during mediation.

[48] I conclude that the representative sample concerning records on the Airport Operator's computer is so poor that no part of the fee estimate based on this part of the sample can be upheld.

Sample from the Airport Executive Assistant's computer

[49] This sample includes the following:

- email from the appellant to the commission dated November 26, 2014 (2 copies)
- email from the appellant to the commission dated May 3, 2012 attaching an invoice (2 copies)
- email from the appellant dated April 25, 2012 with attached by-law and OMB decision (3 copies)
- email from the appellant to the commission dated March 29, 2012 enclosing an invoice (2 copies).

[50] The sample also includes miscellaneous emails between the appellant and commission staff.

[51] The sample comprises 70 pages of an estimated 980 responsive pages. While this is a better sampling rate than the sample from the Airport Manager's computer, its usefulness is, once again, compromised by the number of duplicates it contains.

[52] The commission relies on this sample as the basis for $1,276 in fees, broken down as follows: search $105; preparation $975; photocopying $196. However, it is clear that the elimination of duplicates could reasonably be expected to significantly reduce these fees. Under the circumstances, I find that this sample is not reasonable because the resulting fee estimate is not reliable.

Sample from Airport Executive Assistant's office files

[53] This sample comprises 64 pages of an estimated 300 pages that would be

responsive. It includes:

- appellant's land lease application and site proposal drawing (3 copies)
- character references re the appellant (4 copies of some letters)
- certificate of insurance (4 copies)
- land lease application (blank)
- commission minutes.

[54] It also includes correspondence relating to the appellant's application for a land lease at the airport.

[55] Clearly, this is a better sampling rate than in the Airport Manager's computer, but its usefulness is again compromised by the inclusion of so many duplicates.

[56] The commission relies on this sample as the basis for $420.00 in fees, broken down as follows: search $60.00; preparation $300.00; photocopying $60.00. However, it is clear that the elimination of duplicates would significantly reduce these fees. Under the circumstances, as with the previous sample, I find that this sample is not reasonable because the resulting fee estimate is not reliable.

Sample from Airport Archives Room

[57] This sample consists of three invoices issued to the appellant by the commission in 2011, for a total of three pages. The search to locate these pages took 15 minutes. The commission estimates the total search time in this area at 58.5 hours and estimates that 585 pages of records will be located. This represents a sampling rate of .5%. The fee estimate for this area indicates total fees of $2,457, broken down as follows:

- search fees $1,755.00
- preparation time $585.00
- photocopies $117.00

[58] While this sample does not have some of the problems revealed by others, it is a tiny sample, producing a very low sampling rate, and in the circumstances of this case, seen alongside the other samples, I do not consider it an adequate basis for the substantial fees being charged.

Conclusion

[59] I find that the poor quality of the representative samples relied on in this appeal, which were not arrived at in a reasonable manner, and which are clearly in error based

on the number of duplicates they contain, as well as the other deficiencies noted above, means that the decision itself is unreasonable and inadequate, and the resulting fee estimates can therefore not be upheld. The question of remedy in such a case is complex and the remaining issues in this appeal, including whether the records contain the appellant's personal information and whether the fee estimate is in compliance with the *Act* and Regulation 823, explored below, have a bearing. Accordingly, I will address the issue of remedy at the end of this order.

[60] I will now address the remaining points raised by the appellant about the interim access decision, and the other issues raised by this appeal.

Does the decision indicate which exemptions may apply?

[61] The appellant's observation in his Notice of Appeal, to the effect that the commission's interim access decision and fee estimate did not set out any exemptions that may apply, is clearly true. Neither the original nor the amended interim access decision and fee estimate provides this information.

[62] The appellant goes on to state that "as the commission did not set out any exemptions, the appellant believes that it is reasonable to infer that all records will be released in their entirety upon payment of the fee."

[63] In its initial representations, the commission states:

> While the [commission] did not outline an indication of exemptions or potential basis upon which access might be refused, the [commission] respectfully submits that this is not fatal to the Interim Access Decision and Fee Estimate. While it agrees that institutions must provide as much information as possible for the benefit of the requester in its decision to continue to pursue access, because the head . . . cannot possibly review all the documents until the search, preparation and copying is complete, any final decision on access would be premature. Such a decision can only properly be made once all the records are retrieved and reviewed.
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> The [commission] did not indicate that access would not be granted and based upon the representative sample and those types of records outlined, the [commission] has not identified any records that would be subject to an exemption or upon which access would be denied. However, the [commission] maintains the ability to raise such an exemption to such records if and when such records are retrieved and reviewed.

[64] On this point, the appellant submits:

> Not providing what exemptions or other provisions an institution might rely on to refuse access is not fatal to an interim access decision if the

institution is not relying on any exemptions or other provisions to refuse access.

[65] Order 81 addresses this question in the following way:

> 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. [Emphasis added.]

[66] Order 81 also states: "Failure to indicate that access might not be given implies that full access will likely be given." [Emphasis added.]

[67] In this case, the approach taken to the interim access decision and fee estimate has left the appellant in the difficult position of being unable to determine whether exemptions might apply. While it may be reasonable to infer that no exemptions will be claimed, the commission's failure to address this issue in the interim access decision cannot be used to bar it from claiming exemptions once all records have been identified. This interpretation is consistent with the view expressed in Order 81 (quoted above), that "any final decision on access would be premature, and can only properly be made once all of the records are retrieved and reviewed."

[68] Moreover, depending on the records that are eventually produced, mandatory exemptions such as section 10(1) or 14(1) may apply in some instances, though not necessarily in this appeal. In that event, information would have to be redacted in order to comply with the *Act.*

[69] Nevertheless, the decision letter is deficient for its failure to address this point. As already noted, I will address the question of remedy at the end of this order.

Does the decision sufficiently describe the classes of responsive records in order to permit the appellant to decide whether to pay the fee or reduce the scope of the records?

[70] As already noted, two of the purposes of an interim access decision and fee estimate are:

- to provide the requester with sufficient information to make an informed decision as to whether or not to pay the fee and pursue access; and

- to assist the requester in deciding whether to narrow the scope of a request in order to reduce the fees.

[71] The commission submits that:

> Despite the over-reaching breadth and large scope of the records . . . requested by the Appellant, [the commission] provided a clear breakdown of both the location and type of records within each location for the Appellant's benefit in order to allow the decision on whether or not to proceed with the request to be an informed one.
>
> For example, the [commission] confirmed that within those identified locations [Airport Manager's Computer, Executive Assistant's Computer, Executive Assistant Office Files and Archives Room] that those responsive records in the representative sample included municipal agreements, complaint forms, correspondence, IPC documents and correspondence, certificate of liability insurance, copies of airport commission meetings, airport land lease applications, etc. The [commission] clearly provided a description of those responsive records in the representative sample to the Appellant in its Interim Access Decision dated December 9, 2014.

[72] The appellant submits that:

> . . . classifying 3,705 pages under four classes does not meet the standard of describing <u>all classes</u> of responsive records [emphasis added]. The appellant believes the municipal agreement referred to is less than 20 pages, most complaint forms would be less than 10 pages, and documents and correspondence between the institution [sic] would be at most 100 pages.
>
> The appellant submits the remaining 2,500 pages being classified simply as "correspondence between the appellant and the airport manager" does not meet the standards of describing all classes of records.
>
> The appellant submits after subtracting 10 pages for a by-law and invoice, describing the remaining 970 pages on the airport executive assistant's computer simply by repeating "correspondence between the appellant and airport manager" does not meet the standard of describing all classes of records.

[73] The appellant does not explain the origin of his view that an interim access decision and fee estimate ought to describe "all classes" of records. The appellant may be referring to section 22(3.1) of the *Act*, which permits the required explanation of the reasons for denying access under section 22(1)(b)(ii) or 22(3)(b) to "refer to a summary of the categories of the records requested if it provides sufficient detail to identify them." However, this provision applies to a final access decision in which access

is denied in whole or in part.[10]

[74] Moreover, such a requirement would be inconsistent with the objectives and approach articulated in Order 81. For example, in a passage already quoted from that order, former Commissioner Sidney Linden observed that "[b]ecause 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." A requirement that an interim access decision identify "all classes" of responsive records based on a representative sample would be inconsistent with the acknowledgement that "the head has not seen all of the responsive records."

[75] Consequently, I am not satisfied that the commission is required to describe "all classes" of records. Rather, the interim decision must contain a "description" of the records, and the level of detail in the description should take into account the objective of assisting the requester in deciding whether to pay the fee and pursue access or narrow the scope of a request in order to reduce the fees.

[76] In this case, while the descriptions provided in the fee estimate may be adequate in relation to the representative sample, the poor quality of the representative sample indicates that, overall, the description of the responsive records that are likely to be located is not adequate to assist the appellant in deciding whether to pay the fee or narrow the scope of the request.

[77] Accordingly, I conclude that the interim access decision and fee estimate do not adequately describe the records likely to be produced.

Fee Waiver

[78] As noted by the appellant, the interim access decision does not inform him of his right to request a fee waiver.

[79] The commission acknowledges this error. It points out that regardless of this deficiency, the appellant contacted it within the month following the issuance of the interim access decision and fee estimate to request a fee waiver. On this basis, the commission submits that "the Appellant had actual knowledge of this ability," and that no remedial action is necessary.

[80] The decision was clearly deficient in this regard. However, the appellant has

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[10] The appellant also refers to section 25(1)(b) of the Act, which requires institutions to make available to the public "a list of the general classes or types of records in the custody or control of the institution." That is not a requirement relating to a decision letter, nor is it a section that can be the subject of an appeal. The issue here, as stated elsewhere in this order, is whether the interim access decision adequately describes the records in order to assist the requester in deciding whether to pay the fee, or narrow the scope of the request.

requested a waiver, and that issue will be addressed later in this order. It is clear that this omission has not caused the appellant any prejudice and I will therefore not make a remedial order in this regard.

[81] I would, however, remind the commission of this obligation, and that it must provide this information in all future interim access decisions.

Identification of the name and position of the decision-maker

[82] The interim access decision and fee estimate in this case were sent to the appellant on blank sheets of paper, rather than on letterhead, with no contact information. The letter was signed by the commission chair. There is no statement to the effect that this individual, or some other person, was responsible for the decision.

[83] The commission submits that the decision is signed by the commission chair, "outlining the name and position of the institution decision maker." It goes on to state that the appellant ". . . was at all times aware of this and further sent subsequent correspondence to [the chair]'s attention regarding the disagreement with the decision."

[84] The appellant states that the decision "did not indicate [the commission chair] was the sole decision-maker or identified [sic] if there were other decision-makers included in the process." He also submits that "[i]t appears during a special meeting of the airport commission on December 4, 2014 that the board as a whole may have been decision-makers. A copy of the minutes are attached."

[85] I have reviewed the minutes provided by the appellant and disagree with his interpretation. Although the minutes reflect a fee schedule to be applied to requests under the *Act* (which, as already discussed, exceeds the mandatory fees specified in Regulation 823), they do not discuss any specific access request or the manner in which the commission would respond.

[86] Moreover, the intent of the requirement that an interim access decision must identify the "name and position of the institution decision-maker" is to mirror the requirement in section 22(1)(b) that decisions to deny access must provide "the name and position of the person *responsible for making the decision*." It appears that, in having the commission chair sign the decision, the commission's intent was to identify him as the person responsible for making the decision.

[87] Nevertheless, by not specifying that the commission chair was the decision-maker, and relying instead on inference to communicate this, the commission did not comply with the requirements for an interim access decision. However, the appellant was in touch with the chair about his concerns in relation to the decision. It is clear that this omission has not caused the appellant any prejudice and I will therefore not make a remedial order in this regard.

[88] I would, however, remind the commission of this obligation, and that it must expressly provide this information in all future interim access decisions.

Conclusions

[89] I have found that the interim access decision and fee estimate are inadequate because of: (1) the poor nature of the representative sample, which also undermines the description of the records likely to be produced; (2) its failure to identify whether any exemptions will be claimed; and (3) its failure to adequately describe the classes of responsive records that are likely to be located. These deficiencies are significant, and must be considered in determining the outcome of this appeal. I will refer to them again in my discussion of remedy, below.

[90] In addition, although the interim access decision was deficient in its failure to inform the appellant of his right to request a fee waiver, and in its failure to identify the name and position of the decision-maker, the appellant was not significantly prejudiced by these deficiencies in the circumstances of this appeal and, other than pointing out, as I have done, that these elements must be included in future interim access decisions, I will not be making a remedial order concerning them.

Issue B. Should the fee estimate reflect a request by the appellant for his own personal information?

Introduction

[91] As outlined in more detail below, fees to be charged under the *Act* differ depending on whether an individual is requesting access to general records or to his/her own personal information. In particular, section 6.1 of Regulation 823, made under the *Act*, deals with the categories of fees to be charged in requests for one's own personal information. Unlike a request for general records (dealt with under section 6 of Regulation 823), section 6.1 does not include charges for search or preparation time.

[92] The commission has chosen to treat the appellant's request as relating solely to business information. Its interim access decision and fee estimate do not concede that the records contain the appellant's personal information and, as a consequence, the fee estimate applies the higher fee schedule reserved for general records under section 6 of Regulation 823. However, the appellant contends that the records contain his personal information.

[93] Accordingly, the question of whether the appellant is requesting records that contain his personal information is significant in assessing the commission's fee estimate.

[94] Personal information is defined in section 2(1) of the *Act* as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> > (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
> >
> > (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
> >
> > (c) any identifying number, symbol or other particular assigned to the individual,
> >
> > (d) the address, telephone number, fingerprints or blood type of the individual,
> >
> > (e) the personal opinions or views of the individual except if they relate to another individual,
> >
> > (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
> >
> > (g) the views or opinions of another individual about the individual, and
> >
> > (h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[95] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information.[11]

[96] Sections 2(2), (2.1) and (2.2) also relate to the definition of personal information. These sections state:

> (2) Personal information does not include information about an individual who has been dead for more than thirty years.

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[11] Order 11.

> (2.1) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.
>
> (2.2) For greater certainty, subsection (2.1) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[97] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.[12]

[98] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.[13]

Previous orders

[99] In Order M-514, I determined that a record-by-record approach should be applied in determining whether or not to charge fees where the determining factor is whether the records contain the requester's personal information. At the time of Order M-514, institutions were not permitted to charge any fees in connection with requests for one's own personal information. Subsequently, the *Act* and Regulation 823 were amended to permit institutions to charge fees in that instance, but, as already discussed, the fees that may be charged for one's own personal information are more limited than those that may be charged in requests for general records.

[100] After this legislative change, in Order MO-1285, Adjudicator Laurel Cropley determined that the record-by-record approach should continue to apply, and would now be used to determine whether section 6 (general records) or 6.1 (requester's own personal information) of Regulation 823 would apply. Adjudicator Cropley also stated that "[w]here there is doubt as to how the fees should be applied, in my view, the balance must weigh in favour of the appellant." Having determined that the requester's personal information was intertwined with the general information in the records, Adjudicator Cropley decided that the institution "should have calculated its fees in accordance with section 6.1 of Regulation 823." In other words, the fee schedule for requests for the requester's own person information was applied to all of the records.

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[12] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

[13] Orders P-1409, R-980015, PO-2225 and MO-2344.

[101] In the context of this appeal, the determination of whether the records contain personal information may be impacted by the distinction between personal information and business information. That distinction is addressed in Order PO-2225, where former Assistant Commissioner Tom Mitchinson explained it in the following way:

> . . . [T]he first question to ask in a case such as this is: "in what context do the names of the individuals appear"? Is it a context that is inherently personal, or is it one such as a business, professional or official government context that is removed from the personal sphere? . . .
>
> . . .
>
> . . . I must go on to ask: "is there something about the particular information at issue that, if disclosed, would reveal something of a personal nature about the individual"? Even if the information appears in a business context, would its disclosure reveal something that is inherently personal in nature?

Representations

[102] In its initial representations, the commission submits that the appellant seeks to characterize all the requested information as "personal information" to avoid paying fees for search and preparation time. The commission also points to the wording of the request, and its reference to records "relating to" the appellant "or on behalf of any corporation to be formed by [the appellant]" as proof that at least some of the records would not contain personal information.

[103] The commission also singles out several types of records as examples of business information: aircraft parking invoices of the appellant; Airport Land Lease Application; Certificate of Liability Insurance; Municipal Agreement; and Niagara-on-the-Lake by-laws.

[104] In my view, it cannot be assumed that all of these types of records are, by definition, business information. Aircraft parking may be a personal or business activity. The land lease application expressly states that it is non-commercial. However, I agree that the other records mentioned would appear to be general records that do not contain personal information.

[105] The appellant submits:

> Aircraft operated by the appellant were not commercially registered and the appellant has never been given the required permission by the [commission] to operate a commercial service.
>
> The appellant submits that the [commission]'s claim that 100% of the records do not contain personal information is unreasonable.

[106] The appellant also refers to Order MO-2528 as authority for the proposition that where an individual's conduct is questioned, this would reveal something of a personal nature about the individual, and qualifies as personal information.

[107] The appellant attaches a letter from the commission which, he submits, "shows [his] conduct being questioned."

[108] The commission responds to this argument in its reply representations, stating that the contents of the correspondence make it clear that the appellant submitted a number of business and/or professional propositions to it.

[109] The appellant also submits that because the records contain his personal information, no fees should be charged for search or preparation time.

Analysis

[110] Because the records have not been produced, and the representative sample is of poor quality, it is difficult to assess, in any precise manner, the extent to which the records contain the appellant's personal information.

[111] Without further evidence, it would even be difficult to make this determination for some of the records that have been produced, such as all of the correspondence relating to the appellant's dealings with the commission and this office under the *Act*, including correspondence about the request that is the subject of this order, and correspondence relating to Appeal MA14-30 (the related appeal that led to Order MO-3131). It is not clear whether this is correspondence of a personal nature or simply relates to the appellant's business. To add to the confusion, the appellant implies, by stating that the commission has used records of this nature to "inflate" the page count for its fee estimate,[14] that he does not seek access to this material.

[112] It is clear that some of the responsive records do consist of business information, as the commission points out. However, I agree with the appellant that the commission's approach, that is, treating the records as though they contain no personal information at all, is unreasonable. For example, personal character references concerning the appellant form part of the representative sample. Such records are clearly personal information. Given the presence of this type of information in the records, I fail to comprehend how the commission could have decided to produce a fee estimate on the basis that the records contain no personal information. With a more satisfactory representative sample, the commission could and should have estimated what portion of the records contain personal information, and should not have sought to charge search and preparation time for those records.

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[14] (even though he expressly refers to correspondence with this office in the request).

[113] In my opinion, this is a significant flaw in the fee estimate, and must be considered with the other factors identified in the analysis of the adequacy of the interim access decision, above, in determining the outcome of this appeal. I also agree with Adjudicator Cropley's statement in Order MO-1285 that "[w]here there is doubt as to how the fees should be applied, in my view, the balance must weigh in favour of the appellant."

[114] I will refer to this issue again in my discussion of the appropriate remedy, below.

Issue C. Is the fee estimate in accordance with the *Act* and Regulation?

Introduction

[115] As already noted, the purpose of a fee estimate is to give the requester sufficient information to make an informed decision on whether or not to pay the fee and pursue access.[15] The fee estimate also assists requesters to decide whether to narrow the scope of a request in order to reduce the fees.[16]

[116] In all cases, the institution must include a detailed breakdown of the fee, and a detailed statement as to how the fee was calculated.[17]

[117] This office may review an institution's fee and determine whether it complies with the fee provisions in the *Act* and Regulation 823, as set out below.

[118] 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

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[15] Orders P-81, MO-1367, MO-1479, MO-1614 and MO-1699.

[16] Order MO-1520-I.

[17] Orders P-81 and MO-1614.

(e) any other costs incurred in responding to a request for access to a record.

[119] 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 records provided on CD-ROMs, $10 for each CD-ROM.

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.

6.1 The following are the fees that shall be charged for the purposes of subsection 45(1) of the Act for access to personal information about the individual making the request for access:

1. For photocopies and computer printouts, 20 cents per page.

2. For records provided on CD-ROMs, $10 for each CD-ROM.

3. 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.

4. 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.

7. (1) 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.
>
> (2) A head shall refund any amount paid under subsection (1) that is subsequently waived.
>
> 9. If a person is required to pay a fee for access to a record, the head may require the person to do so before giving the person access to the record.

[120] Section 45(5) states that "[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." In reviewing the commission's fee estimate, my responsibility under section 45(5) is to ensure that the estimated amount is reasonable in the circumstances. The burden of establishing the reasonableness of the estimate rests with the commission. To discharge this burden, the commission must provide me with detailed information as to how the fee estimate has been calculated, and produce sufficient evidence to support its claim.[18]

The Fee Estimate

[121] To reiterate, the commission's revised fee estimate contains the following components.

Airport Manager's Computer

Search: 9.75 hours at @$30.00 per hour =	**$292.50**
Preparation: 123.5 hours @ $30.00 per hour =	**$3,705.00**
Photocopying: 3705 pages @ $0.20 per page =	**$741.00**

Airport Executive Assistant's Computer

Search: 3.5 hours at @$30.00 an hour =	**$105.00**
Preparation: 32.5 @ $30.00 per hour =	**$975.00**
Photocopying: 980 pages @ $0.20 per page =	**$196.00**

Airport Executive Assistant's Files

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[18] Order M-1123.

Search: 2 hours at @ $30.00 an hour =	**$60.00**
Preparation: 10 @ $30 per hour =	**$300.00**
Photocopying: 300 pages @ $0.20 per page =	**$60.00**
Airport Archives Room	
Search: 58.5 hours @$30.00 hour =	**$1,755.00**
Preparation 19.5 hours @ $30.00 per hour =	**$585.00**
Photocopying: 585 pages @ $0.20 =	**$117.00**
Total Search Time	**$2,212.50**
Total Preparation Time	**$5,565.00**
Total photocopies	**$1,114.00**
Total Fees:	**$8,891.50**[19]

Representations

[122] The commission submits that, within the portion of the estimate relating to the Executive Assistant's files and the Archives Room, it is necessary to review the relevant file cabinets and search for file folders relevant to the request. The files are physically located in the files of commission staff and in Archives. Files in the Archives Room "are largely sourced to unmarked banker's boxes and within same are itemized often times not by name but rather by account number as a result of the organizational system of the former administrative employee."

[123] In addition, because the request seeks access to records that are referred to in other records, the commission points out that there is a second level of search required to find these records.

[124] The commission's representations and fee estimates do not explain how the search time for the airport manager's and executive assistant's computers was calculated.

[125] Nor does the commission explain what activities would justify its fees for preparation time.

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[19] The commission's estimate rounds this figure down to $8,891.00.

[126] The appellant submits:

- the fee for photocopying should be reduced to the extent that records are already stored electronically and can be copied on CD-ROM rather than in hard copy;
- the search time claimed is excessive;
- the preparation time charges, which relate to severing, are excessive as the commission has not claimed any exemptions; and
- the commission has failed to provide any meaningful explanation of how it would undertake the search or undertake records preparation.

[127] In reply, the commission explains that records from 1990 to 2010 have not been digitized, and exist in hard copy only; these would need to be photocopied because scanning and then burning them to CD-ROM requires further time and resources than photocopying. The commission concedes that records which exist in electronic format can be disclosed on CD-ROM, and need not be photocopied.

[128] In sur-reply, the appellant points out that the components of the search that relate to computers are expected to produce 4,685 pages of records, whereas the total number of hard copy documents expected to be located is 885. The appellant notes that "[a]n amended fee estimate has not been provided to reflect a reduction in photocopying fees." The appellant submits further that the commission has digitized some of the 885 hard copy pages, and that the estimate has also not been amended to remove photocopy charges for these pages.

[129] The appellant also disagrees with the commission that scanning takes more resources than photocopying.

Analysis and Conclusions

Search time

[130] The commission claims a total of $2,212.50 for search time. In calculating this amount, the commission has ignored the fact that some of the records clearly contain the appellant's personal information, and that for such records, no search time may be charged. The commission has provided only a very general description of the search that would be required, and this description pertains only to two of the four search areas it has identified. It offers no explanation at all as to how the search time relating to the remaining two areas, the airport manager and executive director's computers, was calculated. I agree with the appellant the commission has provided no meaningful explanation of how the searches would be conducted.

[131] As noted above, the onus of demonstrating that a proposed fee is reasonable

rests with the commission. In my view, this burden has not been discharged with respect to fees for search time. Under the circumstances, I do not uphold the commission's claim for search time fees.

Preparation time

[132] "Preparing the record for disclosure," as referenced in section 45(1)(b), includes time for:

- severing a record[20]
- a person running reports from a computer system.[21]

[133] Generally, this office has accepted that it takes two minutes to sever a page that requires multiple severances.[22]

[134] Section 45(1)(b) does not include time for:

- deciding whether or not to claim an exemption[23]
- identifying records requiring severing[24]
- identifying and preparing records requiring third party notice[25]
- removing paper clips, tape and staples and packaging records for shipment[26]
- transporting records to the mailroom or arranging for courier service[27]
- assembling information and proofing data[28]

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[20] Order P-4.

[21] Order M-1083.

[22] Orders MO-1169, PO-1721, PO-1834 and PO-1990.

[23] Orders P-4, M-376 and P-1536.

[24] Order MO-1380.

[25] Order MO-1380.

[26] Order PO-2574.

[27] Order P-4.

[28] Order M-1083.

- photocopying[29]
- preparing an index of records or a decision letter[30]
- re-filing and re-storing records to their original state after they have been reviewed and copied[31]
- preparing a record for disclosure that contains the requester's personal information [Regulation 823, section 6.1].

[135] The commission has not explained what its preparation time would consist of. Most frequently, preparation time relates to severing records to remove exempt information. In this case, the commission has not indicated that it would be claiming exemptions, and if it does not, there would be no preparation time charges for severing. The commission does not identify any other basis for preparation time charges. Nevertheless, the commission claims a total of $5,565.00 for preparation time, based on two minutes of preparation time for every single page of records the commission expects to locate.

[136] As I have already noted, the onus to demonstrate that fees are reasonable rests with the commission. As regards preparation time, I find that it has failed to meet this onus. All preparation time charges are therefore disallowed, and in the order provisions below, I will expressly state that no charges for preparation time may be levied.

[137] To conclude this analysis, I must observe that $5,565.00 is a substantial fee to charge to any requester. The commission has failed to identify any basis whatsoever for charging this fee. In my opinion, this behaviour represents a significant departure from the user-pay rationale that underlies the fee structure of the *Act* and Regulation.

Photocopying

[138] The commission claims $1,114.00 for photocopying 5,570 pages of records. As the appellant points out, the great majority of these pages exist in electronic form and he would prefer that they be provided on CD-ROM. Moreover, given the problems with the representative sample, and the fact that the appellant may well decide that he does not require copies of some records, the total number of pages to be copied is far from clear. Nor is it clear how many CD-ROMs will be required.

[139] However, Regulation 823 provides a photocopy charge of $0.20 per page,

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[29] Orders P-184 and P-890.

[30] Orders P-741 and P-1536.

[31] Order PO-2574.

including records that contain the appellant's personal information, and $10 for each CD-ROM provided. In my order provisions, I will direct that charges be levied for these items based on the actual number of photocopies and CD-ROMs that are required. In addition, the order provisions will stipulate that records which already exist in electronic form must be provided on CD-ROM.

Issue D. Should all or part of the fee be waived?

[140] Section 45(4) of the *Act* requires an institution to waive fees, in whole or in part, in certain circumstances. Section 8 of Regulation 823 sets out additional matters for a head to consider in deciding whether to waive a fee. Those provisions state:

> 45. (4) 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 by the regulations.
>
> 8. 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.
> >
> > 2. If the amount of a payment would be $5 or less, whether the amount of the payment is too small to justify requiring payment.

[141] The appellant concedes that he does not qualify for a waiver based on economic hardship. Nor has the appellant identified other circumstances that would bring him within any other ground for a fee waiver listed in section 45(4) of the *Act*. However, he alleges that the commission ". . . has not demonstrated a reasonable level of cooperation with the appellant. . . ."

[142] Given that the appellant has not identified grounds for a fee waiver that fall

within the parameters of section 45(4), I find that he is not entitled to a fee waiver.

Issue E. What is the appropriate remedy?

[143] In this order, I have found that the commission's interim access decision is unreasonable and inadequate because of the poor quality of the representative sample (among other reasons) and that, on this basis, the fee estimate cannot be upheld.

[144] In addition, I have not upheld the commission's claim for search time based on its failure to account for records containing the appellant's personal information, and on its failure to provide a detailed explanation of how the searches would be conducted or how search time would be calculated. As well, on the evidence provided, I have disallowed charges for preparation time. I have also indicated that the order provisions will allow for photocopy and CD-ROM charges based on the number of pages and CD-ROMs that are actually provided to the appellant when disclosure is made.

[145] These findings are definitive with respect to preparation time (disallowed) and photocopies/CD-ROM (based on actual usage), but leave open the possibility that I could make my own assessment as to how much search time to allow. Alternatively, I could order the commission to issue a new interim access decision.

Representations

[146] The commission submits as follows:

> Adjudicators have taken varied approaches in appeals which involve inadequate interim decisions and remedies vary depending on the facts and circumstances of each case. If the Interim Access Decision and Fee Estimate is found to be inadequate, [the commission] respectfully submits that it be permitted to provide the appellant with a revised Interim Access Decision and Fee Estimate.
>
> In considering this remedy, [the commission] submits that the Interim Access Decision dated December 9, 2014 contained substantially all elements which the jurisprudence indicates is required as is thoroughly reviewed above. In cases where institutions have gone to such lengths in the Interim Access Decision, it is appropriate to allow the institution the opportunity to provide the requestor with a revised interim decision and fee estimate rather than order a final decision on access.
>
> The [commission] respectfully submits that the level of information provided in the Interim Access Decision is akin to the decision in Order M-1367 wherein the institution had performed a sample search of computer records but had not taken the next step of a manual review of those records in order to provide further information on the number of responsive records. It was ordered that the institution be permitted to

provide a revised interim decision and fee estimate rather than imposing access and/or disallowing a portion of those fees proposed.

[147] The commission submits further that:

- the commission would be amenable to permitting the appellant to view the records it identifies as responsive and to indicate which records he wishes to have, and to amend its fees accordingly; and
- the commission would "consider" providing electronic documents to the appellant on CD-ROM and to adjust its photocopying charges to take that into account.

[148] In his representations, the appellant points out that the commission's first fee estimate was based on a by-law passed *after* the commission was ordered to issue an access decision in Order MO-3131. He provides a copy of the by-law, which is dated December 4, 2014. Order MO-3131 was issued on November 27, 2014. The by-law purported to double the amount chargeable for photocopies in Regulation 823, and to increase the hourly rates allowed in Regulation 823 for search and preparation time. Despite this by-law, the amounts chargeable are those set out in Regulation 823. As already noted, during mediation, the commission issued a new fee estimate that references the rates set out in Regulation 823.

[149] The appellant submits that the commission's suggestion that the appropriate remedy would be to order it to produce a new interim access decision and fee estimate should be rejected, and that any further delay by the institution would amount to an abuse of process.

Analysis and Conclusions

[150] I will deal first with the commission's submission that, having found the interim access decision inadequate, and having not upheld and/or disallowed elements of the fee estimate, the appropriate remedy would be to order it to produce a new interim access decision.

[151] In the context of this appeal, I have decided that this remedy would not be appropriate. As the commission notes, adjudicators have crafted different remedies where a fee estimate that accompanied an interim access decision has not been upheld, depending on the circumstances.

[152] The history of this request and the subsequent appeals reveals the following:

- the commission's first response to the request was to declare it frivolous or vexatious under section 4(1)(b) of the *Act*, a determination that was not upheld on appeal in Order MO-3131;

- almost immediately after Order MO-3131 imposed on the commission the requirement to issue an access decision, the commission passed a by-law stipulating fee amounts that double, or at a minimum, exceed, the amounts actually allowable under the *Act* and Regulation 823;

- the commission then prepared an interim access decision and fee estimate based on the by-law, and based on a representative sample that was deficient in the ways identified in this order, including its inclusion of what I have described as an "astounding" number of duplicate pages;

- the interim access decision had the other deficiencies already noted in this order, including failing to indicate whether exemptions would be claimed;

- when it revised the fee estimate during mediation, the commission was aware of the appellant's position that the records contain his personal information, but did not take this into account in assessing search and preparation charges;

- the commission included $5,565 of preparation time in its revised estimate notwithstanding that it did not indicate that it would be claiming any exemptions, and could therefore not reasonably be expected to sever any of the records, and without any other explanation as to why preparation charges would be incurred;

- the evidence does not demonstrate any attempt on the part of the commission during the processing of the request to co-operate with the appellant in attempting to better define the parameters of the request or to reach a common understanding of the means by which access would be provided (*i.e.* photocopies or CD-ROM); and

- rather than proposing that computerized records could be provided on CD-ROM for $10 per CD-ROM, the commission's revised fee estimate imposes photocopy charges for 4,685 pages of computerized records[32] that could be placed on CD-ROM and not photocopied.

[153] In these circumstances, I do not consider the remedy of ordering a new interim access decision and fee estimate, which could well lead to a further appeal and significant additional delay, to be appropriate. The commission has already had two opportunities to produce a reasonable fee estimate, and has not done so.

[154] I disagree with the commission that the circumstances of this case are analogous to Order M-1367. This is not a case where, but for the omission of one step, the commission has produced a reasonable estimate. The commission's interim access decision and fee estimate are riddled with problems and deficiencies, as documented in

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[32] At $0.20 per page, the photocopy charges for these pages would be $937.00.

this order. These problems have not been remedied during the course of this appeal, despite the fact that, during mediation, a new fee estimate was produced.

[155] In other cases where fees have been disallowed on the basis of an inadequate interim access decision that has not been saved by amendments or additional information provided during the inquiry, the institution has been ordered to produce a final access decision without charging fees for search or preparation time.[33] Here, as in those cases, the institution has been offered an opportunity to discharge the onus of substantiating these fees, and has failed to do so.

[156] Moreover, one of the purposes of the *Act* identified in section 1(a)(i) is "to provide a right of access to information under the control of institutions in accordance with the principles that . . . information should be available to the public." At this point, in view of the history of this matter, the appellant is entitled to receive the non-exempt information that is responsive to his request as expeditiously as possible.

[157] Accordingly, I will not order the commission to produce a new interim access decision and fee estimate. Instead, I will order the commission to produce a final access decision. I have not upheld the commission's fees for search time and have disallowed its fees for preparation time. The new access decision is not to include fees in these categories. Fees for photocopies and CD-ROMs may be charged based on the number of pages photocopied and the number of CD-ROMs needed to accommodate the electronic records that are disclosed, in accordance with the fees in Regulation 823. I will not order the commission to scan records that do not exist in electronic form as I do not believe that this step is justifiable under the *Act* in the circumstances of this case. Rather, records being disclosed that exist only in hard copy are to be photocopied. Records being disclosed that already exist in electronic form are to be provided on CD-ROM.

[158] I recognize that this task will be onerous for the commission, which has only one administrative employee. Order MO-3131 required the commission to produce an access decision without recourse to a time extension. Although the appellant argues that the commission did not comply because it issued an interim access decision, not a final one, I have already determined that it did comply with Order MO-3131. Therefore, the order provisions of Order MO-3131, including its requirement that no time extension be claimed, are not determinative of the remedy that I must now impose.

[159] One of the bases of a time extension for replying to a request, set out in section 20 of the *Act*, is that a request "necessitates searching through a large number of records and meeting the time limit would unreasonably interfere with the operations of the institution." Under the circumstances, based on the evidence before me, I will allow the commission until December 30, 2016 to produce its final access decision.

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[33] See Orders M-1123 and MO-2020.

[160] The differences between the parties on whether to produce the records in the form of photocopies or on CD-ROM, as well as the appellant's comments suggesting that he may not require access to some of the records, make it imperative that the commission consult with the appellant and allow him to determine which of the responsive records he actually requires. Accordingly, I will order the commission to invite the appellant to provide input on these points during the period allowed for it to produce a final access decision.

ORDER:

1. I order the commission to produce a final access decision and statement of fees to the appellant on or before **December 30, 2016**.

2. During the preparation of the final access decision, I order the commission to invite comment from the appellant concerning the records he is to receive. Once responsive records are identified as records that may be disclosed, I order the commission to invite the appellant to attend to view them, and he may indicate those he wishes to receive copies of.

3. The commission is not to charge fees for search or preparation time.

4. Copies of records to be disclosed shall be made on CD-ROM for electronic documents, and by photocopy for records that exist only in hard copy. I uphold a fee of $10 per CD-ROM and $0.20 per page for photocopies. The commission may require payment of these fees by the appellant prior to providing the records to him in the form of photocopies and CD-ROMs.

Original Signed by: September 28, 2016

John Higgins
Adjudicator