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

ORDER MO-2319

Appeal MA07-146

Niagara Regional Police Services Board

Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9188
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

The Niagara Regional Police Services Board (the Police) received a request from a newspaper reporter, under the *Municipal Freedom of Information and Protection of Privacy Act* (*Act*) for information about the Police's enforcement of the *Retail Business Holidays Act* (RBHA), between December 1, 2004 and January 10, 2007. The requester specifically sought access to:

- The number of investigations under the RBHA
- Dates of charges laid under the RBHA
- The names of the people or businesses charged under the RBHA
- Municipalities in which the charges were laid
- The outcome of the charges (convictions, acquittals)
- A description of the alleged infraction
- The name(s) of the police officer who laid the charges

The requester also asked that both the application fee of $5.00 and search fees, if any, be waived.

The Police located the responsive records and issued a decision granting the requester access to the information upon receipt of $60.00 representing the Police's fee. The fee represents two hours of search time at a rate of $7.50 per 15 minutes or $30.00 per hour.

With respect to the request for a waiver of the application and search fee, the Police advised the requester that they would not waive the fees.

The requester did not pay the $60.00 fee and the Police did not provide the responsive records to him. The requester (now the appellant) appealed the Police's fee and decision to deny his fee waiver request to this office. The appeal letter also indicates that the responsive records "…should be routinely available."

The appeal was assigned to a mediator who facilitated a teleconference mediation meeting between the parties. The Police brought its Analyst Programmer to the teleconference who provided the following explanation, which was set out in the Mediator's report:

> The Analyst Programmer advised that the search to locate the responsive information in 2004 and 2005 took a great deal of time because she had to conduct the search on the old computer system. She explained that she had to write a number of scripts or programmes to try to locate the information.
>
> She also advised that it took less time to search for the responsive information in 2006 and 2007 on the new computer system. However, she advised that she still had to write a programme to locate the specified information.
>
> In addition, the FOI Coordinator indicated she had to retrieve the individual occurrence reports located as a result of the computer search. She also advised that she created a record of these occurrences and did not charge for this.

At the end of the mediation process, the appellant indicated that he no longer sought a review of the Police's decision to deny his fee waiver request. The appellant, however, continued to dispute the Police's fee and maintained that the Police should make the information at issue "routinely available".

The adjudicator originally assigned to this appeal commenced her inquiry by sending a Notice of Inquiry to the appellant which outlined the facts and issues in this appeal and sought the appellant's written representations. In particular, the appellant was invited to provide representations on whether the Police can be compelled under the *Act* to make the information at issue available through routine disclosure. The appellant was also invited to provide representations on whether the Police's fee should be upheld.

The appellant submitted representations in response. In his representations, the appellant raised additional issues beyond those identified in the Notice of Inquiry. As a result, the file was briefly returned to mediation. Mediation did not resolve any of the issues in dispute and the file was returned to adjudication. One of the additional issues raised by the appellant in his representations was his position that the Police conducted a search for the responsive records before he requested the records under the *Act*. As a result, the appellant argues that the Police should not be allowed to charge a fee for its search time. The other issue raised in the appellant's representations was his position that the Police should waive its fee although he previously advised he was not persuing this issue.

The appellant consented to sharing his representations with the Police, in their entirety, and they were attached to the copy of the Notice of Inquiry sent to the Police. The Police provided representations in response which were shared with the appellant. The appellant was provided with an opportunity to provide reply representations, which he declined.

This appeal was subsequently transferred to me in order to complete the inquiry.

DISCUSSION:

PRELIMINARY ISSUE:

The Notice of Inquiry sent to the appellant asked him to make submissions on the legislative basis for his position that the Police should make the information at issue routinely available to the public, as well as the basis for his belief that this office has the jurisdiction to require the Police to do so. In addition, the appellant was asked to explain why and how routine disclosure of this information would be in accordance with the *Act*. The Notice of Inquiry provided to the appellant enclosed a copy of *IPC Practices Number 22 Routine Disclosure/Active Dissemination (RD/AD) of Government Information*. Routine disclosure is the routine or automatic release of certain types of administrative and operational records in response to requests made informally or under the *Act*. *IPC Practices Number 22* encourages Freedom of Information and Privacy Coordinators to review general records and talk to their staff to identify which records would be good candidates for routine disclosure and active dissemination. The *IPC Practices Number 22* does not indicate whether this office has the authority to compel institutions to make records available through routine disclosure.

The appellant's representations submit that this office has the "authority to overrule the head of an institution's decision to impose a fee". The appellant's representations then go on to provide reasons why the Police should waive its fee. One of the arguments made by the appellant is the routine release of information. In this regard, the appellant states:

> Institutions have a great deal of discretion to waive fees when they release information. The Niagara Regional Police Service routinely release information to the news media about charges that are laid, about public safety notifications, or when they are seeking public assistance in an investigation. They regularly issue press releases about certain types of crime. Presumably, they are exercising the discretion under [s]ections 45(4)(b), (c) and (d) every time a member of the public asks for information from the police.
>
> Our newspaper has a practice of regularly checking with the NRP's Niagara Falls detachment to ask about any newsworthy occurrences. If officers had voluntarily disclosed [*RBHA*] infractions as they had occurred, there would have been no need to make the … request.
>
> Asking a newspaper to pay for historic records that could have been released at the time of the incident runs counter to the Ontario's openness principle.

The Police submit that the appellant's request for the information at issue is the only request for information relating to the RHBA it has received and submits that "…nothing compels the police to provide routine access to information".

As noted above, the topic of "routine disclosure" has been addressed by this office in *IPC Practices Number 22*, it has also been discussed in previous Orders from this office [Orders M-583, M-697]. For example, in Order M-583, the sole issue before former Commissioner Tom Wright was whether the institution had calculated the requested fees in accordance with the *Act* for records relating to expenses incurred by school board trustees. The appellant in that appeal submitted that taxpayers should have the right to scrutinize the employment-related expenditures of school trustees. Though Commissioner Wright agreed with the appellant's position, he found that the institution was entitled to charge fees for the requested information, on the basis that the information was requested under the *Act*. Commissioner Wright, however, made some postscript comments regarding routine disclosure:

> At a time when the financial resources available to public organizations continue to decline, the need for creativity in the administration of programs is even more pressing. Freedom of information is no exception - there are straightforward, inexpensive solutions.
>
> …
>
> I believe that the routine disclosure of various types of government-held information will assist government organizations to respond to requests for

> information more effectively, more efficiently and at significantly less cost. Or to say it in plain words, routine disclosure makes access to information better, faster and cheaper.
>
> To this point my comments have been directed toward government organizations. In my opinion this is appropriate since these organizations maintain the records and, therefore, can determine how they are best made available to the public.

I have considered the appellant's representations and find that the appellant has failed to provide sufficient convincing evidence in support of his position. In making my decision I took into account that neither the *Act* nor *IPC Practices Number 22* specifically provides that this office has the authority to order institutions to make the information at issue available for routine disclosure. I also considered the approach taken in previous Orders from this office to encourage, not require, institutions to consider the routine disclosure of some of its general records. This spirit of encouragement is evidenced in Commissioner Wright's post-script comments in Order M-583. In particular, though Commissioner Wright commented that "it's time for all government organizations to make expenditure-related information routinely available to the public", he did not compel the institution to make the information at issue available through routine disclosure. Rather, he upheld the institution's fee and encouraged government institutions to consider routine disclosure of its general records.

I adopt the approach taken by Commissioner Wright and find that I do not have the authority to compel the Police to provide the appellant information relating to RBHA infractions, outside the *Act*, through routine disclosure.

As a result of my finding, I will go on to consider whether the fee charged by the Police is in accordance with the *Act*, and if I find that it is, whether the Police should waive its fee.

FEES

Section 45(1)(a) of the *Act* requires institutions to charge search fees for requests under the *Act*. This 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,
>
> > the costs of every hour of manual search required to locate a record;

More specific provisions regarding search fees are found in section 6 of Regulation 823, which reads in part:

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

The Police submits that the two hours of search time was spent locating records responsive to the appellant's request under the *Act*. The Police submit that the $60.00 fee comprises of two hours of search time calculated at $7.50 per 15 minutes or $30.00 per hour.

The appellant submits that he should not have to pay a fee to the Police to obtain access to the records he requested under the *Act* as the Police had completed its search for the same records before he submitted his request. The appellant advises that before he filed his request under the *Act*, he telephoned the Police's media officer to inquire whether the information at issue could be provided to him informally. The appellant submits that the Police's media officer telephoned him several days later and advised that the Police had responded to seven complaints under the RBHA. The appellant states the following regarding the information he obtained informally from the Police's media officer:

> While that information was a good start, it didn't answer all the questions I had about the enforcement of the [RBHA]. When I was unable to get more details, I filed the … request. But the records I had requested had already been searched. And no one had charged a fee for search time.

The appellant also questions why his request required two hours search time when the Police routinely conducts various computer checks and searches such as security and vehicle checks. He goes on to state:

> … in an information age, it's difficult to understand that it could take two hours' search time to find seven records over a two-year period. This is especially so, given that it is the [P]olice themselves … inputted the records into their own database that they manage.

The representations prepared by the Police's Freedom of Information Analyst submit that she was not aware that the appellant had made an informal request for the same information at the time she requested the search. The Police's representations state:

> During the course of this appeal I have spoken to the Analyst and asked her if she undertook the same search in January of 2007. She advised me that her records show that she ran a preliminary search in response to an information request from the statisticians. Her search found no records for the year 2005 and she advised the statisticians of this factor with a notation that, because no records were located, she was not sure if she had search correctly or thoroughly enough and wished to be advised if a more thorough search was required. No one responded to her.
>
> When the Information System Analyst received the request for the search in March she was under the impression that it was the same requester who was now making a formal request and that she was now required to do a more in-depth search which she did perform this time, albeit with the same results (i.e., no records found for 2004 and 2005).

> It was this search for which I charged the requester. I was not charging the requester for a search that had been performed prior to his formal request and, as I stated, I was unaware that a previous search had been performed.

Previous orders from this office have recognized that the *Act* contemplates a user-pay principle that requires requesters to pay fees to cover the costs related to the time institutions spend searching and preparing records under the *Act* [Orders M-376, MO-2163]. In my view, the appellant triggered the fee provisions under section 45 of the *Act* when he abandoned his attempts to obtain the information informally and filed a freedom of information access request for the same information. Accordingly, under section 45, the Police has an obligation to charge the appellant a fee in relation to his request for general records under the *Act*.

The appellant also submits that the fee charged by the Police is not reasonable taking into consideration the number of records located. I have carefully reviewed the representations of the parties and I am satisfied that the fee calculated by the Police represents the Police's search time required to completely respond to the appellant's request under the *Act*. In making my decision, I accept the Police's evidence that it had to write a number of scripts or programmes to conduct in-depth manual searches of its record-holdings to locate the information on two of its computers. Accordingly, I am satisfied that the Police's fee was calculated in accordance with the *Act* as the fee charged represents the prescribed amount set out in the Regulations.

As a result of my finding, I will now go on to consider whether the Police should have waived its fee.

FEE WAIVER

The appellant submits that the Police should waive its fees as the criteria at sections 45(4)(a), (b) and (d) apply in the circumstances of this appeal. These sections read:

> A head shall waive the payment of all or any part of an amount required to be paid under subsection (1) if, in the head's opinion, it is fair and equitable to do so after considering:
>
> (a) the extent to which the actual cost of processing, collecting and copying the record varies from the amount of the payment required by subsection (1);
>
> (b) whether the payment will cause a financial hardship for the person requesting the record;
>
> (d) any other matter prescribed in the regulations.

A requester must first ask the institution for a fee waiver, and provide detailed information to support the request, before this office will consider whether a fee waiver should be granted. This office may review the institution's decision to deny a request for a fee waiver, in whole or in part, and may uphold or modify the institution's decision [Orders M-914, P-474, P-1393, PO-1953-F]. The institution or this office may decide that only a portion of the fee should be waived [Order MO-1243].

Section 45(4) requires that I must first determine whether the appellant has established the basis for a fee waiver under the criteria listed in section 45(4) and then, if that basis has been established, determine whether it would be fair and equitable for the fee to be waived.

Part 1: basis for fee waiver

Section 45(4)(a) – Actual cost of processing and collection varies from fee

As noted above, the appellant believes that the $60.00 fee varies from the actual cost of locating and preparing the responsive records. The Police in this case, charged the appellant $7.50 per 15 minutes for its search of electronic records responsive to his request under the *Act*. The Police describes its fee as "…modest and a more than fair reflection of the actual cost of processing" the appellant's request.

I find that the criteria at section 45(4)(a) has no application in the circumstances of this appeal for the same reasons I articulated above relating to my decision to uphold the Police's fee. In arriving at this decision, I took into consideration the evidence tendered by the Police that they were required to write a number of scripts or programmes to try to locate the information at issue. Accordingly, I find that the Police's fee represents its actual cost to locate the responsive records.

For the reasons set out above, I find that the criteria at section 45(4)(a) has no application in the circumstances of this appeal.

Section 45(4)(b) - Financial Hardship

The appellant's position is that the Police should waive its fees on the basis that payment would result in financial hardship to his employer as the newspaper which employs him has to "…watch its expenditures carefully". In support of his position, the appellant provided information about the newspaper's corporate and ownership structure. The appellant, however, did not submit any documentation in support of his position.

The Police's Freedom of Information Coordinator states that:

> When I advised the requester of the fee, he had asked me if I would consider waiving it. I advised him that, unless it would cause financial hardship I would not be waiving the fee. The requester advised me that he could not very well prove that fact without throwing open the financial records of [the newspaper] to

> me. He did not offer any indication of how the fee might cause financial hardship.

Generally, a requester should provide details regarding his or her financial situation, including information about income, expenses, assets and liabilities [Orders M-914, P-591, P-700, P-1142, P-1365, P-1393]. In my view, the appellant has failed to provide evidence, such as financial records demonstrating that payment of the requested fee would result in a financial hardship, in support of his position. Rather, the evidence provided by the appellant is generalized and not documented.

Accordingly, I am not satisfied that payment of the requested fee would constitute a financial hardship for the appellant's employer and find that the criteria at section 45(4)(b) has no application in the circumstances of this appeal.

Section 45(4)(d) – Other matters prescribed by Regulation

For the criteria at section 45(4)(d) to apply, the appellant must demonstrate that one of the circumstances prescribed by the Regulations applies in the circumstances of this appeal. Section 8 of Regulation 823 sets out additional matters for a head to consider in deciding whether to waive a fee, as follows:

> The following are prescribed as matters for a head to consider in deciding whether to waive all or part of a payment required to be made under the *Act*:
>
> 1. Whether the person requesting access to the record is given access to it.
>
> 2. If the amount of a payment would be $5 or less, whether the amount of the payment is too small to justify requiring payment.

In my view, the circumstances described in section 8 of Regulation 823 have no application in this appeal. Not only is the fee requested by the Police in excess of $5, the Police have not given the appellant access to the responsive records. Accordingly, I find that the criteria at section 45(4)(d) does not apply to the circumstances of this appeal.

Summary

As the appellant has failed to demonstrate that the criteria at sections 45(4)(a), (b) and (d) apply in the circumstances of this appeal, I find that the appellant has failed to establish the basis for a fee waiver.

ORDER:

1. I uphold the Police's fee of $60.00 for search time.

2. I uphold the Police's decision to deny the appellant's request for a fee waiver under section 45(4) of the *Act*.

Original signed by: June 17, 2008
Jennifer James
Adjudicator