



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

ORDER MO-2529

Appeal MA09-378

Toronto Police Services Board



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NATURE OF THE APPEAL:

The Toronto Police Services Board (the Police) received a six-part request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for the following information:

1. The current [Police] domestic violence policy and all related policies.
2. A list of both governmental and non-governmental organizations to which [the Police] refers complainants/victims of domestic violence, broken down by gender of client served by the organization.
3. A list of names of organizations which operate shelters where complainants/victims of domestic violence have been taken by officers in the past 2 years broken down by gender of complainants/victims.
4. The number of complainants/victims of domestic violence, broken down by gender, that officers have referred to the above or other organizations for safety and/or counseling services.
5. The criteria used in identifying the above organizations for use by [Police] Officers.
6. The number of all charges laid by [the Police] in the past 2 years, broken down by gender of accused, as well as the same resulting strictly from domestic violence cases of:
 - a) public mischief,
 - b) obstruction of justice,
 - c) and/or perjury.

The Police initially responded to only item 6 of the request, and provided an interim decision advising that the estimated cost for search time for an analyst to retrieve the statistics responsive to item 6 of the request was \$420.00. The Police stated they required a deposit of \$210.00 in order to proceed with this item of the request. It appears that the Police did not intend to charge the requester a fee for the processing of items 1-5.

The requester then asked the Police to waive the estimated fee, pursuant to section 45(4) of the *Act*. The requester specifically referred to section 45(4)(b) (financial hardship) and 45(4)(c) (dissemination will benefit public health or safety) as reasons why the fee ought to be waived. In response to the fee waiver request, the Police issued a decision denying the fee waiver. The decision stated:

You have indicated that the fee estimated would prove to be a financial burden to you at this time but do not attach any documentary evidence to adequately support this claim.

Secondly, you stated that the information will update victims, advocates, and researchers of domestic violence in general, thereby becoming of general public interest. Please note, some of the information ... is publically available by viewing the [Police] website at ...

The Police then referred to two websites which they stated may provide information responsive to some of the requested information, which may narrow the request and thereby reduce the estimated fee. The Police then reviewed section 45(4) of the *Act* and stated:

Your request has not met any of the [criteria in section 45(4)]. After reviewing this in conjunction with the search time required, your application for a fee waiver has therefore been denied.

Subsequently, the Police issued a final decision on access to the six items identified in the request. The Police granted partial access to certain records responsive to items 1 through 5, denying access to certain records and portions of records. With respect to item 6, the Police advised that because the required deposit was not received, access would not be granted to the statistical data requested.

The requester (now the appellant) appealed the Police's denial of access, as well as the Police's refusal to grant a fee waiver.

With respect to the denial of access to portions of records responsive to items 1-5, during mediation the Police agreed to conduct further research and provided the appellant with additional information about certain policies and procedures. The Police also provided some additional information about the severances made to the records. After receiving the information, the appellant confirmed that he was not pursuing access to the portions of the records to which access was denied, and all issues relating to items 1 through 5 were resolved and removed from the scope of this appeal.

With respect to the fee waiver request relating to item 6, during mediation the appellant sent the Police a second fee waiver request, and supplied additional information in support of his position that payment would cause him financial hardship. He provided information about his income for the three preceding years, and also identified his expenses during that period. The request also identified the appellant's assets and liabilities, and asked the Police to reconsider their decision not to waive the fee.

The Police responded to the second fee waiver request with a further decision, again denying the appellant's request to waive the fee. This second decision letter reviewed some of the background to the request, including the time and effort that had gone into responding to the appellant's request. With respect to whether the payment will cause a financial hardship, the letter stated:

While you have outlined your income ..., you have not provided sufficient or compelling grounds to accept your position. ...

With respect to the issue of whether dissemination of the record will benefit public health and safety, the letter stated that the appellant had failed to provide compelling arguments in support of a finding that this factor applied.

The letter then stated that, as the appellant had not provided sufficient grounds for a fee waiver under sections 45(4)(b) and (d), the fee waiver was denied.

The appellant continued to appeal the Ministry's decision to deny his request for a fee waiver. Mediation did not resolve the fee waiver issue, and this appeal was transferred to the inquiry stage of the process. I sent a Notice of Inquiry, identifying the facts and issues in this appeal, to the appellant, initially, and the appellant provided representations in support of his position that the fee ought to be waived. I decided that it was not necessary to seek the representations of the Police.

DISCUSSION:

FEE WAIVER

General principles

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

45. (4) A head shall waive the payment of all or any part of an amount required to be paid under subsection (1) if, in the head's opinion, it is fair and equitable to do so after considering,

- (a) the extent to which the actual cost of processing, collecting and copying the record varies from the amount of the payment required by subsection (1);
- (b) whether the payment will cause a financial hardship for the person requesting the record;
- (c) whether dissemination of the record will benefit public health or safety; and
- (d) any other matter prescribed by the regulations.

8. The following are prescribed as matters for a head to consider in deciding whether to waive all or part of a payment required to be made under the Act:

1. Whether the person requesting access to the record is given access to it.

2. If the amount of a payment would be \$5 or less, whether the amount of the payment is too small to justify requiring payment.

The fee provisions in the *Act* establish a user-pay principle which is founded on the premise that requesters should be expected to carry at least a portion of the cost of processing a request unless it is fair and equitable that they not do so. The fees referred to in section 45(1) and outlined in section 8 of Regulation 823 are mandatory unless the requester can present a persuasive argument that a fee waiver is justified on the basis that it is fair and equitable to grant it or the *Act* requires the institution to waive the fees [Order PO-2726].

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].

In reviewing a decision by an institution denying a fee waiver, this office may decide that all or part of a fee should be waived [Order MO-1243].

Part 1: basis for fee waiver

Section 45(4)(b): financial hardship

For section 45(4)(b) to apply, the requester must provide some evidence 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 and P-1393]. The appellant has provided material in support of his position that payment of the fee will cause him financial hardship. He has identified his income over the course of the last three years, and has also listed his assets, liabilities and yearly expenses. In support of his position, the appellant has also provided copies of his T-4 slips from his employer.

The appellant had provided this information to the Police, and the Police responded by denying the fee waiver request for a variety of reasons. With respect to the issue of whether payment of the fee would cause financial hardship, the Police appear to take the position that, because the appellant is employed and not on social assistance, section 45(4)(b) does not apply to the appellant.

Analysis and finding

Based on my review of the appellant's submissions and the documents submitted as evidence of his financial status, I find that the appellant has established that the criteria for fee waiver found in section 45(4)(b) exists. The appellant has provided evidence regarding his income over the last number of years, which confirms that his income (particularly last year) is not high. Furthermore, the appellant's expenses exceed his income and the value of his assets. Although

the amount of the fee is not particularly large, based on the information provided by the appellant regarding his income, assets and expenses, I find that payment will cause a financial hardship.

Section 45(4)(c): public health or safety

The appellant also takes the position that the public health or safety criteria in section 45(4)(c) applies to his request for fee waiver.

Previous orders have established that the following factors may be relevant in determining whether dissemination of a record will benefit public health or safety under section 45(4)(c):

- whether the subject matter of the record is a matter of public rather than private interest
- whether the subject matter of the record relates directly to a public health or safety issue
- whether the dissemination of the record would yield a public benefit by
 - (a) disclosing a public health or safety concern, or
 - (b) contributing meaningfully to the development of understanding of an important public health or safety issue
- the probability that the requester will disseminate the contents of the record

[Orders P-2, P-474, PO-1953-F, PO-1962]

The focus of section 45(4)(c) is “public health or safety.” It is not sufficient that there be only a “public interest” in the records or that the public has a “right to know.” There must be some connection between the public interest and a public health and safety issue [Orders MO-1336, MO-2071, PO-2592 and PO-2726].

In his initial request to the Police for a fee waiver, the appellant identified the reasons why he believed section 45(4)(c) applied as follows:

The request will update victims, advocates, and researchers of domestic violence in general. It will add to the credibility of, or the improvement in delivery and services to victims. The focus this research will bring to how [the Police] assists men and women who are victims of domestic violence, will no doubt support continued and improved responses from the service. ... Further it is also an issue of general public concern and my request results will be of a general public interest.

The appellant provides information in support of the position that there is a great public interest in the issue of domestic violence, and that this issue is discussed a great deal in the media. With respect to the application of section 45(4)(c), the appellant states:

It is commonly held that Domestic Violence (DV) is a large problem and must be prioritized as a violent crime. DV knows no bounds but crosses boundaries of cultural, race, religion, age, ethnicity, socio-economic class, sex or gender, sexual orientation, marital or relationship status. See the [Toronto Police Domestic Violence Brochure], DV has become a major priority to stop or punish in Canadian society as a whole and in the city of Toronto in particular. So much has this become a priority that the [Police] has both an entire department exclusively devoted to investigating this crime and has put out public appeals to educate about the law and remedies in the event of this crime....

The appellant then provides statistics regarding the approximate number of charges the Police lay in "Domestic" cases each year, and identifies that the majority of these charges are laid against men. The appellant then states:

The [Police] in their education and public forums makes it clear that women are victimized by perpetrating men. Although in their opinion this reflects a valid factual comment, it belies a prejudice, however valid or otherwise.

Most well meaning and some well informed public policy makers make the same assertion

There is a less, but a growing public discussion regarding the discrimination in prosecuting this crime based on gender...

The appellant then refers to two specific articles written in a National newspaper, one written in 2008 and the other in 2010, which discuss in general discrimination in prosecuting DV based on gender. The appellant also refers to what he describes as a "vast body of research which shows that DV is reciprocal as between the genders," and refers to a website which contains various articles addressing topics of various kinds relating to family relationship issues.

The appellant also specifically states that there is a benefit to public safety "of divulging records that will show any bias in the delivery of police or other protective services to a specific victim group and may exclude any other group from that same service."

Although the Police were not provided with the appellant's detailed representations, the Police in their initial and subsequent responses to the fee waiver request state that the appellant failed to supply compelling arguments to support the application of section 45(4)(c).

Analysis and finding

Based on my review of the appellant's representations, I find that the appellant has not established the basis for fee waiver found at section 45(4)(c). Applying the criteria from previous orders set out above, I am not satisfied that section 45(4)(c) applies.

In the first place, I have not been provided with sufficient evidence to satisfy me that the subject matter of the record relates directly to a public health or safety issue. The record requested in item 6 is "the number of all charges laid by [the Police] in the past 2 years, broken down by gender of accused, as well as the same resulting strictly from domestic violence cases of a) public mischief, b) obstruction of justice, and c) perjury." Although the responsive records may provide some interesting information regarding these types of offences and how they relate to gender, the appellant has not connected the information in these records with his concern that there may be bias in the delivery of police or other protective services provided. Furthermore, the appellant has not provided evidence to support the view that dissemination of the requested information contained in the records would yield a public benefit by disclosing a public health or safety concern, or contributing meaningfully to the development of understanding of an important public health or safety issue.

Secondly, while I accept that there is a public interest in issues regarding domestic violence in general, and while the appellant has provided some evidence that there is public debate over gender issues relating to domestic violence, I am not satisfied that the subject matter of the record specifically requested in item 6 is a matter of public rather than private interest. Clearly the appellant is interested in obtaining the requested data, and has referred to how the information could assist further research in this area. However, based on the material provided, I find the subject matter of the record is more a matter of a personal interest to the appellant, than a matter of public interest. I find further support for this in the fact that the appellant has not provided any information regarding the probability that he will disseminate the contents of the record.

As a result of the above, I find that the criteria listed at section 45(4)(c) does not apply in this appeal.

As I have found that the criteria in section 45(4)(b) applies, I will now proceed to consider whether it is fair and equitable to grant a fee waiver in the circumstances of this appeal.

Part 2: fair and equitable

I have found that the only basis for a fee waiver is that payment of the fee would cause financial hardship for the appellant [section 45(4)(b)].

However, for a fee waiver to be granted under section 45(4), it must be also be "fair and equitable" to do so in the circumstances. Relevant factors in deciding whether or not a fee waiver is "fair and equitable" may include:

- the manner in which the institution responded to the request;

- whether the institution worked constructively with the requester to narrow and/or clarify the request;
- whether the institution provided any records to the requester free of charge;
- whether the requester worked constructively with the institution to narrow the scope of the request;
- whether the request involves a large number of records;
- whether the requester has advanced a compromise solution which would reduce costs; and
- whether the waiver of the fee would shift an unreasonable burden of the cost from the appellant to the institution.

[Orders M-166, M-408, PO-1953-F]

The Police's second decision letter states that the Police denied the fee waiver request after "much consideration," and then identifies that they reviewed a number of factors, including the time and effort that had gone into responding to the appellant's request. The appellant did not provide representations that specifically address whether it would be "fair and equitable" to provide a fee waiver.

In my view there are a number of factors in this appeal that are relevant to determining whether it would be fair and equitable in the circumstances to grant a fee waiver to the appellant.

On my review of the circumstances surrounding the appellant's 6-part request, I am satisfied that the Police responded appropriately to the request, identifying the item to which fees would apply as a result of the nature of the information requested, and proceeding to process the other items in the request. In addition, I find that the Police worked constructively with the requester to attempt to narrow his request. Specifically, the Police referred to the appellant's stated reasons as to why he was interested in the information, and referred the appellant to various resources and websites, stating "You may wish to review these ... in response to some of your queries and re-evaluate the records requested which may result in reduction of the records required and therefore the fees estimated." I find that these factors weigh against granting a fee waiver.

In addition, I note that the institution provided the appellant with records and portions of records responsive to the other items in the request, and after conducting further searches, subsequently provided the appellant with additional records responsive to those items. There is no indication that the Police charged any fee for these records, and I find that this factor also weighs against granting a fee waiver.

Furthermore, although I have found that the payment of the estimated fee will cause a financial hardship to the appellant, I have no evidence to suggest that the appellant worked constructively with the Police to narrow the scope of the request, or that he advanced a compromise solution which would reduce costs. These factors also weigh against granting a fee waiver.

Lastly, an important factor to consider is if a waiver of the fee would shift an unreasonable burden of the cost from the appellant to the Police. In the circumstances of this appeal, after

considering all of the circumstances, including that the appellant seems to want this information to assist further research in an area which he has a particular interest, rather than disseminating it to the public, I find that this factor weighs against granting a fee waiver.

As noted above, I have found that the only basis for a fee waiver is that payment of the fees would cause financial hardship for the appellant [section 45(4)(b)]. However, after considering the factors that are relevant in deciding whether granting a fee waiver would be “fair and equitable,” I have concluded that the factors that weigh against doing so outweigh those in favour. Accordingly, given that the *Act* is based on a user pay principle, it is not reasonable in the circumstances for the appellant to expect the Police (and, by extension, other taxpayers) to cover the costs for the records responsive to item 6 of his request. Consequently, I find the Police’s decision not to grant the appellant a fee waiver is fair and equitable in the circumstances.

ORDER:

I uphold the decision of the Police not to waive the fee, and dismiss this appeal.

Original signed by: _____
Frank DeVries
Adjudicator

_____ June 18, 2010