Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

INTERIM ORDER MO-1985-I

Appeal MA-030422-2

Toronto Police Services Board

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NATURE OF THE APPEAL:

This is an appeal from a decision of the Toronto Police Services Board (the Police), made under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The requester sought access to 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 465-200l 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.

To understand this request, it is helpful to have at least a basic understanding of the terms used in the request and the regulatory scheme to which it refers. Neither of the parties provided any explanation of these terms and the regulatory scheme involved. However, from my reading of statutes and by-laws, it appears that the regulatory scheme operates in the following manner.

Under section 15 of the *Police Services Act*, the councils of municipalities may appoint persons to enforce the by-laws of the municipality. Under section 170(15) of the *Highway Traffic Act*, municipal law enforcement officers have the right to have any vehicle parked in contravention of a municipal by-law towed or impounded. Under section 1(3) of the *Provincial Offences Act*, a minister of the Crown may designate in writing any person or class of persons as a provincial offences officer for the purposes of any class of offences. Under section 15 of that Act, a provincial offences officer may issue certificates of parking infraction (CPIs) and parking infraction notices (PINs).

According to the preamble of section 150 of the City of Toronto Municipal Code, By-law 465-2001 (the Toronto Municipal Code or the Code), the Solicitor General of Ontario has designated all municipal law enforcement officers as provincial offences officers, and therefore, by virtue of this combination of provisions, municipal law enforcement officers have the right both to issue CPIs and PINs (both commonly known as "parking tickets") and to have illegally parked cars towed away.

While municipal law enforcement officers are generally employees of municipal government, the Toronto Municipal Code authorizes the City to license private companies to carry out these functions. These companies are called Private Parking Enforcement Agencies (Private Agencies). To obtain and maintain a licence and to issue parking tickets and have vehicles towed, these Private Agencies must meet several requirements.

Under section 545-544 of the Toronto Municipal Code, the Chief of Police of the Toronto Police Service approves a private parking enforcement course, which individuals employed by Private Agencies must successfully complete before they may enforce parking by-laws, either by ticketing or towing. To be licensed to enforce parking by-laws, a Private Agency must employ municipal enforcement officers who have successfully completed this course.

Any principal, officer or employee of a licensed Private Agency who has been certified by the Chief of Police as competent to enforce parking by-laws, after successfully completing this course, is designated as a Certified Officer (Parking Offences) (Certified Officer).

Section 150-5 of the Municipal Code provides that any Certified Officer who complies with certain conditions may issue CPIs and PINs, as well as authorize the towing and impoundment of illegally parked vehicles. Among those conditions is the one that the requester referred to in his request:

Section 150-5, B(8) of Article III of the Toronto Municipal Code provides:

> (8) Neither the [certified officer (parking offences)] 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….;
> (b) A Toronto Police Service tow card; and
> (c) *Other documents, if any, approved by the Chief*. [Emphasis added]

As I explained above, subsection (a) of this provision refers to what are commonly known as parking tickets. In section 150-1 of the Code, the Toronto Police Service tow card referred to in subsection (b) of this provision is defined as "A Toronto Police Service tow card approved by the Chief [of Police]". Although I did not find any further specific explanation of what this tow card is, section 150-13 of the Code makes it clear that an employee of a Private Agency may not have a vehicle towed unless he or she issues both a parking ticket and a tow card at the time of the tow.

In my review of the legislation and by-law, I found no explanation of what kinds of documents are contemplated by subsection (c), "other documents, if any, approved by the Chief". However, 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 "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.

Part 1 of the request, therefore, is for the names of Private Parking Enforcement Agencies that have been licensed by the City to issue parking tickets and tow vehicles, whose employees, officers or principals prepare and issue the documents described in subsection (c), i.e., documents other than certificates of parking infraction, parking infraction notices, and tow cards. Part 2 of the request is for copies of the actual documents, if any, approved by the Chief pursuant to subsection (c) as well as the criteria for approving each of them.

The first appeal (MA-030422-1)

The appellant submitted his request on October 3, 2003. The Police did not comply with section 19 of the *Act*, which required them to issue a decision within 30 days of receipt of a request, unless they extended the time in the circumstances in which this is permitted under section 20, which was not done. On December 16, 2003, the appellant wrote to this office indicating that the Police had not replied to his requests. A failure to comply with sections 19 and 20 is deemed to be a refusal of the request, which can be appealed to this office. On December 22, 2003, Intake Analyst Lucy Costa advised the Police that if a decision was not issued by January 9, 2004, she would be in a position to issue an order requiring the Police to provide a decision letter to the appellant.

When the Police did not issue a decision, Intake Analyst Costa issued Order MO-1740, dated January 14, 2004. This order required the Police to issue a final decision letter to the appellant regarding access to the records in accordance with the *Act* no later than January 21, 2004.

The current appeal (MA-030422-2)

The Police issued a decision letter on January 21, 2004. It was not a final decision, as ordered by Intake Analyst Costa, but partly a final decision and partly an interim decision. A final decision, as required by section 19, is one that gives written notice to the person who made the request as to whether or not access to the record or a part of it will be given.

The final decision

Part 1 of the decision letter is a final decision. In Part 1of their decision, the Police denied access to the information in Part 1 of the request on the basis that no record exists containing a list of such agencies. The Police informed the appellant that in order to provide the information, a record would have to be created, and they are not required to create a record.

The Police did not address the underlying questions of whether the Chief has, in fact, approved any such documents as suitable for preparation and issuance by Private Agencies, and, if so, whether any private agencies have been authorized to prepare and issue them.

The interim decision

In relation to Part 2 of the request, the Police did not confirm or deny whether the Chief has approved any documents other than parking tickets and tow cards as suitable for preparation and

issuance by Private Agencies and whether any criteria have been developed and used for this purpose. Rather, the Police issued an "interim decision" on access and gave a fee estimate of $30,495.00 for searching for responsive records. The Police required the requester to state in writing that he accepted this fee and pay a deposit of $15,242.50 before they would proceed further with his request. The Police also advised that "additional search, preparation and photocopy fees may apply".

The Police did not indicate in this interim decision whether the requester would be given access to any records in return for paying this fee, except to state that "Access may be denied to certain, *or all*, information requested pursuant to subsections 7(1) [advice and recommendations] and 10(1)(a) [third party information] of the *Act*". [Emphasis added].

The appellant appealed the decision of the Police that a listing of private parking enforcement agencies that prepare or issue subsection (c) documents does not exist and therefore it has no duty to provide the names, since this would involve creating a list.

He also appealed the amount of the fee estimated by the Police for producing the records responsive to the request. The appellant also indicated to this office that he is seeking a waiver of the fee estimated by the Police for locating the records; however he had not requested a waiver in writing. After the appellant submitted this request directly to the Police, the Police denied the request for a fee waiver. The appellant has also appealed the decision to deny the fee waiver request.

As this appeal could not be resolved through mediation, it was assigned to an Adjudicator. The Adjudicator sent a Notice of Inquiry setting out the facts and issues in this appeal to the Police initially, and invited them to provide representations on the appeal. She received representations from the Police and provided them to the appellant, together with a Notice of Inquiry and an invitation to provide representations. The appellant was asked to respond by November 4, 2004. He provided representations on December 23, 2004.

The appeal was subsequently transferred to me. I asked the Police to clarify whether the Chief has ever approved any documents under subsection (c) of section 150-5 B(8) of the Code, and at the same time I invited the appellant to also address the questions I put to the Police if he has any knowledge about these matters. I received representations from the Police, but not from the appellant.

DISCUSSION:

SEARCH FOR RESPONSIVE RECORDS

Did the Police conduct a reasonable search for records?

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

The Police state:

> Fulfilling the requirements of item 1 of your request would necessitate the creation of records by the institution, access cannot be provided to the data as specified, as such records do not exist.
>
> Pursuant to the foregoing, it is the function of the Toronto Police Service Freedom of Information and Protection of Privacy Unit to disseminate *recorded* information to which an individual is entitled under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). It is not within the mandate of the Freedom of Information Unit to create a record in response to a request. [Emphasis in original].

The Police cited Orders 50, MO-1381, and MO-1422 in support of their position that they have no duty to create a new record in response to the appellant's request.

I accept the representations of the Police that no list of agencies that issue subsection (c) documents exists. I also agree with the Police that in most cases the *Act* does not require an institution to create a record when one does not exist. However, this is not the end of the matter. In Order 50, former Commissioner Sidney B. Linden stated:

> In cases where a request is for information that currently exists, either in whole or in part, in a recorded format different from the format asked for by the requester, in my view, section 24 of the *Act* imposes a responsibility on the institution to identify and advise the requester of the existence of these related records. It is then up to the requester to decide whether or not to obtain these related records and sort through and organize the information into the originally desired format.
> …
>
> …In other words, 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, but, subject to special provisions which apply only to information stored on computer, the institution is not required to organize this information into a particular format before disclosing it to the requester. [Emphasis in original]

The Commissioner's statement refers to section 24 of the *Freedom of Information and Protection of Privacy Act*, but applies equally to its municipal equivalent, section 17 of the *Municipal Freedom of Information and Protection of Privacy Act*.
Section 17(2) of the Act provides that:

> If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request … .

This office has stated that institutions should adopt a liberal interpretation of a request, in order to best serve the purpose of spirit of the Act. Generally, ambiguity in the request should be resolved in the requester's favour [Orders P-134, P-880]. It is in the spirit of the *Act* for institutions to be helpful to requesters. Had the appellant requested the *names* of all Private Agencies who issue the documents in question instead of a *listing* of such agencies, the Police would have been required to make reasonable efforts to determine whether records exist that contain this information and to issue a decision on access to any records that exist. It is not in the spirit of the legislation for the Police to take advantage of the wording of the request to refuse to carry out these statutory duties.

Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has made reasonable efforts to identify and locate records, including conducting a reasonable search for records, as required by section 17 [Orders P-85, P-221, PO-1954-I]. If I am satisfied that the efforts made were reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches or other efforts.

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].

The question, therefore, in relation to Part 1 of the request, is not whether a list exists. Regardless of whether there is a list, the question is, first, whether the Police have made reasonable efforts to determine whether records exist from which the appellant could compile his own list (i.e., which indicate that particular Private Parking Enforcement Agencies have been licensed to issue a document approved by the Chief pursuant to section 150-5, B(8)(c) of the Toronto Municipal Code), and, second, whether the Police have made reasonable efforts to locate such records.

In this case, the Police have not addressed the question of whether records containing the names of private agencies that prepare and issue documents approved by the Chief under subsection (c) of the by-law provision exist, because they limited their consideration to the question of whether a list exists and determined that it does not. I find that the access procedure specified under the *Act* (particularly section 19, which compels institutions to respond to access requests) requires the Police to address this question.

In light of my finding that the Police have an obligation to attempt to determine whether records exist that contain the requested information, I will order the Police to make reasonable efforts to identify and locate such records.

In Part 2 of his request, the appellant did not seek access to the list of agencies that issue such documents, but only to the generic documents and the criteria used to approve them. The Police responded that finding this information would require a search of 61,000 pages of records - i.e., a search of every record in each Private Agency's file. I am concerned, therefore, that the Police may consider this a reasonable approach to its duty to conduct a reasonable search for records

responsive to Part 1 of the request. In light of the approach the Police took to identifying and locating the records responsive to Part 2 of the appellant's request, I find it necessary to comment further on the types of inquiries and searches that would be reasonable in relation to part 1 of the request.

Before searching through thousands of records to determine whether individual agencies have been authorized to issue subsection (c) documents, the Police must first make reasonable efforts to determine whether the Chief of Police or, if delegation of this function is permissible, any delegate of the Chief, has approved such documents.

If it is established, as a result of reasonable efforts to determine this, that the Chief has never approved any documents other than CPIs, PINs and tow cards, then it will not be necessary to conduct further inquiries or searches to determine whether any Private Agencies have been licensed to issue such documents.

On the other hand, if it appears that the Chief or his delegate have approved such documents, then it will be necessary to conduct further inquiries or searches to determine whether any Private Agencies prepare and issue them, and, if so, what records contain the names of Private Agencies licensed to prepare and issue those documents and how most efficiently to locate those records.

In my view, it would be reasonable to conduct searches of every record in every agency file, which could be described as looking for a needle in a haystack, only after taking other less expensive and possibly more effective steps. One such step would be to inquire of knowledgeable staff, including Julian Fantino, who was the Chief during the period covered by the appellant's request, and, if necessary, the current Chief, whether the Chief has ever approved such documents or delegated this function to someone else, as a way of determining whether there is any reason to believe there could be any such records in the agency files.

As I indicated earlier, if such inquiries indicate that no such documents have ever been approved, then further inquiries and searches may not be necessary.

On the other hand, if these inquiries indicate that such documents have been approved, a more reasonable approach might have involved an "Order 81" type interim access decision and fee estimate.

In any case, it appears that no inquiries have been made to determine whether the Chief has ever exercised his power to approve such documents. During the course of this inquiry, I asked the Police to respond to the following questions:

> (a) have the Police approved any documents for preparation or issuance by licensed Private Parking Enforcement Agencies, other than those listed in [section B(8) of article 3 Paragraph 150-5 of City of Toronto by law 465-200l] subsections (a) and (b);

(b) if so, what is the nature of these documents;

(c) On whose recommendation does the Chief rely in determining whether to approve these documents for use by Private Parking Enforcement Agencies; and

(d) What criteria do the Chief use in evaluating [whether] to approve such documents for use by Private Parking Enforcement Agencies.

The Police answered three of my questions but refused to answer the fourth question. They replied:

> Confirmation that documents have been approved can only be determined upon a full and complete search being conducted. …
>
> Until a complete search has been conducted and responsive "approved documents" located, this institution is not in a position to describe the nature of these "approved" documents. This institution declines to speculate as to the nature of such documents.
>
> Only after a complete search has been conducted and responsive records located, which outline the approval of such documents and the criteria upon which the specific approval was based, can the identity of the person making the recommendation potentially be determined.
>
> The general criteria used by the Chief in evaluating approval of such documents is (sic) outside the scope of the original request. The request specified "the specific criteria on which such a decision was based". Therefore this institution declines to provide the general criteria used in evaluating documents.
>
> Conclusion
>
> … Until a complete and thorough search has been completed, this institution is unable to provide specific responses to issues a, b and c. Issue d…is information which is outside the scope of the original request.

This response provides a strong indication that the approach taken by the Police to locating responsive records is unreasonable. Clearly, searching through up to 61,000 pages of records for a class of records that may not exist, rather than simply asking those responsible for approving such documents whether they have done so, is illogical.

Unfortunately, former Chief of Police Julian Fantino, who was the Chief during the time covered by this request, is no longer in office. However, I have been provided with no indication that the Police are unable to locate former Chief Fantino and ask him whether he approved any documents under subsection (c) of section 150-5B(8), or alternatively to ask the current Chief,

staff of the Office of the Chief, or other knowledgeable officials about the practice during Chief Fantino's tenure.

The designation of a document or class of documents as one that can be prepared or issued by a Private Parking Enforcement Agency has been deemed of sufficient importance by the Council of the City of Toronto that it provided in a by-law that the approval of the Chief is required. Thus, the approval of a document or a new class of documents that can be prepared and issued by Private Enforcement Agencies appears to be a significant event that the Chief or other officials involved would likely remember.

In his representations, the appellant states:

> On November 19, 2004, Mr. [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 Section Supervisor of Contract Services] is the designated person to approve all alternative documents and he appears to easily recall relevant information.
>
> It is difficult to understand why the Toronto Police Service can justify a charge in excess of $30,000 for search for information that, according to evidence given, would be readily available. Clearly it is the intention of [the Section Supervisor] and/or the Toronto Police Service to obstruct access to this information with ludicrous cost estimates and misleading statements as to the ability to extract a report [from] a database *when the preliminary question should relate the actual existence of these documents and the criteria under which [the Section Supervisor] approved them*. [Emphasis added].

I note that the representations of the Police state that the analyst responsible for coordinating the Police response to this appeal "received information from" the Section Supervisor of Contract Services - presumably the individual referred to in the appellant's representations. However, there is no indication in the representations whether the Section Supervisor was asked about his role in approving the class of documents in question or in advising the Chief about this function, which would shed light on whether such documents have ever been issued, and, if so, to whom. It appears from the representations that this official was only asked what would be involved in searching computer databases and file drawers for this information.

I do not accept the claim of the Police that the only way to determine whether the Chief has exercised his powers under subsection (c) is to search every document in every agency file. I agree with the appellant that such a search must be preceded by generally considering and inquiring into the existence of these documents, which may well be aided by a consideration of

the criteria, if any, developed to guide whether such documents will be brought into existence. Based on the answers the Police provided to my questions, I, like the appellant, question the motives of the Police in constructing a $30,000 search of 61,000 records without first making these inquiries.

In my view, a search through 61,000 records for a class of records that might not exist, without first taking the simple step of asking the Chief and others who have authority to approve or recommend approval, or develop criteria for approval, or are otherwise involved in this kind of decision, whether the Chief has ever approved such a class of documents, would be highly unreasonable.

In addition, although the most appropriate first step would have been to make inquiries of the most knowledgeable individuals, not about how to conduct a search, but about whether the power under section 8(c) was ever exercised, conducting a search of a representative sample of records would also have been more reasonable than searching every record in every agency file.

When there is a possibility, but not a certainty, that records exist, previous orders have identified are at least two alternatives to searching through every file that may contain the records [Order MO-1930-I, MO-1367].

One approach is to ask the individuals responsible for creating such records or other knowledgeable individuals whether records exist [Order MO-1930-I]. In Order MO-1930-I, Adjudicator Frank DeVries "categorically" rejected the institution's position that it was reasonable to search through files for documents that may have been created by institution staff without first contacting those staff members and asking them whether such records exist.

A second alternative to searching every record under such circumstances is for an institution to provide better information as to the likelihood that responsive records will be retrieved as a result of a complete search by conducting a sample search. A sample search permits an institution to provide information to a requester as to the likely number of responsive records that may be found in a complete search, the likelihood of access to the records being granted, and a more reliable estimate of the fee for the complete search. It may be that as a result of such a search, an institution will tell a requester that there appear to be no responsive records. If it does, the appellant is free to challenge this assertion at that time. Or the sample search may indicate that there will likely be few such records, but that the cost of retrieving the records is high. At that point, a requester can make a more informed decision whether to bear that cost [Order MO-1367].

A sample search can be conducted as a basis for an interim decision, or in some cases, as a basis for a final access decision [Order 81, Order M-555].

I find that the Police have not made reasonable efforts to identify and locate the records requested in Part 1 of the request, in the circumstances of this appeal, where it appears that general inquiries could provide a conclusive answer as to whether there are any documents of the type authorized by section 150-5, B(8)(c) of the Toronto Municipal Code. In such a case,

reasonable efforts to identify and locate these documents would include reasonable efforts to determine whether such records are likely to exist before looking through thousands of files for them. Such reasonable efforts would include asking knowledgeable officials whether the former Chief, who was responsible for approving such documents during the time period covered by the request, ever approved any subsection (c) documents. Officials who may have this knowledge might include Former Chief Fantino, current Chief William Blair, or staff in the Office of the Chief.

If the appellant is correct that the Chief has delegated this function to the Section Supervisor of Contract Services, then a reasonable search might include asking this individual whether he has approved such documents.

If no private agencies have been authorized to prepare and issue the documents in question, then the fee for searching all the records in the files of every Private Parking Enforcement Agency for evidence of whether that agency has prepared or issued such a document would not be justified, as the search would be futile. However, if it is determined through these inquiries that the Chief of Police has approved certain agencies to prepare and issue such documents, then it would not be necessary to search the files of the rest of the agencies for such documents, and this also might result in a lower search fee.

FEES

A consideration of whether the fee estimate of $30,495.00 for searching for records is reasonable in this case involves two issues. First, did the Police issue a proper interim decision? Second, is a search of this magnitude necessary or would less costly measures to determine the existence of the records and locate them suffice?

Did the Police issue an adequate interim decision?

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 [Order MO-1699].

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

The purpose of the fee estimate, interim access decision and deposit process is to provide the requester with sufficient information to make an informed decision as to whether or not to pay the fee and pursue access, while protecting the institution from expending undue time and resources on processing a request that may ultimately be abandoned [Order MO-1699].

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, or, if a fee waiver has been requested, a decision on the fee waiver.

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

An interim access decision is not a final decision on access, and the institution should make this clear to the requester.

This office may review an institution's interim access decision and determine whether it contains the necessary elements. This office will not determine whether or not the exemptions or other provisions the institution cites actually apply to the records until the institution issues a final access decision.

Where the interim decision is found to be inadequate, this office may order the institution to: issue a revised interim access decision; undertake additional work for the purpose of issuing a revised interim access decision; issue a final access decision; or disallow some or all of the fee [Order MO-1614].

As indicated above, 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 [Orders P-81, MO-1367, MO-1479, MO-1614, MO-1699]. In all cases, the institution must include a detailed breakdown of the fee, and a detailed statement as to how the fee was calculated [Order P-81, MO-1614].

The norm established in the *Act* is that access decisions together with fee estimates are to be issued within thirty days of receiving a request (section 19), although this time may be extended for a reasonable period of time where the request is for a large number of records and meeting the time limit would unreasonably interfere with the operations of the institution or certain consultations are needed (section 20(1)).

As an alternative to such time extensions, as noted above, this office has developed an interim decision process that permits an institution to give an individual an idea of what information he or she is likely to obtain and at what cost, without doing all the work necessary to respond fully to the request. However, if an institution wants to take advantage of this procedure, the interim

decision must meet certain minimum standards, to be fair to requesters. If it does not, one of the remedies I may consider is disallowing some or all of the fee estimate.
As I indicated earlier, the interim decision issued by the Police did not meet the long-established requirements of this office. It contained no description of the records found to be responsive to Part 2 of the request, or even an indication of whether any responsive records exist. It contained no indication of whether access is likely to be granted to any of the records, if they exist, and if so, which records are likely to be disclosed and which are likely to be denied. It did contain an indication of what exemptions or other provisions the institution might rely on to refuse access, but did not indicate which records or types of records these exemptions would apply to. The interim decision contained no breakdown of the $30,495 fee or explanation of how it was calculated. In short, the interim decision provided the appellant with no information that could assist him in determining whether to proceed with his request, narrow, it or abandon it.

Nor is the appellant in any better position to make these decisions as a result of the representations of the Police in this appeal. Although the Police explain in their representations what work would be required in carrying out a search for records, nowhere in their representations do the Police indicate whether such records exist or likely exist. In fact, as indicated earlier, my questions to the Police were unsuccessful in eliciting whether the documents that the Chief is authorized to approve exist.

Is the search upon which the fee estimate is based necessary?

Part 2 of the request does not ask for a list of the agencies that prepare or issue the documents referred to in Part 1, but rather for access to the documents prepared or issued by these agencies. In relation to Part 2 of the request, the Police did not assert initially that the documents requested do not exist; rather, they claimed that it would require a fee of $30,495.00 to produce them if they exist.

A search fee to carry out a search that is not needed is not a reasonable search fee. As indicated in my discussion of Part 1 of the request, a $30,000 search is not needed at this time and if certain inquiries are made, may not be needed at all. It is not appropriate to require the appellant to pay $30,495 for a search that may not be necessary.

As indicated earlier, the Police say that to determine whether the Chief of Police (or possibly his delegate) has ever exercised his authority to approve documents under subsection (c) and, if so, what criteria he used, can only be done by a search of every record in every agency file, presumably to see if any of them fit this description. The Police state that the agency files contain 61,000 records, each of which they would need to search. At one minute per record this would take 1016.5 hours. At $30 per hour, the search fee is estimated as $30,495.00.

If such a lengthy search is necessary to determine whether any records in this category exist, and, if so, to locate them, the search fee may be reasonable, provided that it otherwise complies with section 45 and Regulation 823. However, the Police have not established that a search of this magnitude is needed, as they have not indicated that they put their minds to the preliminary question of whether the Chief of Police has ever determined that documents other than

certificates of parking infraction, parking infraction notices, and Toronto Police Services tow cards are suitable for preparation and issuance by Private Agencies, and if so, whether the Chief has approved any such agencies to carry out this function.

In my view, the approach of the Police to determining the fee in this case cannot be supported at this time. To search through files for documents that may never have been created without first asking the person authorized to create them, or other individuals in a position to know what action that person took, whether the authorized individual has done so, is irresponsible. The appellant cannot reasonably be expected to pay over $30,000 for a potentially fruitless exercise that might easily be avoided or reduced in scope by the Police first asking a few knowledgeable individuals what their practice has been in relation to exercising the power granted to the Chief of Police by the Toronto Municipal Code, and, depending on the information obtained, possibly conducting a search of a representative sample of records to determine whether a full search is necessary.

It is not appropriate to charge the appellant for a full search without first making appropriate inquiries and then, if warranted, conducting a limited search of a representative or otherwise appropriate sample of files or records and advising him of the results of these inquiries and/or searches to allow him to determine whether he wants to pursue his request, narrow it, or abandon it.

Conclusion

I cannot tell from the interim access decision or any of the other material provided by the Police what information, if any, the appellant is likely to obtain as a result of paying the $30,495 fee. Nor do I have a breakdown of the fee estimate by type of document, that would permit me to determine whether any part of the fee is reasonable. It is, however, apparent to me that the search proposed by the Police that would result in this fee is unnecessary at this time and quite possibly ineffective.

Accordingly, I will not uphold any of the fee at this time.

Instead, as indicated earlier, I will order the Police to make reasonable inquiries of knowledgeable individuals as to whether they have ever engaged in or have knowledge of the former Chief engaging in the activity of determining which types of documents are suitable for issuance by Private Parking Enforcement Agencies and approving the preparation and issuance of such documents by individual agencies.

FEE WAIVER

Should the fee be waived?

The appellant asked the Police to waive the entire fee on the grounds that (a) the estimated cost of $30,495.00 would cause him undue financial hardship, and (b) "waiving of the fees would likely result in re-assessment of the material to be reviewed and would thereby result in the production of the requested materials in a mere fraction of the estimated time".

In light of the fact that I have not upheld the Police's fee estimate, it is not necessary at this time to address the issue of fee waiver. When the appellant receives a proper access decision together with a fee estimate, he may request a waiver of any fees and the institution may issue a new decision on any such fee waiver request at that time.

ORDER:

1. I order the Police to provide to me within 30 days of the date of this Interim Order, an affidavit from an authoritative source, which may include the Section Supervisor of Contract Services, former Chief Fantino, present Chief Blair, or the staff of the Office of the Chief of Police. At minimum, the affidavit should address:

   (a) Whether former Chief Fantino or anyone delegated by him approved any individual documents or classes of documents that may be prepared and issued Private Parking Enforcement Agencies pursuant to section 150-5, B.(8)(c) of City of Toronto By-law 465-2001;

   (b) Whether former Chief Fantino or anyone delegated by him authorized or approved any specific Private Parking Enforcement Agency to prepare or issue any individual documents or classes of documents pursuant to the above by-law provision;

   (c) If former Chief Fantino carried out either of the above functions, whether he relied upon the advice of any staff of the Toronto Police Service, and, if so, the names and titles of these individuals and the advice given by them;

   (d) If former Chief Fantino delegated either of the above functions, the names and titles of the individuals to whom he delegated the function;

   (e) If former Chief Fantino or anyone delegated by him 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;

   (f) Whether 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.

2. I order the Police to obtain and provide to me, within 30 days of the date of this Interim Order, an affidavit from the Section Supervisor of Contract Services named in the appellant's letter to this office dated December 23, 2004, a copy of which is enclosed with this order. At minimum, the affidavit should address:

(a) Whether he is the individual referred to in paragraph 9 of the representations of the Police from whom the analyst received information;

(b) If so, what information was requested and what information did he provide to the analyst;

(c) If not, the name of the Section Supervisor of Contract Services referred to in paragraph 9 of the representations of the Police.

3. I may decide to share affidavits provided to me pursuant to this Interim Order with the appellant, unless there is an overriding confidentiality concern. The procedure for the submitting and sharing of representations is set out in IPC Practice Direction 7.

4. If as a result of the further inquiries, the Police identify records responsive to the request, I order the City 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.

5. I do not uphold the fee estimate.

6. 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: October 27, 2005
John Swaigen
Adjudicator