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

ORDER MO-2201

Appeal MA07-144

Hamilton Police Services Board

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NATURE OF THE APPEAL:

The Hamilton Police Services Board (the Police) received a lengthy request under the *Municipal Freedom of Information and Protection of Privacy Act* (the Act) for access to records relating to an investigation conducted by the Police. The investigation arose from complaints made by the requester regarding alleged criminal activity of named individuals. The requester also sought access to records relating to a complaint he filed with the Ontario Civilian Commission on Police Services and the Professional Standards Branch of the Police.

Enclosed with the request was a cheque, signed by the requester's spouse, in the amount of $5.00 representing the request fee applicable under the *Act*.

By letter dated April 24, 2007, the Police responded to the requester and stated:

> At this time I am returning your cheque as the policy of the Hamilton Police Service does not allow us to accept personal cheques. ***Please resubmit the $5.00 fee by cash or money order payable to the Hamilton Police Service***. [emphasis added]
>
> Should I not receive your payment by May 24, 2007, I will assume you are no longer interested in receiving the information and the file will be closed.
>
> Once we receive your fee this institution has 30 days to respond to your request unless other interests such as third party privacy rights, become an issue and you will be advised accordingly by correspondence. Please note that your name may be subject to release to any person who is affected by your request.

No other decision regarding access to the records responsive to the request was made by the Police. The requester, now the appellant, filed an appeal with this office by letter dated April 28, 2007 in which he disputes the authority of the Police to demand payment by cash or money order as a condition to processing his access request.

During the intake stage of our appeal process, the Police were notified of this appeal and attempts were made by this office to find a resolution. As it was determined that a resolution was not possible, this appeal was moved to the adjudication stage. I began my inquiry by issuing a Notice of Inquiry to the Police, inviting them to submit representations on the issues set out in the Notice and on any other issues that they may determine relevant to this appeal. I received representations from the Police. After reviewing these representations, I decided that it was not necessary to seek representations from the appellant and I moved this appeal to the order stage of our appeal process.

DISCUSSION:

BACKGROUND

Subject to the notification provisions in section 21, Section 19 of the *Act* requires an institution receiving a request under the *Act* to issue a decision within 30 days of receipt of the request. In

this case, the Police returned the appellant's cheque on the basis that it was a personal cheque rather than cash or a money order. This response of the Police did not indicate whether or not access to the requested records would be given. On the contrary, any substantive response to the request was contingent on the Police receiving the request fee in cash or money order. In addition, as indicated earlier, no other decision was issued by the Police. This placed the Police in a potential "deemed refusal" position.

As a result, I decided to process this appeal in accordance with section 8 of this office's *Code of Procedure*. Section 8 of the *Code* sets out an expedited process relating to straightforward appeals such as deemed refusals or adequacy of decision letter appeals.

The procedures set out in section 8 of the *Code* were followed in all principal respects. This section contemplates that an Intake Analyst or a Mediator may make an order in straightforward appeals. However, given the importance of this issue and the potential impact of the procedure of the Police on the rights of all requesters, as Assistant Commissioner, I have decided to adjudicate this appeal.

JURISDICTION

Section 39(1) of the *Act* states, in part:

> A person may appeal *any decision of a head under this Act* to the Commissioner if,
>
> (a) the person has made a request for access to a record under subsection 17(1);
>
> (b) the person has made a request for access to personal information under subsection 37(1);
>
> …

In this case, I may decide that the decision to require cash or a money order for the $5.00 request fee is not authorized under the *Act*. Nevertheless, the decision to impose this requirement directly relates to the express provisions of section 17(1)(c) and 37(1)(c) and the regulation-making authority found in section 47(1)(f) of the *Act*, and in my view, it is accurately characterized as a decision under the *Act* within the meaning of section 39(1).

This view finds further confirmation in section 1(a)(iii) of the *Act*, which deals with the purposes of the statute, and provides that "decisions on the disclosure of government information should be reviewed independently of government."

While this is sufficient to resolve the question of jurisdiction, I also rely on this office's oversight role with respect to the operation of the *Act*. As former Assistant Commissioner Tom

Mitchinson stated in Order P-257 (made under the companion *Freedom of Information and Protection of Privacy Act*):

> In my view, however, the Information and Privacy Commissioner has an inherent obligation to ensure the integrity of Ontario's access and privacy scheme.

Similarly, in Order PO-1694-I, the former Assistant Commissioner found that a decision regarding notification of affected persons under the equivalent of section 21 of the *Act* at the request stage is a decision of the head and is subject to appeal to the Commissioner.

Accordingly, in my view, where an institution's processes for access to information are not specifically established in the *Act* or by regulation, this office has the authority to review, comment on and establish processes for institutions. In its oversight role under the *Act*, this office has the authority to control its own processes and to supervise the processes of institutions under the *Act* in a manner that is consistent with the purposes of the *Act* and with a view to minimizing or eliminating the potential for abuse. [Orders M-618 and MO-1353-I] For all these reasons, I am satisfied that I have the jurisdiction to determine the appropriateness of the Police's policy of not accepting personal cheques for the payment of request fees under the *Act*.

REFUSAL TO ACCEPT PERSONAL CHEQUE

The *Act* sets out a procedure that must be followed by requesters who wish to seek access to information held by institutions. Section 17 of the *Act* states:

> A person seeking access to a record shall,
>
> (a) make a request in writing to the institution that the person believes has custody or control of the record;
>
> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record; and
>
> (c) at the time of making the request, pay the fee prescribed by the regulations for that purpose.

Section 5.2 of Regulation 823 states that the fee to be charged for the access request is $5.00. Section 5.2 states:

> The fee that shall be charged for the purposes of clause 17(1)(c) or 37(1)(c) of the *Act* is $5.00.

In my Notice of Inquiry, I asked the Police to submit representations on the following issues:

1. Did the appellant make a valid request under the *Act*?

2. If the answer to question (1) is yes, was the April 24, 2007 letter an adequate decision letter under sections 19 and 22 of the *Act*?

3. If the answer to question (2) is no, are the Police in a deemed refusal situation under section 22(4)?

Representations of the Police

In their representations, the Police state that they received the appellant's access request accompanied by a personal cheque on April 11, 2007. The Police state that although they opened a file, they wrote to the appellant asking that payment for the access request be resubmitted by cash or money order. They also state that the appellant was informed that if payment was not received by May 24, 2007, the Police would assume that the request had been abandoned and would close its file.

The Police acknowledge they did not make a determination on the records requested. In their representations, the Police state:

> We were simply seeking redress to an administrative detail which had to be satisfied before any action would be taken on the appellant's request, in the same manner as we handle a request for which *no* fee is submitted. (original emphasis)

The Police acknowledge that the request was made in accordance with the provisions of the *Act*. However, they state that the required fee was not paid in an acceptable method, namely cash or money order. They also state that no decision letter was issued in accordance with sections 19 and 22 of the *Act* as the request had not progressed to a stage where they were obligated to issue a decision letter. The Police argue that they are not in a deemed refusal position because they are not required to respond to the request in view of the appellant's failure to comply with their policy regarding the method of payment.

The Police equated the refusal to accept a personal cheque with business practices of commercial organizations:

> Although the Act prescribes the fee, it is silent on the method of payment. A Police Service, like any other organization or vendor collecting fees for goods or services, has the right to determine forms of payment acceptable to the organization. The Act does not specify that payment may be made by cheque, nor does it restrict payment to any specific type(s). Therefore, it is reasonably assumed the method of payment is determined by the receiver. Many businesses

> do not accept personal cheques as a matter of course; we are not unique in this regard.

The Police further submit:

> It was determined many years ago that the Records Section would only accept cash, debit, credit card, certified cheque or money order as payment for services. Personal cheques are not accepted, in part due to past problems recovering funds for NSF cheques as well as the additional associated costs levied by financial institutions. As the FOI section falls under the organizational command of the Records Section, payment related to FOI requests follow the same criteria as all other types of requests processed by this office. Given the wide choice of payment alternatives, it is not unreasonable to exclude personal cheques unless they have been properly certified by the bearer's financial institution.
>
> Forms of payment are published on our website, as well as prominently displayed on point-of-sale signage.
>
> As the Act does not mention or specify how the access fee is to be paid, I do not believe the IPC has the jurisdiction to dictate the financial business practices of Police agencies, and suggest this issue should more appropriately be subject to *judicial review*. (original emphasis)

Analysis

Simply put, the issue before me is whether an otherwise valid request for access to information is invalid if the payment required by the *Act* and Regulation is made by personal cheque.

The Police are correct in noting that both the *Act* and the Regulation are silent as to the method by which the payment should be made by the requester. However, I do not agree with the position of the Police that they have the right to impose restrictions of any kind on the payment options of the requester. In my opinion, on a plain and ordinary reading of section 17 of the *Act*, in conjunction with section 5.2 of Regulation 823, a requester is entitled to make the required payment of the $5.00 fee in any reasonable manner. I find that the refusal by the Police to accept payment of the fee by personal cheque is not reasonable and is not consistent with the *Act*.

The modern rule of statutory interpretation is articulated by Ruth Sullivan in *Driedger on Construction of Statutes*, 4th ed. (Toronto: Butterworths, 2002) at pp. 1 and 3:

> … [I]n the first edition of the *Construction of Statutes*, Elmer Driedger described an approach to the interpretation of statutes which he called the modern principle:
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context, in their grammatical

> and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> …
>
> At the end of the day, after taking into account all relevant and admissible considerations, the court must adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with the legislative text; (b) its efficacy, that is, its promotion of the legislative intent; and (c) its acceptability, that is, the outcome complies with legal norms; it is reasonable and just.

Based on all three criteria set out above, I am satisfied that an appropriate interpretation of the *Act* leads to the conclusion that the Police have imposed an improper fee requirement on the appellant.

(a) Plausibility or Compliance with Legislative Text

Driedger states (at p. 123) that to be a plausible interpretation it "must be one that the words of the text can reasonably bear." As noted, section 17 and section 5.2 of Regulation 823 include the word "fee" without any other language to qualify or restrict the plain and ordinary meaning of that word. In these circumstances, I find that the most plausible interpretation of that section is that the Legislature did not intend to unreasonably restrict the method of payment of the fee.

In my opinion, it is not a plausible interpretation to conclude that the Legislature contemplated imposing rigorous requirements for a fee of $5.00, which is generally perceived as a token or minimal amount. The harm to be suffered by an institution should a personal cheque for this amount subsequently prove to be insufficient is, at worst, trivial. (Where larger amounts are involved, for example a large fee estimate for search and preparation of records, an institution can protect itself through other means. For example, the institution could wait until the cheque has cleared and been validated by a financial institution prior to proceeding further with preparing the records for disclosure.)

On the other hand, the requirement imposed by the Police on requesters places requesters in a difficult position. Should requesters choose to pay cash, they have two choices, neither of which is defensible given the amount of the fee. They may attend the Police office in person, which may impose an unreasonable burden on a requester. Alternatively, they can send the cash through the mail, which may be resisted by requesters for obvious security reasons. Requesters may therefore opt to pay the fee by way of money order or certified cheque. However, to require this form of payment for a token amount is again, in my view, unreasonable. First, it would require a requester to attend a financial institution in order to procure the money order or certify the cheque. Second, the cost associated with obtaining a certified cheque or money order may well exceed the minimal request fee of $5.00.

I further note that the Police have provided no evidence that their practice of requiring a money order or cash is consistent with the approach taken by other institutions subject to the province's two access-to-information laws. In fact, speaking from the perspective of an adjudicator who has handled many access appeals under both *Acts*, the refusal to accept a personal cheque for payment of the $5.00 request fee is highly unusual and exceptional. In my view, this detracts from any argument that the Police might have that their interpretation of the *Act* is plausible and supportable by the words of the text.

In light of the above, I am of the opinion that the Police's interpretation would require an interpretation of the *Act* that the words of the text cannot bear and that is therefore not plausible.

(b) Promotion of Legislative Intent

Section 1 of the *Act* describes the purposes of the legislation. It states, in part:

> The purposes of this Act are,
>
> (a) to provide a right of access to information under the control of institutions in accordance with the principles that,
>
> (i) information should be available to the public,
>
> (b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.

The *Act* clearly sets out a primary purpose of providing individuals with a right to government-held information, including a right to their personal information. Interpretations of the *Act* that create unnecessary procedural and financial obstacles to the right of access are inconsistent with the stated purpose of the *Act*.

It is important to note that the *Act* contains numerous provisions supporting the view that the access process should be structured and applied by institutions in a reasonable and flexible manner. For example, section 5 of the *Act* creates an obligation to disclose the information requested "as soon as *practicable*". Section 17(1) of the *Act* provides that the request for access shall provide sufficient detail "to enable an experienced employee of the institution, *upon reasonable effort*, to identify the record". More importantly, section 17(2) provides that if the detail provided in the request is not sufficient, the institution has an **obligation** to "*offer assistance* in reformulating a request so as to comply with subsection (1)". Section 50 provides that nothing in the *Act* prevents an individual from making an access request in oral format. (emphasis added)

In my view, these provisions, read in conjunction with section 1 of the *Act*, demonstrate an intention on the part of the Legislature that an individual's access request will be processed by the institution in a fair, reasonable, open and flexible manner; a manner that is consistent with the purpose that information should be available to the public. I find support for this view in the following statement of former Commissioner Tom Wright in Order M-618:

> When "open-ended" rights are granted by legislation, such as the right of access to information set out in [the *Act*] and the Legislature has not expressly built in reasonable limits or other controls on the unbridled use of processes designed to secure those rights, in my view, it falls to those charged with administering the legislation and its processes to do so in a manner that is fair, reasonable and consistent with the legislative purpose.

An interpretation of the *Act* that permits the institution to impose unreasonable restrictions on the payment options of the requester is inconsistent with the right of an individual to access general records or their personal information. Such an interpretation is inconsistent with a reasonable and flexible approach to the management of access to information requests that is desirable for the promotion of an open and transparent government institution.

As noted above, the policy of requiring cash, certified cheques or money orders creates obstacles to access that, in my view, could not have been intended by the Legislature. To repeat, it is common knowledge there are risks incurred when citizens send cash using the mail system and, in my opinion, it is unreasonable to expect requesters to bear that risk. Similarly, it is equally well known that there is a cost for certifying cheques or purchasing money orders. Although that cost will vary, in most cases it will exceed the amount of the $5.00 prescribed by section 5.2 of Regulation 823. In addition, rather than providing a simple process that can be accessed by mail, the Police are in effect requiring a requester to attend at either their premises or a financial institution to complete an access request. For requesters, this creates a financial and bureaucratic barrier to access that is inconsistent with the purpose of the *Act* and, in my opinion, was not intended by the Legislature.

The Police have provided no justification for this policy other than that it is consistent with the approach taken by the Records Section for the purchase of other information products, such as criminal records checks and fingerprinting for civil purposes. As set out in their representations, the Police state:

> As the FOI Section falls under the organizational command of the Records Section, payments related to FOI requests follow the same criteria as all other types of requests processed by this office.

The fact that the Police may have established a policy regarding payment for information products falling outside the *Act* is irrelevant to my considerations. That purchasers of other goods or services from the Police must pay in cash or by money order does not mean that requesters under the *Act* should be automatically bound by the same rules. The right to submit

an access-to-information request to a government institution is a legislated right, set out in the *Act*. The Police are compelled to consider the provisions of the *Act* when determining the form and amount of payment. Arbitrarily imposed rules for requests falling outside the *Act* are not relevant to interpreting the obligations of the Police under the *Act*.

The Police justify the requirement for cash or certified cheques by suggesting that they have had problems recovering funds for cheques that were returned to them because the signator had insufficient funds to cover the cheque. In the context of an access to information request, this is not a persuasive argument. As noted above, the harm suffered by the Police should a $5.00 cheque not be honoured is trivial. As well, in the event that a requester did "bounce" a cheque, the Police have the option of discontinuing the access process and subsequently requiring a certified cheque. Significantly, the Police have not suggested that the appellant in this appeal has ever submitted a personal cheque that was not honoured. Instead, the Police have submitted that it is their policy not to accept personal cheques from *any* requester. This is not acceptable.

In summary, I conclude that the legislative intent of the *Act* is not promoted by requiring the appellant to submit the $5.00 request fee by way only of a money order or cash.

(c) Outcome must be consistent with legal norms

In the Driedger test quoted above, Ruth Sullivan discusses the meaning of "legal norms" and indicates that "[t]heir primary source…is the common law." As well as conforming with such norms, the outcome must be reasonable and just.

For the reasons set out above, I find that to, in effect, read language into section 17 and section 5.2 of Regulation 823 that would permit the institution to impose unreasonable restrictions on the method of payment of the access fee would be unjust.

In summary, I find that the interpretation advanced by the Police is neither plausible nor appropriate and it does not promote the legislative intent of the *Act*. The institution is not permitted to impose unreasonable restrictions on the method of payment of the fee for access prescribed in section 17 in conjunction with section 5.2 of Regulation 823. Specifically, I find that the decision of the Police not to accept personal cheques is an unreasonable restriction on the access rights of the appellant and is contrary to the *Act* and the Regulation.

DEEMED REFUSAL

Where an institution receives a valid request for access to information, the requirement to issue a decision letter is set out in section 19 of the *Act*. Given my finding that the cheque provided was satisfactory, the request was valid and complete, and the Police are therefore required to issue a decision letter in accordance with section 19. The Police have acknowledged that they did not issue a decision letter in this appeal. I therefore find that the Police have failed to meet their obligations under section 19.

Section 22(4) of the *Act* states:

> A head who fails to give the notice required under section 19 or subsection 21(7) concerning a record shall be deemed to have given notice of refusal to give access to the record on the last day of the period during which notice should have been given.

Accordingly, I find that the Police are, effectively, in a deemed refusal position pursuant to section 22(4) of the *Act*.

As noted above, the Police returned the appellant's personal cheque to him with correspondence dated April 24, 2007. The appellant should resubmit his payment by personal cheque at the earliest opportunity, if he wishes to pursue the access to information request. I will order the Police to issue a decision letter to the appellant regarding access to the records requested within 30 days after the personal cheque is received.

CONCLUSION

I have found that the Police are in a deemed refusal position due to their refusal to accept a personal cheque to cover payment of the $5.00 request fee. Such an interpretation would act as an unreasonable barrier to requests being submitted to an institution and does not address any need or harm that has been articulated by the Police.

This does not mean that a personal cheque may never be refused while processing a freedom of information request. There may be cases where the history between a particular requester and an institution would lead a prudent institution to requiring cash, a certified cheque or a money order. For example, a requester may have previously submitted cheques to the institution that were not honoured. Further, should a $5.00 cheque accompanying a request not be honoured, the institution would have the option of putting the request on hold until payment was rendered. This is not such a case.

This order is directed towards the Police in the context of this particular appeal. However, it is my expectation that their payment practices for requests under the *Act* will change and that, in the future, they will accept personal cheques to cover the request fee. In addition, to the extent that other institutions refuse to accept personal cheques for the $5.00 access fee, this practice should cease.

ORDER:

1. Should the appellant resubmit a personal cheque in the amount of $5.00, I order the Police to issue a final decision letter to the appellant regarding the access request, in accordance with the *Act* and without recourse to a time extension, except as may be required by section 21, within 30 days following the receipt of the cheque.

2. In order to verify compliance with provision 1 of this order, I order the Police to provide me with a copy of the decision letter referred to in provision 1 when it is sent to the appellant. This should be forwarded to my attention, c/o Information and Privacy Commissioner/Ontario, 2 Bloor Street East, Toronto, Ontario M4W 1A8.

Original signed by: June 19, 2007
Brian Beamish
Assistant Commissioner