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

ORDER MO-2003

Appeal MA-030341-1

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*). On April 7, 2003, the Police received a request for access to the following records:

1. Complete listing of all Applicants for the PRIVATE PARKING 1, ENFORCEMENT AGENCY COURSE from the Toronto Police Service from January 2001 to present

Specifically:

- Applicant's name;
- Private Parking Enforcement Agency on behalf of which the applicant would be enforcing bylaws;
- Status of each application including all relevant data, i.e., approved, issued, pending, denied, course completed/not successfully completed, approved on condition, details of any conditions…etc. and the respective dates corresponding with the data;
- Status of applicant license if course successfully completed, including all relevant data i.e. valid, under review, suspended, revoked etc. and the respective dates corresponding with the data.

2. Complete listing of all "Businesses" that have applied to participate as a "PRIVATE PARKING ENFORCEMENT AGENCY" from January 1, 2001 to present

- Applicant and Corporate Officers Names;
- Business Name and Operating Name (if different);
- Names of all Municipal Law Enforcement Officers and "Certified Officers (Parking Offences)" sorted by Agency/Business that have been certified by the Chief of Police to enforce the municipal parking by-laws in the city of Toronto on behalf of each Private Parking Enforcement Agency Business;
- Status of each application including all relevant data, i.e.,: issued, pending, denied, issued on condition, details of any conditions…etc. and the respective dates corresponding with the data;
- Status of Agency (if approved) including all relevant data i.e., under review, suspended, revoked, etc. and the respective dates corresponding with the data.

In response to the request, the Police notified the requester on April 11, 2003 that they were extending the time to make a decision for "an additional 90 days" to August 5, 2003.

On September 11, 2003 the Police issued an "interim decision" in which they stated that the estimated fee to search for responsive records would be $120,997.50, and requested a deposit of 50% of this amount. The Police stated that if the appellant paid the deposit, they would require a time extension of five years from the date the deposit is received to complete the processing of his request.

They stated that based on a review of a representative sample of the records, they anticipated that information in those records might be severed under the exemptions in sections 8(1)(l) (law enforcement), 9 (1)(d) (relations with governments), and 14(1)(f), 14(2)(h), 14(2)(i), 14(3)(b) and 14(3)(d) (protection of personal privacy) of the *Act*.

The requester (now the appellant) appealed the fee estimate and time extension. As mediation through this office did not resolve the issues, the appeal was transferred to the adjudication stage for an inquiry. This office sent a Notice of Inquiry setting out the facts and issues in the appeal to the Police initially, inviting them to provide representations. After a review of those representations and the records at issue at the Parking Enforcement Unit of the Police, this office decided to ask for further representations from the Police. The Police provided "supplementary" representations.

As a result of the supplementary representations provided by the Police, this office decided to add an additional issue to the Notice of Inquiry to be sent to the appellant. The additional issue is whether the information in the electronic database maintained by the Police qualifies as a "record" within the definition in the *Act*. This office sent the Notice of Inquiry to the appellant, along with the two sets of representations of the Police, and invited him to provide his representations. The appellant did so.

In his response, the appellant questioned why the Police did not obtain the requested information from their "application/status log". As the appeal had been reassigned to me, I wrote to the Police asking them to respond to the question asked by the appellant and received a response from the Police.

DISCUSSION:

The request is for records relating to "Private Parking Enforcement Agencies", "Certified Officers (Parking Offences)" and a "Private Parking Enforcement Agency Course". 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 in which these terms are used. Neither of the parties provided any explanation of these terms or a description of 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, including parking by-laws. 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. Section 1(3) of the *Provincial Offences Act* (*POA*) authorizes Cabinet Ministers to designate any person or class of persons as a provincial offences officer. According to the preamble of chapter 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. Under section 15 of the *POA*, a provincial offences officer may issue certificates of parking infraction (CPIs) and parking infraction notices (PINs). 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.

FEES

Should the fee be upheld?

As stated earlier, the Police stated in their interim decision that the estimated search fee for locating the records requested would be $120,997.50. The appellant believes this fee is unreasonable.

General principles

Where the fee exceeds $25, an institution must provide the requester with a fee estimate.

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

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

[Orders P-81, MO-1699]

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].

This office may review an institution's fee and determine whether it complies with the fee provisions in the *Act* and Regulation 460, as set out below.

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

> A head shall require the person who makes a request for access to a record to pay fees in the amounts prescribed by the regulations for,
>
> (a) the costs of every hour of manual search required to locate a record;
>
> (b) the costs of preparing the record for disclosure;
>
> (c) computer and other costs incurred in locating, retrieving, processing and copying a record;
>
> (d) shipping costs; and
>
> (e) any other costs incurred in responding to a request for access to a record.

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

Those sections read:

> 6. The following are the fees that shall be charged for the purposes of subsection 45(1) of the *Act* for access to a record:

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

2. For floppy disks, $10 for each disk.

3. For manually searching a record, $7.50 for each 15 minutes spent by any person.

4. For preparing a record for disclosure, including severing a part of the record, $7.50 for each 15 minutes spent by any person.

5. For developing a computer program or other method of producing a record from machine readable record, $15 for each 15 minutes spent by any person.

6. The costs, including computer costs, that the institution incurs in locating, retrieving, processing and copying the record if those costs are specified in an invoice that the institution has received.

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.

Analysis and findings

In determining whether to uphold the fee estimate, two issues are important in this case. The first is whether the Police issued a proper "interim decision", including a proper breakdown and calculation of their fee estimate. Secondly, regardless of whether the interim decision was adequate, I may consider any later explanation of the basis for the fee estimate and determine whether this explanation provides a basis for upholding the fee estimate.

Was the interim decision, including the fee estimate, adequate?

The Police received the appellant's request on April 11, 2003. On September 11, 2003, five months after the request, the Police issued an "interim decision".

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, 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 where certain kinds of consultations are needed.

As an alternative to such time extensions, as noted above, this office has developed an interim decision process that permits an institution to give a requester 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. The purpose of a fee estimate and interim access decision is to permit an institution to meet its obligations to a requester under the *Act* while not putting it to the expense of locating and making a final access decision on each one of a large number of records.

However, if an institution wants to take advantage of this procedure, the interim decision must meet certain minimum standards. An interim access decision may be 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 [Orders 81, MO-1479, MO-1614].

As indicated earlier, the fee estimate must include a detailed breakdown of the fee, and a detailed statement as to how the fee was calculated [Orders P-81, MO-1614].

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]. Armed with adequate information about the fee estimate, the requester is in a position to know how best to proceed – for example, whether to (1) proceed with the request as it stands and pay the full fee deposit; (2) appeal the fee estimate, or any part of it; (3) refine the request with a view to lowering costs; or (4) abandon all or part of the request, without paying associated costs. Armed with this same information, the Commissioner is in a position to assess whether the fee estimate

is reasonable, and, if unreasonable, to determine an appropriate amount or provide other appropriate remedies.

Thus, the purpose of the Commissioner's requirement that an interim decision must meet these standards is to ensure that the requester, and the Adjudicator on an appeal, are in a position to assess whether the fee estimate is, in fact, reasonable, to be fair to requesters. This office may review an institution's interim access decision and determine whether it contains the necessary elements.

If an interim decision and fee estimate do not meet these minimum standards, one of the remedies an Adjudicator may consider is disallowing some or all of the fee estimate. 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].

Therefore, one of the factors that I may consider in deciding whether to uphold the fee estimate is the adequacy of the Police's decision letter.

The interim decision issued by the Police did not meet the long-established requirements of this office. It contained no description of the records in the institution's custody or control that would be responsive to the request. Although it stated that the Police anticipated that the requester would "get partial access to the information requested" and that "access may be denied to certain information", the decision provided no indication of which information would likely be disclosed, and which was likely to be withheld.

The decision letter did contain an indication of what exemptions the institution might rely on to refuse access, but provided no breakdown of which exemptions might apply to which records or types of information, or why.

The interim decision contained no breakdown of the $120,997.50 search fee or explanation of how it was calculated, other than a statement that a review of a representative sample of records had been conducted. The Police advised that in addition to the search fee, "additional search, preparation and photocopy fees may also apply". However, they provided no estimate or breakdown of these additional fees.

In short, the interim decision did not provide the appellant with the information that would assist him in determining whether to proceed with his request, narrow it, or abandon it.

Do the representations of the Police establish that the fee estimate is reasonable?

Notwithstanding that the explanation of the fee estimate provided in the interim decision is inadequate, in determining whether to uphold it, I have taken into account any information provided in the representations during the appeal that clarifies the basis for the initial fee

estimate, provides the appellant with the information required to make an informed decision as to how to proceed, and provides me with a basis to determine whether the fee is reasonable.

In my view, the Police representations do not provide me with the kind of information required to determine whether the fee estimate is a reasonable one. Nor do they provide the appellant with the kind of information needed to determine: (1) what information he will receive in return for paying a fee of almost $125,000 or (2) a breakdown of that fee that will allow him to assess how he might reduce the scope of his request to reduce the fee and still obtain the information that is of most interest to him.

The unreasonableness of charging a requester a substantial fee without any assurance that records will be provided has been recognized not only by the Commissioner in fashioning his interim decision procedure, but also by the Williams Commission, upon whose recommendations Ontario's information and privacy statutes are based, and the U.S. Attorney General: See *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980* (Toronto: Queen's Printer, 1980) volume 2, at 270.

As a preliminary matter, I will address the appellant's assertion that all the information he requested should be easily accessible because it is located in an "application/status log". In his letter appealing the fee estimate, the appellant stated his belief that it would take the Police three to four hours to produce a report containing this information, because:

> The information requested has been compiled by and is under the direct control of the Parking Enforcement Unit of the Toronto Police. Further, it is current and relates to a limited number of applicants.

However, in their representations, the Police indicated that they would have to conduct an extensive search of both paper and electronic records to locate the responsive information.

In response to the representations of the Police, the appellant stated, "One wonders why the Respondent would not simply refer to the application/status log to provide much of this information".

As a result, I asked the Police whether they maintain an "application/status log", and, if so, what information this log contains, and in what format. The Police responded:

> Contract Services Section is the sub-unit at the Parking Enforcement Unit responsible for the administration of the Municipal Law Enforcement Program.
>
> The Section Supervisor of Contract Services was contacted regarding the existence of an application/status log. The Section Supervisor advises that the TPS does not have, nor does it maintain, an application/status log.

In my review of the representations of both parties, I have not found any evidence of the existence of an "application/status log" containing the requested information other than the

appellant's bald statement. I will therefore consider the reasonableness of the fee on the basis that no such log exists.

In their initial representations during this appeal, the Police raised their search fee estimate. The estimate given in the interim decision letter was $120,997.50 for 4033.25 hours of search time. The estimate in their March 2004 representations was $124,800 for 4160 hours of search time to search 48 file drawers containing an estimated 192,000 pages of records and twenty boxes containing an estimated 50,000 pages of records. The search time was calculated based on an estimate of one minute per paper record to determine whether it is responsive to the request. By paper record, they appear to mean each page. They claim that it is necessary to search every page of every file in four separate categories of files.

The representations state that additional responsive information not found in the paper records is in their electronic database, but they have not provided a fee estimate for searching this database, although they did not state that they are waiving this fee.

In their representations, the Police explained that they maintain four types of files containing paper records that are responsive to the request: "Applicant files", "Agency files", "manager application" files that are associated with Agency files, and "site files". The Police do not explain how these files relate to the various types of information requested. However, I assume from the names of the files and the descriptions of their contents that the "Applicant files" contain the information responsive to the first part of the appellant's request; that is, a list of all applicants for the Private Parking Enforcement Course run by the Police, and specified information about each of those applicants, and that the "Agency files" contain the information that is responsive to the second part of the request, and that there is some overlap.

The Police explained that Applicant files may contain the following types of records: Personal History forms (2 pages); various forms of identification; educational information; CPIC printouts; occurrence reports; records of arrest; case tracking information concerning charges; synopses of charges; various types of correspondence; certificates; test scores; testing forms; Application Forms; Indemnity Agreements; and "other types of non-standard records". The Police indicated that "manager application" files are related in some way to Agency files, but contain similar records to Applicant files.

The Police explained that Agency files may contain the following types of records: insurance certificate; various types of correspondence; "approved documents"; Ministry documents re: Articles of Incorporation; Parking Enforcement standard form(s); forms/correspondence from City of Toronto; various types of corporate documents; and "other types of non-standard records".

The Police explained that site files may contain the following types of records: application for site approval form; correspondence; and "other types of non-standard records".

Although the Police listed in their representations the kinds of documents that would be stored in each of the four kinds of files they identified, they did not indicate which kinds of documents

would contain which kinds of information requested by the appellant. Nor did they indicate which of the requested information in these records is likely to be disclosed and which is likely to be exempt.

The Police explained that applicant and agency files are stored alphabetically, without consideration of the date of the application. Therefore, according to the Police, searching for records related to the time period covered by the request requires searching through every page of every record for the name of the agency or applicant and for dates to determine whether the record falls within the time period specified in the request. As some files contain both records within the time period covered by the request and before this time period, "each document in these files would require cross-referencing to determine their responsiveness to the request".

When the Police state that they would have to search every "record" for dates to determine whether it is responsive to the request, I understand them to mean they would have to scrutinize every page in a file of their paper records relating to a particular agency or applicant to determine whether that applicant or agency made its application within the time period specified in the request or to determine the current status of that application.

The Police explained that most of the responsive records are in paper form. The information stored on its database is derived from the paper records, but some of the electronic records include a small amount of additional information, and the electronic records may contain additional information only for a small number of agencies and applicants.

The Police stated that the database does not have a report feature capable of extracting the additional information not found in the paper records. It would require a manual search of the database based on agency name, applicant name, or a unique number assigned to an applicant to identify electronic records containing additional information. When found, the responsive information would have to be printed rather than provided in an electronic format.

The Police say that to minimize "what would be a very extensive search on the electronic database" would require reviewing the paper records to identify the agencies and applicants whose records fall within the time parameters of the request before searching the database for additional information not in the paper records.

Analysis and findings

As noted earlier, the interim decision of the Police states that the fee estimate is based on "a review of a representative sample of the records". However, their representations do not refer to such a review.

If the Police did conduct a review of a representative sample of records, as they claim, in regard to the paper files, I would expect that they would be able to provide the following information that would assist in determining whether the fee estimate is reasonable: an estimate of the number of files the Police maintain in each category (applicant, agency, manager, and site); an estimate of how many of the files/records relate to the time period covered by the request; how

the records within the file are organized (for example, chronologically, by reverse chronology, by subject matter); which of the types of information requested were found in the files that were searched and which were not; in which types of files and records each of these kinds of information were found; what percentage of the total files were searched; what percentage of the files searched contained each of the types of requested information; which categories of the requested information that was located are likely to be disclosed; which categories of the requested information are unlikely to be disclosed; the exemptions claimed and the reasons for claiming these exemptions; the actual time taken and cost of searching the representative sample; the actual time and cost of preparing for disclosure and photocopying those responsive records that were located in the representative sample; a statement as to what percentage of the total records to be searched the representative sample comprises, and a consequent estimate of the total cost of preparing and photocopying the remaining records to be disclosed.

Based on the type of information requested and the Police description of their holdings and the format in which the information is held, it appears to me that some of the information requested may be relatively fast and inexpensive to locate and prepare for disclosure, while other types may be slow and costly. Providing the types of information I have referred to above may assist in determining which parts of the requested information, if any, are obtainable at an affordable cost and which are not.

The Police state that some of the requested information is in their electronic database. If the Police did conduct a review of a representative sample of records, it appears from their representations that this did not include a review of the information on their database. In their initial representations, the Police stated that additional information for a small number of agencies or applicants, beyond what is found in the paper records, is located in their electronic database. However, they have not indicated the number and size of directories and files in the database, the fields used, the subject matter of the directories and files, which of these directories or files may contain responsive information, or which of the kinds of information requested that are not on paper are in the database.

In response to a question about this posed during this inquiry, the Police stated:

> The Parking Enforcement Unit is unable to provide an estimate of the number of applicant names, agency names, manager names or site locations for electronic records.
>
> The Parking Enforcement Unit is unable to provide an estimate regarding the number of electronic records which would result in additional responsive information which is not contained in the paper records.

If the Police conducted a representative search of their electronic records, I would expect that they would be able to provide some of this information, if not all of it, based on this review. Without further information about what information the electronic database contains and how it is organized and what results a search of a representative sample of electronic records produced,

I am unable to assess the ability of the Police to provide access to the responsive electronic records.

The Police stated that they based their calculation on 50% of the records searched being responsive to the request. However, they did not indicate whether this is an assumption or was ascertained through their review of the representative sample.

The number of files in each category together with a breakdown of each type of requested information found and its location within the file would also be useful in determining whether the fee is reasonable. The Police state that the relevant paper files are filed alphabetically in file cabinet drawers and boxes. They were able to ascertain the number of cabinets and boxes as well as estimate the number of pages of records in each of those filing cabinet drawers and boxes. If they can ascertain this information, it is unclear to me why they are unable to also estimate the number of files in these drawers and boxes. The bald statement that they cannot do so does not persuade me that the Police are unable to estimate the number of files that may contain the requested information.

The position of the Police appears to be that because the files are arranged in alphabetical order they may contain records both inside and outside the time period covered by the request; therefore, to determine, for example, whether an applicant made its application within the specified time period would require the Police to go through every page of every record within the applicant's file. In my view, this would only be the case if the records are thrown into the file in no particular order so that the application could be anywhere within the file. Even then, it is unlikely that it would be necessary to search every record before finding this basic information.

Moreover, if there is no order within the files, it would not be reasonable to expect the applicant to pay for the institution's administrative inefficiency. While the *Act* may not require an institution to organize its information in the manner best suited to making it accessible to the public, nevertheless, "the *Act* contemplates that records will be maintained in accordance with some regularized and managed system", as Adjudicator Laurel Cropley said in Order PO-1943.

In this case, the Police have provided no information about the number of files in each of the four responsive categories, which of the records in these files may contain which responsive information, or the internal organization of material within these files, nor have they provided information about the number and type of responsive records within their electronic database.

I find that the Police have not provided me with sufficient information to determine whether their fee estimate for searching paper records, or any specific part of the estimate, is reasonable. Therefore, I cannot uphold the fee estimate and have no basis to substitute a different fee estimate. As a result, I will disallow the fee estimate entirely, without prejudice to the right of the Police to submit a new fee estimate for searching paper records, when they issue their access decision or decisions.

It is clear from the representations of the Police that they based their fee estimate on the paper records alone. As the Police have provided no fee estimate for searching electronic records, it would be unfair to the appellant and would undermine the *Act* to permit them to introduce a new search fee at this late date, and my order will not permit the Police to do so.

DEFINITION OF A RECORD

Is the information in the electronic database a "record"?

The representations of the Police raise the issue of whether the information in the electronic database qualifies as a "record" within the definition given in the *Act*. That definition, in section 2(1), states:

> "record" means any record of information however recorded, whether in printed form, on film, by electronic means or otherwise, and includes,
>
> (a) correspondence, a memorandum, a book, a plan, a map, a drawing, a diagram, a pictorial or graphic work, a photograph, a film, a microfilm, a sound recording, a videotape, a machine readable record, any other documentary material, regardless of physical form or characteristics, and any copy thereof, and
>
> (b) subject to the regulations, any record that is capable of being produced from a machine readable record under the control of an institution by means of computer hardware and software or any other information storage equipment and technical expertise normally used by the institution;

Regulation 823 under the *Act* specifies:

> A record capable of being produced from machine readable records is not included in the definition of "record" for the purposes of the Act *if the process of producing it would unreasonably interfere with the operations of an institution*.

The Police do not deny that the information in the database is capable of being extracted onto a printed page by means of computer hardware and software or other information storage equipment and technical expertise normally used by the Police.

However, they argue that the database is not a "record" because the process of extracting the requested information would unreasonably interfere with the operations of the Police. The Police state that their database fails on a daily basis to respond to processing demands, or "freezes", causing the entire database to be non-functional for periods of time. The length of time the database is "down" varies. The Police state that if they search their electronic records for the information requested, the occasions when the computer freezes will include these

searches.

The position of the Police is that searching the volume of electronic records requiring review to respond to the appellant's request would increase the number of freezing episodes, which might in turn lead to more permanent damage to the system, which would "significantly interfere with the daily operation of the Parking Enforcement Unit and its employees in the performance of their duties".

They state that, "[g]iven the fact that vendor support for the programming no longer exists, given the fact that the cause of these episodes [is] unknown, and given the limitations of the current technical staff in dealing with an older program, the database would be subjected to an increased likelihood of significant failure beyond experiencing the episodes of failing to respond to commands".

The Police state:

> Any increased frequency of these episodes *may* result in a substantial failure of the database. Such a substantial failure of the programming *may* result in a long-term or even permanent loss of functionality, including loss of information contained within the database itself. …[A]ll data entry would cease, and all search inquiries would require a manual search of paper records, resulting in significant loss of time. [Emphasis added].

In response, the appellant states:

> It has become apparent that the Toronto Police Service response to all of my requests for information is consistently focused on all the reasons <u>why they can't</u> provide the information.
>
> The concern that the use of computers for their intended purpose (such as this request) "could", "may", "might" irreparably damage their (apparently) antiquated computer system does not appear to be an issue when this Unit wants to produce comprehensive, complex reports on an ad-hoc basis that suit their own purpose. [Emphasis in original].

For several reasons, I do not accept the representations of the Police that the process of producing the information requested would unreasonably interfere with their operations. First, the suggestion that the search may "overload" the system to an extent that causes permanent damage is based on the premise that "a thorough and complete search of all electronic records" would be required unless all the paper records are first reviewed to eliminate those agencies and applicants whose records do not fall within the time period covered by the request. The evidence does not point to a need for a search of every electronic record. As the Police indicated in their representations, once they have determined from the paper records which applications fall within the time period specified in the request, they need only search the electronic files for those applicants. Moreover, they need only search the electronic files for information where it is not in

the paper files, is of a type that the Police enter into the computer files, and is responsive to the request.

Second, determining whether interference with the other functions of the Police is unreasonable involves identifying the specific functions of the Police that may be impacted and balancing of the importance of fully maintaining those functions against the importance of carrying out their duties under the *Act*, which are also integral to their mandate. The Police have not provided any information in this regard.

Third, the Police have not addressed whether the anticipated impact of the search could be mitigated by measures such as spacing out the searches over time, even though they propose to conduct its search over a five year period. As former Assistant Commissioner Tom Mitchinson noted in Order P-1534:

> [T]here are a number of alternative measures available to relieve an institution faced with a request which may, on the surface, appear likely to interfere with its operations (Order M-906). They are the fee provisions in section 57 of the Act and the related provisions in the Regulation, and the interim access decision and fee estimate scheme described in Order 81. In some circumstances, a time extension under section 27(1) may also provide relief.

As noted earlier, in my view the Police have not made proper use of the interim access decision process or provided a proper fee estimate.

Fourth, even though I accept the representations of the Police that processing the computers would likely freeze while processing this information since it freezes regularly in any event, the conclusion that processing this particular information may result in permanent damage to the system is pure speculation, unsupported by any scientific or technical evidence. Nor is there any indication that the opinion has been provided by a person with the knowledge or experience of the causes of computer failure, in other words, the relevant expertise, to provide a reliable opinion.

Finally, even if the system were to fail, I do not accept the position of the Police that the search would be the cause of this failure. At most, it would be one of several contributing factors. It is apparent from the representations of the Police that the freezing is already causing substantial interference with their functions and that there are several contributing factors, including failure to replace an old system that has no vendor support and the "limitations" (as they put it) of their current technical staff. In my view, the proposition that an institution should be permitted to rely on its own failure to keep its equipment and technical systems up to date in a reasonable fashion as a basis for claiming "unreasonable interference" with its operations is highly questionable.

In summary, I do not accept the arguments of the Police that the information in the database is not a "record" within the meaning of the *Act* and Regulation on the basis of unreasonable interference with their operations.

TIME EXTENSION

Time extensions are governed by section 20(1) of the *Act*. That section provides:

> A head may extend the time limit set out in section 19 for a period of time that is reasonable in the circumstances, if,
>
> (a) the request is for a large number of records or necessitates a search through a large number of records and meeting the time limit would unreasonably interfere with the operations of the institution;
>
> or
>
> (b) consultations with a person outside the institution are necessary to comply with the request and cannot reasonably be completed within the time limit.

The issue to be addressed is whether the extension is reasonable in the circumstances of the request, in the context of the provisions of section 20(1). Factors which might be considered in determining reasonableness include:

- the number of records requested;
- the number of records the institution must search through to locate the requested record(s);
- whether meeting the time limit would unreasonably interfere with the operations of the institution.

Although there is no burden of proof specified in the *Act* in this instance, the burden of proof in law generally is that a person who asserts a position must establish it.

In this case, the Police received the request on April 7, 2003. On April 11, 2003, the Police extended the time for making a decision for an additional 90 days beyond the 30-day time limit in section 19 of the *Act*. They stated that, "The reasons for the extension are that it would necessitate a search through a large amount of records".

The Police issued a second time extension along with its interim access decision on September 11, 2003. They stated that they were extending the time for making an access decision "in accordance with section 20 of the Act" for a further five years from that date on which the Police receive from the appellant a deposit of $60,498.25. The Police stated that, "The reasons for the extension are that it would necessitate numerous hours of search time, i.e., locating records, and would unreasonably interfere with the operations of the institution".

In Order 81, former Commissioner Linden stated that "[s]ection 27 [the provincial *Act*'s equivalent of section 20 of the *Act*] is not applicable to a situation where the institution is experiencing a problem because a record is unduly expensive to produce for inspection by the head in making a decision".

In Order M555, Senior Adjudicator John Higgins reviewed and interpreted this order. He explained it as follows:

> Order 81 states that "[s]ection 27 [the provincial *Act*'s equivalent of section 20 of the *Act*] is not applicable to a situation where the institution is experiencing a problem because a record is unduly expensive to produce for inspection by the head in making a decision". In other words, where an interim decision is being made to accompany a fee estimate, it is inappropriate for an institution to claim a time extension under section 20. I agree with that interpretation.
>
> In my view, Order 81 also stands for the proposition that, once the question of fees is settled and any requested deposit has been paid, if the institution finds that it faces one of the situations described in section 20, it may claim a time extension at that point (subject to the requester's right to appeal that time extension in the usual way).

Given that a time extension may not be claimed in connection with an interim access decision, the Police should, in fact, have produced their interim decision within thirty days or, alternatively, should have produced a final access decision at the end of that initial ninety-day extension. An additional defect in the approach taken by the Police in this case is that, contrary to the comments quoted from Orders 81 and M-555, they went on to issue an interim access decision AND claim a further time extension of five years. Under the interim access scheme, they should not have claimed a time extension until the issue of the interim decision and fee was settled, that is, after any appeal of the fee was resolved and/or the applicable deposit had been paid. The claim for a five year extension was therefore premature.

Nevertheless, the appellant has appealed the five-year extension and the Police have made representations to justify it. Without sanctioning the approach of the Police, and simply to avoid further delays for the appellant, I will rule on the adequacy of the time extension claim in this order.

In my view, the Police have not established that a five-year extension is necessary or appropriate. The Police explained their initial 90-day extension on the basis that this time was required to carry out extensive searches. However, apart from the bald statement in their interim decision letter that the fee estimate was based on a representative sample search, I can find no indication that they made any searches during this period. Their representations do not describe any such searches.

In support of their argument that they are "entitled" to extend the time for five years, the Police state that, "[a]fter the initial time extension on April 11, 2003, new information came to light which radically altered the volume of records to be called in and the duration of search to be conducted". The Police do not state what this new information was, how it came to light, or how it radically altered the search.

Whatever this information may be, had the Police complied with the requirements of section 19 or Order 81 within the first 30 days, they might have known this information in April of 2003, rather than five months later.

Moreover, the Police provided no explanation of how they calculated their fee estimate until March 31, 2004, when they provided their first set of representations in this appeal. As I indicated earlier, they still have not provided the information necessary to enable the appellant to make an informed decision how to proceed.

I am satisfied from the representations of the Police that the request is for a large number of records or necessitates a search through a large number of records. Under the circumstances, I would have upheld the ninety day extension originally claimed by the Police. Because the Police have in effect "used up" this extension in regard to the paper records (even though, as noted, it was not proper for them to claim it and then issue an interim access decision), I am only prepared to allow the time allowed by the *Act* to produce a final access decision as regards the paper records, treating the date of this order as the date of the request (i.e. thirty days, unless third party notification is required). With respect to the electronic records, I will allow the Police ninety days to produce a final access decision, subject to third party notification.

ORDER:

1. I do not uphold the fee estimate given by the Police.

2. I do not uphold the extension of time claimed in the Police's interim decision letter.

3. I order the Police to issue a final access decision regarding information in paper records responsive to the appellant's request, including a new fee estimate, without recourse to a time extension, in accordance with the requirements of sections 19, 21 and 22 of the *Act*, as applicable, treating the date of this order as the date of the request, and to send me a copy of the decision letter when it is sent to the appellant.

4. I order the Police to issue a final access decision regarding information in electronic records responsive to the appellant's request, without charging a search fee, without recourse to a time extension, in accordance with the requirements of sections 19, 21 and 22 of the *Act*, as applicable, treating the date of this order as the date of the request, but substituting a period of "ninety days" for "thirty days" where those words appear in sections 19 and 22(3), and to send me a copy of the decision letter when it is sent to the appellant.

5. I order the Police to provide to this office with their decisions, and subject to any confidentiality concerns, to the appellant, an index of records that conforms to the provisions of IPC Practice Direction Number 1, "Providing records to the IPC during an appeal".

Original Signed By: December 9, 2005
John Swaigen
Adjudicator