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

ORDER MO-2603

Appeal MA-030268-3

Toronto Police Services Board

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BACKGROUND:

The appellant, who writes for the *Toronto Star* newspaper, has been the lead reporter responsible for the newspaper's investigation into racially-based policing, with the resulting publication of several series of articles over the past decade addressing the subject and related topics.[1] The articles were based, in part, on information obtained from the Toronto Police Services Board (the police) through access requests filed under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*).

NATURE OF THE APPEAL:

The history of this appeal dates back to 2003 when the appellant submitted two requests to the police under the *Act* for access to electronic copies of two databases: the Criminal Information Processing System (CIPS) and the Master Name Index (MANIX) database.[2]

On November 7, 2005, Adjudicator Frank DeVries issued Order MO-1989, ordering the police to extract and prepare the data responsive to the requests. The police sought a judicial review of Order MO-1989. On June 21, 2007, the Divisional Court issued a decision quashing the adjudicator's order. On appeal of this decision by the appellant, the Court of Appeal subsequently overturned the Divisional Court's decision and restored the provisions of Order MO-1989,[3] which required the police "to respond to the appellant's requests by issuing access decisions in accordance with the provisions of sections 19, 21 and 22 of the *Act*…"

At this point, I wish to emphasize that the issues addressed in Order MO-1989 and the subsequent court decisions are not before me in the present appeal. Appeal MA-030268-3 relates solely to the appellant's appeal of the police's decision respecting fee and fee waiver. I will now provide a brief outline of the fee appeal.

Consequent to the January 2009 Court of Appeal decision restoring the provisions of Order MO-1989, the police issued a decision in October 2009 providing access to the records. The decision letter stated, in part:

> Based on the documentation received in this request, the search and production fee for the records requested is $12,450.00. This is based on the search/review time by a technical analyst, including manual data verification and cross-referencing of the raw material.

[1] "Race and Crime" (2002) and "Race Matters" (2010).

[2] Appeals MA-030268-2 and MA-030269-2, respectively. The parties acknowledge that both CIPS and MANIX are now part of the larger Centralized Occurrence Processing System (COPS). In addition, there was a 2008 migration of data from MANIX to a replacement database called Field Information Report (FIR). However, for the purposes of this order, the two databases are most commonly referred to by the original names identified in the 2003 requests (CIPS and MANIX).

[3] *Toronto (City) Police Services Board v. Ontario (Information and Privacy Commissioner)* [*Toronto Police*] (2009), 93 O.R. (3d) 563 (Ont.C.A.); reversing [2007] O.J. No. 2442 (Div.Ct.).

> Search time under the Legislation is $15.00 per 15 minutes of search time. Based on a preliminary review of the time expenditures claimed, a fee has been calculated and attached [Regulation 823 – section 6.5].
>
> As the work has already been completed, full payment is required prior to the release of any data. … Please note that the overall cost includes all extraction, consolidation, confirmation and production of the requested records [emphasis in original].

The attached "Fee Invoice" itemized photocopying, search, preparation and shipping, but only listed charges for search and preparation of 175.5 hours at $60.00 per hour, for a total of $12,450.00. As stated in the decision letter, the police sought full payment of the assessed fee because the work of responding to the request had been completed. Advising the police that he intended to appeal the amount of the fee to this office, the appellant paid the fee and received the records in CD format. In a letter to the police sent in early November 2009, the appellant also requested a fee waiver under section 45(4) of the *Act*, but the police denied the request.

The appellant appealed the fee and fee waiver decisions to this office, and a mediator was appointed to explore the possibility of resolution. During mediation, the police issued a "fee breakdown," outlining the time spent processing the request by a member of the police, who specializes in database manipulation and extraction.[4] When this explanation of the fee was shared with the appellant, he asked that the file be moved to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*.

After the appeal was assigned to me, I started my inquiry by sending a Notice of Inquiry outlining the issues to the police initially, to seek representations. Upon receipt of representations from the police, I sent a complete copy of them to the appellant, along with a modified Notice of Inquiry, seeking his representations in response. Having reviewed the appellant's representations, I decided that I should provide the police with an opportunity to respond to the appellant's submissions on the issue of the police not having provided a fee estimate, in the context of Order MO-2355 (described further below), as well as the grounds for fee waiver. In turn, I provided the reply representations of the police to the appellant for the purpose of sur-reply, and he submitted brief comments to me for this purpose.

DISCUSSION:

PRELIMINARY ISSUE: NO FEE ESTIMATE

The appellant takes issue with the fact that the police did not provide a fee estimate prior to issuing the final decision, to which an invoice for work already completed was attached.

Section 45(3) of the *Act* provides that the head shall give the requester a "reasonable estimate" of the fee to be charged. That section states:

[4] This individual member of the police is referred to in this order as the subject matter expert, or SME.

> The head of an institution shall, before giving access to a record, give the person requesting access a reasonable estimate of any amount that will be required to be paid under this *Act* that is over $25.

Many past orders of this office have discussed the purpose and the value of the fee estimate required by section 45(3) of the *Act*. A fee estimate is intended 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 and MO-2355). The fee estimate also assists requesters to decide whether to narrow the scope of a request in order to reduce the fees (Order MO-1520-I). Further, the institution must include a detailed breakdown of the fee and a detailed statement as to how the fee was calculated (Orders P-81 and MO-1614).

As noted in the introductory section of this order, I asked the police to review the fee (estimate) issue in conjunction with Order MO-2355, a copy of which I sent with the Notice of Inquiry. In Order MO-2355, I permitted the institution to charge the appellant only $25 for processing his request, as a remedy for not issuing a fee estimate prior to providing the records to him.[5] As I explained to both parties at that time, however, while I was seeking representations regarding the possible implications of Order MO-2355 for the present appeal, I am not bound by *stare decisis*[6] and my decision would be based on the specific circumstances of this appeal.

Representations

While conceding that Order MO-2355 and this appeal share the fact of there being no fee estimate provided, the police argue that

> The issue concerning a fee estimate in this instance is structurally based upon a portion of the Order by the Court of Appeal for the [police] to produce records that did not exist, which is contrary to Order MO-2355 where [the institution] provided full access to information … contained within a format readily accessible to the [institution].

The police submit that the fee is based on section 6.5 of Regulation 823 of the *Act*[7] and that:

> there was no feasible way for this institution to estimate the time and therefore the cost in accordance with ss. 45(3) of the *Act*. The resolution asserted through the Court of Appeal's decision, and interpreted by the [police] was to complete the task and apply a fee.

[5] The $25 amount I permitted the institution to charge in that appeal is referable to the maximum fee allowed under section 45(3) of the *Act* without triggering the requirement for a fee estimate.

[6] The doctrine of *stare decisis* refers to the principle of following precedents previously established. This doctrine does not apply to decisions of this office: see *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] S.C.J. No. 75, at p. 27; and *Hopedale Developments Ltd. v. Oakville (Town)* (1964), 47 D.L.R. (2d) 482 (Ont. C.A.)].

[7] Section 6.5 of the Regulation refers to the fees charged "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." This part of the regulation is also addressed further under the fee quantum issue, below.

The police indicate that there was a great deal of consultation between the SME, other police staff, and the appellant to prepare the requested information in the format desired. The police claim that in this context, the appellant was well aware that there would be a large fee, and yet raised the issue of cost only once. More specifically, the police claim that:

> The appellant was provided, at a meeting with Records Management Staff (non-subject matter experts), an informal, premature and genuine guess that it would be similar to the previous cost incurred by the appellant, but "probably higher." The suggested potential fee was verbally provided based exclusively on the appellant's previous request which did not include the MANIX database or the randomly-generated unique numbers. …

Maintaining that it was not feasible to provide an estimate to the appellant, the police refer several times to information contained in a 2004 affidavit sworn by the same detective (the SME) who ultimately performed the necessary work on the two databases to process the request. In the 2004 affidavit, which addresses the "costing involving the same database [CIPS] and same appellant," the SME states that it would take 40 hours to "extract and manipulate" data from the CIPS, one of the two databases requested.

> There was no plausible way for the TPS to provide an **accurate** fee estimate, which was the case in Order MO-2355 where the requested data was readily available to the institution [emphasis added].

The police also offer submissions under the fee estimate heading that refer to the actual costs associated with the legal proceedings far surpassing the fee actually charged, along with the appellant's purported ability to pay. However, these submissions are more properly addressed under the discussion of fee waiver, below, and will not be canvassed further in this section.

The appellant's representations on the fee estimate issue point to the fact that he was not provided "with a reasonable fee estimate prior to the preparation of the requested data." According to the appellant, while he expected that programming fees would be charged, no written estimate of those fees was ever provided, prior to him being given access to the data and simultaneously invoiced for $12,450.00, as was the case in Order MO-2355. The appellant notes that the disparity between the previous verbal estimate of $800 given by the police and the amount ultimately invoiced was "a great surprise." The appellant continues by saying that:

> Given the history of this request, my employer agreed to pay the invoice amount in full, obtain the data and appeal, without knowing exactly what data we would receive. This was not, I submit, an informed decision, but rather one of necessity, due to the fact [that] the data had now clearly been prepared … There was no decision letter spelling out what data would be included or excluded. Despite an open and informal dialogue between police and this requester to hammer out the task at hand – i.e. how police would fulfill the order of the Court of Appeal – I was unaware of what exactly would be released even as I handed over a cheque for $12,450. As it turned out, expected data was missing. As a result of further dialogue and [the] cooperation of [the] police, outstanding data that had been

> expected but not released was released after the initial release, at no additional cost to this requester.
>
> Nonetheless, I submit that this scenario places the adjudicator in a similar situation to [Order] MO-2355, where one must balance an apparent breach of [section] 45(3) with the user-pay principle in [section] 45(1). The fee should be waived or reduced.

In reply representations, the police note that the appellant concedes that programming fees were expected, but they give a different characterization of the fee for the "previous similar request for arrest data" than the appellant. Specifically, the police indicate that the appellant was charged a total of $7,793.33 (for two requests) and state that although the police:

> … later reached an agreement for a lesser sum for those particular requests doesn't alter the fact that the indication the [police] gave was that the amount **charged** would be similar, and in fact probably higher than the previous request. The fact that the [police] agreed to accept much less than the actual cost of these past requests, due to the circumstances in those particular cases, does not mean that it must charge less than the amount due under the *Act* in this case. The appellant would have been well aware that the current request was going to involve more time and money than the previous ones.

The police also dispute the appellant's assertion that he felt compelled to pay for the data produced "without an opportunity to ponder an accurate fee estimate."[8] The police claim that the October 22, 2009 decision letter was "a fee letter" that the appellant knew, or ought to have known, was coming and that he could have refused to pay, narrowed the scope of the appeal, or appealed at that point, rather than paying the fee. The police state that the appellant knew the fee that was being charged before he asked for the data to be delivered. Further, the police submit that:

> The only prejudice suffered would be the [police's], if the fee were waived or reduced. Having done all of the work, in consultation with the appellant, having told the appellant what the cost would be before any data was delivered, the [police are] now faced with the appellant taking the data and attempt[ing] to argue that he should have to pay nothing. Surely an estimate is no more or less than an indication of what the cost will be, which he was given, **before** he was given access to the records [emphasis in original].

According to the police, as the appellant was involved in ongoing discussions for the processing of the data, he "could have asked for an earlier rough estimate [if he was concerned about fees], though he would have known that it could not have been accurate at that time." Following a lengthy excerpt from Order MO-1520-I, the police maintain that the appellant could not have been taken by surprise by the amount of the fee, even without a fee estimate, and so in the absence of prejudice to him, he should therefore still be required to pay the full invoiced fee. The

[8] The appellant's reference to paying "without an opportunity to ponder an accurate fee estimate" appears under his submissions on the financial hardship basis for fee waiver, at page 3 of the initial representations.

police note that in Order MO-2355, this office found that it was not appropriate to ask the appellant to return the records pending resolution of the fee dispute and they point out that they had suggested to the appellant that he not take the records until payment was "sorted out." In concluding its reply representations on this issue, the police insist that they "clearly gave an estimate – an exact number in fact – before giving access to the record."

The appellant's sur-reply representations address the reply representations of the police as they refer to "expectations" he may have had about the fee charged. He states:

> Whether I knew or not that [the] police were working on compiling the data for months is in my view irrelevant as to my understanding of what the fees might be.
>
> [The] police point to two fee amounts related to a 2000 FOI request that was for similar data to this request. After a [thorough] review of my files … I was unable to locate any correspondence that mentions that I was "charged … a total of $7,793.33." It may be possible that these figures were arrived at internally but not shared with me. The only figure I have on record is the $800 actually charged for the data. … I was aware that because of the length of time that first request took, that the fee had been reduced. I have no recollection of ever hearing what the cost could have been.
>
> I did locate other fees that police sought to charge early in the 2000 request, including one for more than $7,440.06 for a list of database names. Upon appeal, the fee was reduced to $20.60 in photocopying fees. It may be that the figures [the] police cite are related to earlier phases of the original FOI request but, as stated, I cannot find reference to the actual figures cited.
>
> Regardless, I was expecting the fees in the neighbourhood of what was actually charged, which was $800. I was indeed genuinely surprised by the fees in this request. Again, there was no traditional fee estimate.

Analysis and Findings

It must be recognized that the circumstances surrounding this appeal are unusual, in view of lengthy intervening court proceedings between the parties which were ultimately resolved by the Court of Appeal decision restoring the original provisions of Order MO-1989. Notwithstanding this history, however, I agree with the appellant that there was no "traditional," or any, fee estimate provided to him by the police. Accordingly, and for the reasons that follow, I find that the police have failed to comply with section 45(3) by providing the appellant with "a reasonable estimate of any amount that will be required to be paid" under the *Act*.

As noted previously, I drew the attention of the parties to Order MO-2355 for the purpose of eliciting representations from them on the discussion contained therein regarding the issues shared by the two appeals. In that order, I set out an excerpt from Order PO-2299, in which former Assistant Commissioner Tom Mitchinson described the balancing of interests inherent in the fee structure outlined in section 45 of the *Act*, taken together with Regulation 823:

> The purpose of the fee estimate, an interim access decision and deposit process is to provide the requester 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.

The police have pointed out, correctly I believe, that they were operating under a directive – from the Court of Appeal – to process the request and "apply a fee." To this extent, the circumstances of the present appeal vary from those contemplated by the former Assistant Commissioner in describing the *usual* balancing of interests respecting fees to be charged under the *Act*. In my view, however, this is where the distinguishing features of this appeal end. There was nothing about the Court of Appeal's decision that could have, or did, excuse the police from abiding by the mandatory fee provisions contained in the *Act*, including their obligation to provide the appellant with a fee estimate. Furthermore, I am not persuaded by the arguments presented by the police that providing the fee estimate required by section 45(3) was either impossible or implausible.

A number of arguments were offered by the police in an effort to substantiate the alleged impossibility or implausibility of providing the appellant with a fee estimate in the circumstances of this appeal. The police suggest, for example, that "an estimate is no more or less than an indication of what the cost will be, which [the appellant] was given, **before** he was given access to the records [emphasis in original]." The police also argue that "there was no plausible way for the TPS to provide an **accurate** fee estimate, [unlike] Order MO-2355 where the requested data was readily available to the institution [emphasis added]." I reject both of these arguments.

First, an estimate is *not* "an indication of what the cost **will** be [emphasis mine]." In this context, in my view, an estimate is an approximation of the fee that will be charged for the actions carried out in section 45(1) of the *Act*, roughly calculated using rational or logical procedures, and in consideration of the amounts for each of the actions that are permitted by Regulation 823.

Second, section 45(3) does not require that the estimate be accurate. It need only be *reasonable*. In their representations in this appeal, the police twice set out the [same] excerpt from the 2004 affidavit of the SME responsible for processing the data relating to one of the databases at issue. This individual estimated, and the language of the affidavit reflects that it was an estimate, that it would take 40 hours to extract and manipulate the requested data from CIPS. Yet the police do not appear to have considered that a "reasonable" fee estimate could have been based on an extrapolation of this very same information to account for both CIPS and MANIX being involved, as well as the required anonymizing of the data. Instead, this affidavit is presented in support of an argument that the appellant's expectations of a fee in the range of $800 were unreasonable.

The police also refer to fees charged to process similar requests in the past and argue that "the fact that the [police] agreed to accept much less than the actual cost of these past requests … does not mean that it must charge less than the amount due under the *Act* in this case." The fees in these past requests are also the subject of some dispute between the parties since the appellant indicates that he was, in fact, *not* aware of the other, larger, fees not ultimately charged to the

Toronto Star. Regardless, even if I were to accept for the sake of argument that the appellant ought to have been aware that processing the requested data would involve more time and effort in this instance, it is no answer to the mandatory fee estimate requirement in section 45(3) to point this out. Section 45(3) does not demand "reasonable" expectations on the part of an appellant regarding fees. Very clearly, the obligation under section 45(3) rests with the institution to provide "a reasonable estimate of any amount that will be required to be paid under this *Act*;" and it remains the case that the police failed to provide the requisite fee estimate to the appellant in this appeal.

I must now consider whether or not to order a remedy to address the failure of the police to comply with section 45(3) of the *Act*. As the police point out, Adjudicator Liang did not order a remedy in the circumstances of Order MO-1520-I. However, both that decision and Order MO-2355 contemplate that there may be situations in which a failure to provide a fee estimate may warrant a remedy based on prejudice to the appellant.

In support of their position that the appellant did not suffer prejudice from the lack of a fee estimate, the police quote from Order MO-1520-I, an order to which I also referred liberally in Order MO-2355. Specifically, the police highlight the portions of Adjudicator Liang's reasons describing her finding that the appellant did not suffer prejudice through the lack of an early fee estimate in that appeal, such as the absence of surprise, his awareness of the scope of the request and the possibility of narrowing its scope. As the police acknowledge, Adjudicator Liang concluded that there had been no prejudice and instead determined that the mandatory fee recovery provisions in section 45(1) must be given effect.[9]

On my consideration of the facts of this appeal, I am of the view that there is at least an arguable basis upon which I could find that the appellant has experienced prejudice as a consequence of the failure by the police to provide a fee estimate pursuant to section 45(3). The police claim that their "October 22, 2009 decision letter was 'a fee letter' that the appellant knew, or ought to have known, was coming and … he could have refused to pay … or appealed at that point, rather than paying the fee." In my view, prejudice lies in the spectre of the delay in receiving the data that would have been brought about by an appeal of the police's failure to provide the fee estimate *at that time*. After all, in the industry in which the appellant and his employer operate, it is often said that "news is news precisely because of its immediacy."[10]

Notwithstanding the possible prejudice to the appellant discussed above, however, I have concluded that other considerations militate against a finding that I should order some form of redress for the breach of section 45(3). It must also be acknowledged that the court proceedings, though they may have been initiated by the police, did dictate aspects of the eventual processing

[9] It should be noted, however, that in Order MO-1520-I, Adjudicator Liang considered the issues in a different order than I have chosen in this appeal: she reviewed the fee estimate issue after she had already determined that the quantum of the fee should only be partly upheld.

[10] "News is news precisely because of its immediacy. It is for the public and journalists, not legislators, prosecutors and judges to decide when information (especially truthful information regarding public events involving judicial institutions of government) is sufficient newsworthiness to warrant immediate publication" (per David Lepofsky "Open Justice" p. 242): cited by Kovacs J. in *R. v. Bernardo [Publication ban - Proceedings against co-accused] Between Her Majesty The Queen, and Karla Bernardo also known as Karla Teale*, [1993] O.J. No. 2047. This same principle was also addressed by Abella J. (in dissent) in *R. v. Bryan* 2007 SCC 12.

of the request. Further, the appellant appears to have been an active participant in discussions and consultations with the police in the months between the Court of Appeal decision and the date the decision letter was sent to him, notifying him of the fee. Furthermore, on balance, I am satisfied that the appellant's concerns about fees in this matter are adequately accounted for under my review of the quantum of the fee levied by the police under section 45(1) and Regulation 823. Accordingly, I find that even though the police failed to provide a "reasonable estimate" under section 45(3) of the *Act*, they are not precluded from recovering the fees I have found to be reasonable in the next section of this order.

FEE

This office may review an institution's fee and determine whether it complies with the fee provisions in the *Act* and Regulation 823. Section 45(1) requires an institution to charge fees for certain activities undertaken to process requests under the *Act*. Section 45(1) states:

> 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. The relevant sections for this appeal 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:
>
> 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.

The appellant challenges the amount of the fee assessed (and paid), which the police indicate was based on the number of hours worked by the SME to comply with the request. This individual's efforts are described by him in an attachment to the initial representations provided by the police, titled "Outline of Search/Preparation and Production of Data."[11] The "breakdown" of the fee prepared by the police during the mediation stage of the appeal states:

> The following represents the fee breakdown based solely on the hours spent by one member of the [police], specializing in CIPS manipulation and extraction. This same member was instructed to produce the records outlined in Order MO-1989 for the MANIX/FIR databases as well as those for CIPS. …
>
> The following [chart] demonstrates hours worked strictly on "overtime" by one member of the Intelligence Section of the [police]. Overtime is paid to members as time and a half. The below chart depicts as such.

There are two charts, each featuring columns labelled "Month – 2009," "Actual Hours," "Paid O.T. Hours" and "Total." The first chart represents the hours on the "original Fee Invoice" and the overall total number of hours is 175.5 (the sum of hours in the "Paid O.T. Hours" column), charged at $60.00 per hour. The second chart represents "Additional hours not captured on the original Fee Invoice," and it records 32 hours in the "Actual Hours" column, charged at $60.00 per hour. These charts represent the 207.5 hours charged at $60.00 per hour to the appellant for a total of $12,450.00.

The police submit that 10% of the SME's time was spent "cross-checking and searching" the data, while 90% of the time involved (direct quote):

- preparation of individual programs used to extract, clean and manipulate the information into the format used to feed the data into the main system/program;
- ingestion of the data into the main system necessitated a separate extraction of the data in order to programmatically create the unique identifying numbers. This ensured that personal information (for example, arrest and case numbers) was not inadvertently released;
- the unique identified numbers then had to be mapped and connected to the original numbers to ensure accuracy of the generated numbers;
- program writing to ensure formatting was suitable for ingestion into the main system; and
- to ensure programs are running correctly, codes were written to clean the data and then run subsets. The data was then tested to filter out any missed data.

[11] The attachment contains four appendices: Appendix A: Sample Tag Table for CIPS; Appendix B: Sample UMF Record; Appendix C: MTP Cleansing Function; and Appendix D: Address Enhancement.

Representations

The police submit that because calculating the "actual amounts of time taken for each action throughout this process" was highly challenging, providing "a specific description of each action with the exact hours allotted to that action is difficult." As I understand it, this explanation is offered to justify the absence of specific time allotments in the fee "breakdown" and the use of percentages instead.

Under the heading "Search – section 45(1)(a)," the police explain that the requested data exists in CIPS and MANIX, two databases that are exclusively in the possession of the police. The police state that:

> To create randomly-generated unique numbers for each individual entered into both CIPS and MANIX, an experienced programmer and member of the Intelligence Unit [the SME] made multiple attempts to ensure non-sequential and non-producible numbers were generated. These non-sequential numbers had to then be verified as unique in order to eliminate the possibility of tracing the number back to an individual. This ensured anonymity pursuant to the *Act*.

Regarding preparation for disclosure under section 45(1)(b), the police indicate that the appellant was not charged preparation time for the use of Entity Analytics[12] "as this is a program/system that will be used by the [police] in the future." However, according to the police, since

> a randomly-generated, unique number did not exist for each individual entered into the CIPS and MANIX application databases[, it] was only with the assistance and direction of the appellant that the data was released in the format set out. As such, the "manual data verification" noted by the appellant was not "assembling information and proofing data" as suggested.

The police submit that because the unique identifier that had to be created for each individual in this matter was the "key ingredient," it would be "absurd" not to allow time for the data verification function to ensure the accuracy of that identifier. The police also submit that:

> In the Court of Appeal's final ruling, the [police were] ordered to produce the records that in fact, could pose an unjustified invasion of personal privacy. These necessary confirmation and compliance checks were applied throughout the process and therefore charged to the appellant. Again please refer to [the] Detective's … breakdown for the details of this process.

[12] As noted, the Entity Analytics System (or EAS) is described in the SME's attachment as the "software used to identify the individuals in the data set and assign a unique number to them." Entity Analytics is software created by IBM that is used by law enforcement agencies in Canada and the U.S. to avoid duplication of individuals in databases that may result from clerical errors and the entry of unverified information by police. Source: http://www.itworldcanada.com/news/bc-police-fight-crime-with-ibm-entity-analytics/141812 ("BC police fight crime with IBM entity analytics;" by Kathleen Lau for ComputerWorld Canada; posted 26 Oct 2010), as reviewed by adjudicator.

I asked the police to respond to the appellant's question (in his appeal letter) about whether the police were able to use SQL (structured query language) to extract the relevant data or were instead required to develop a specific computer program. The police submit that while SQL was used in the "initial phase of this process, it was not charged to the appellant." However, the outline prepared by the SME to explain his work to process the request suggests differently. The SME's outline begins with the following:

> In addition to the SQL statements required to select the appropriate records from the requested databases several computer programs were required to transform the extracted data into a useable format called a Universal Message Format (UMF). The data had to be transformed in order that it could be loaded into Entity Analytics System (EAS) which was the software used to identify the individuals in the data set and assign a unique number to them. …
>
> … Steps were taken to ensure that the process was extendable and repeatable so that the individual programs could be run in series where appropriate. It was also designed to allow for easy adaption of the columns selected for export to EAS. This included the ability to apply rules to any individual data item (column) in order to address data cleansing and formatting.
>
> As this process had not been performed before … in addition to writing the programs necessary time was required to design the solution. The design time was not extensive but amounted to approximately 1.5 days of the billed effort.

The SME then describes processes to assess the data for the purpose of determining the need for data cleansing,[13] as well as testing the building of the UMF data. According to the SME, the need for data cleansing, and corresponding programming efforts, was particularly high for certain types of data, such as fingerprint records, due to broader variability in data entry format by attending officers. The SME also describes the process of assigning the unique identifier to meet the request's parameters: following data ingestion (i.e. loading), "EAS grouped records relating to a specific individual to a single unique ID;" "Once extracted, the identifying numbers … were replaced by randomly generated unique IDs." According to the SME, SQL queries were written to replace the original source IDs with Pseudo IDs in each of the data sets requested. Finally,

> Once the IDs were replaced it was necessary to check that they were creating the correct relationships between the tables being released to the requester. This was done to ensure that the work done in creating these records and unique IDs for the requestor accurately represented the data in the source systems.

Nothing further from the attachment to the police representations prepared by the SME is reproduced in this order; however, I have reviewed and considered the descriptions, charts and "code snippets" provided in his submission, as well as in the appendices, in their entirety.

[13] Data cleansing is carried out to correct or remove incomplete or inaccurate records from a record set, and replace, modify or delete the "dirty" data.

Respecting the fee calculation, the appellant takes issue with the police allotting 10% of the fee to the action of "cross-checking" or proofing the data. He also notes that of the other 90%, "an unknown amount of that time was also spent proofing or cleaning" and this, he submits, is not recoverable under the *Act*, according to Order M-1083. The appellant questions how much of the data cleansing and verification was "necessary" to ensure accuracy with respect to the unique identifiers produced. An example given of what the appellant suspects may be unnecessary (and should not have been charged for) relates to the possible use of street addresses to create or cross-check the identifiers. The appellant notes that this data was not requested and was not included in the records produced.

Noting that the police suggest that the creation of the unique identifiers required "significant effort," the appellant submits that because the MANIX identifiers do not link up with those created for FIR or CIPS, no programming charges should be permitted for that portion of the effort. The appellant also states:

> On the SQL issue raised by me in the appeal, police in their representations have shared other methods used to query, match and manipulate data. The police used UMF formatting and VBScript, the latter a language developed by Microsoft and native to Microsoft programs for more than a decade. Both of these methods are common. I raise this only to ensure that the IPC is not left with the impression that unusual methods were used to prepare the data.

In their reply representations, and with reference to the appellant's expressed concern about "cleaning and data verification" related to street addresses, the police explain that street addresses were required to identify that an individual in a record was not the same as an individual appearing in another record. The police maintain that these efforts were required to comply with the request, but they state that no programming efforts to link databases were made, or charged to the appellant.

In sur-reply, the appellant acknowledges that he has "no means of disputing what [the] police state in their representations" regarding the testing, cleansing, extraction and anonymizing of the data. However, he submits that his questioning of the fee quantum is based on concerns about "whether programming fees should apply to all of the work" carried out by the police in fulfilling the request.

Analysis and Findings

This appeal raises a number of questions about the quantum of the fee levied by the police that are not easily resolved. I accept that apportioning, or even estimating, a specific number of hours for each of the activities carried out by the SME and described in the bulleted list of the "fee breakdown" would have been challenging, as the police claim, given the history and circumstances of this appeal. However, the lack of specificity in the number of hours, combined with activity descriptions that appear, in some respects, to overlap with one another, contributed to what was bound to be a challenging review of the fee's reasonableness in the first place.

As a preliminary consideration, I note that the police have based their fee on the number of hours worked by the SME to prepare and produce the data requested on an *overtime* basis. In my view, there is neither precedent nor any reasonable basis upon which a requester should be required to pay for hours calculated at anything other than the rate provided by the *Act* and regulations. Accordingly, my review of the fee will be based on the numbers found in the "Actual Hours" column of each of the charts provided, which is 117 plus 32, for a total of 149 hours. With respect to this number, I am prepared to accept that the SME put in 149 hours to process the data for the appellant's use.

The next aspect of my review of the fee in this appeal involves considering the nature of the SME's activities as they have been described to determine the correct charge for those activities under the *Act*. In other words, I must determine whether the 149 hours should be charged at $60.00 per hour as "developing a computer program or other method of producing a record from machine readable record" under section 6.5 of Regulation 823; at $30.00 per hour under other parts of section 6 of the Regulation; or, indeed, at any amount at all.

In any event, as indicated previously, the appellant argues that some of the identified activities do not amount to "computer programming" within the meaning of section 6.5 of Regulation 823, either because they involve the use of SQL, or because the police were merely using a widely available pre-packaged software to carry out the task. For the reasons that follow, I agree with the appellant. Furthermore, the extent to which SQL was used and possibly charged to the appellant (as programming) is a matter that I am unable to resolve on the evidence before me, not only because specific hours are not given, but also because the information provided on the subject in the police's written representations does not appear to be entirely in accordance with that given in the SME's attached outline.

Other adjudicators from this office have been faced with the task of parsing out the difference between computer programming and the use of SQL, and how these activities should fit within section 6.5 of Regulation 823. In Order MO-1456, for example, Adjudicator Dawn Maruno described the situation before her as follows:

> Unlike records in a paper format, the records in this appeal are stored electronically. As a result, a manual search for the records was not required since all the requested information is located in one database. However, to prepare the records for disclosure, the City had to extract the relevant information from the database, and create a new record with that information. Since the database contained information other than what was requested, the City had to find a way to extract what was relevant. The City has charged on the basis of its having developed a computer program to extract the information.

She then described her understanding of the difference between a computer program and a database query in this way:

> A computer program and a database query are similar in that each is a set of instructions in programming code telling the computer to do something. However, as a general rule, a computer program is capable of very complex

> procedures while a query utilizes simple commands. The development of a computer program is a complicated process utilizing high-level computer language, while the development of a query is comparatively straightforward. In this appeal, the City had to extract four data fields from a larger database.
>
> The City used the word "query" and not "computer program" to describe the activity it undertook to extract the responsive information from the database. Although the language used is not determinative of the activity, I am satisfied that the work undertaken by the City is more like the development of a query than a computer program.
>
> The City submits that "the end results are the same" whether you use a computer program or a query. Although this may be true, it is a question of choosing the right tool for the job. In the same way that a farmer would not use a backhoe where a shovel would do, a programmer would not develop a computer program where a database query would work. If a programmer chooses the more difficult and expensive approach, it would not be reasonable to pass on these higher costs when a more cost effective method would have sufficed. Accordingly, I find that the City can charge at the rate allowed for preparing a record for disclosure and not at the rate to develop a computer program.

The issue of the distinction – for fee purposes – between a computer program and a query was considered more recently by Adjudicator Catherine Corban in Order MO-2071, where she took a slightly different approach to the matter. In that appeal, Adjudicator Corban wrote:

> The appellant argues that the work required to be done to respond to his request does not amount to "computer programming" but is more of a "query" for which he should be charged the regular search fees of $30 per hour for "preparing a record for disclosure" under paragraph 4 of section 6 of the Regulations, rather than the computer programming fees of $60 per hour under paragraph 5 of section 6. In his representations, the appellant makes brief mention of Order MO-1456.
>
> In Order MO-1456, based on the representations before her, Adjudicator Dawn Maruno found that the City of Hamilton could not charge the computer programming fee of $60 per hour for developing "queries" to extract responsive information from a database. Adjudicator Maruno identified the difference between a computer program and a database query and stated "the development of a computer program is a complicated process utilizing high-level computer language, while the development of a query is comparatively straightforward". While she acknowledged that "the language used is not determinative of the activity" she was of the opinion that the work undertaken by the City in that appeal was more like the development of a query than a computer program.
>
> However, in the circumstances of this appeal, I am satisfied that the Police can properly charge the amount of $60 per hour as set out in paragraph 5 of section 6 of Regulation 823 for the identified work. Paragraph 5 establishes the fee for

> "developing a computer program **or other method of producing a record from machine readable record**" [my emphasis]. Although, in Order MO-1456, Adjudicator Maruno did not address the "other method of producing a record" component of paragraph 5 of the fee schedule, in my view, it is significant and relevant to the current determination. **As described by the Police in their representations, their database does not record the information sought by the appellant in the manner requested, and a way in which to extract the information must be developed by technical personnel. … Regardless of whether the work which must be done to extract the responsive information can be defined as computer programming or not, in my view, it clearly constitutes another "method of producing a record from a machine readable record"** [emphasis added].

I have considered the analysis provided by Adjudicators Maruno and Corban in Orders MO-1456 and MO-2071 in reaching the following conclusions about the fee in this appeal. Using the activity descriptions provided by the police, I will now review each of these activity sets in turn.

Prepare programs to extract, clean and manipulate the information into the format used to feed the data into the main system/program

Based on the evidence provided by the police, including the SME's outline of his efforts, I am satisfied that the police are entitled to charge programming fees under section 6.5 of the Regulation for the development of programs for data cleansing, as well the rendering of unique identifiers. Respecting the data cleansing, I am satisfied by the SME's evidence that this required him to develop a program, or programs. Further, I note the SME's indication that SQL queries were written to replace original source IDs with psuedo IDs for each of the data tables received by the appellant, and I accept that this constitutes another "method of producing a record" for the purpose of paragraph 5 of section 6 of Regulation 823 (see Order MO-2071).

Further, I am also persuaded, based on the description provided by the SME that the creation of the Visual Basic application to test the UMF data qualifies as a programming charge under section 6.5 of Regulation 823.

In the SME's outline, he refers to having spent a day and a half (which I interpret to be 12 hours)[14] to "design the solution." I see no reference in the list of activities described in the "fee breakdown" to anything resembling solution design. However, in my view, the SME's efforts to conceptualize the software architecture prior to developing the programs required to process this request also fit within the scope of section 6.5 of Regulation 823 (Order MO-2071). Accordingly, I find that all of the activities referred to above may be charged at the fee set by section 6.5 of Regulation 823, or $60.00 per hour.

[14] Indeed, this is the only reference I could find in any of the outline or representations that specifically allots a time to an activity for processing the CIPS and MANIX data for this request.

Ingestion of the data into the main system by extracting the data to 'programmatically create' the unique identifying numbers and ensure no personal information was released

With respect to data ingestion, "programmatically" creating unique numbers, and ensuring no personal information was released, I have concluded that the activities as described under this heading duplicate, in part, activities already identified under the first bullet point in the list. First, I have already allowed the police to charge $60.00 per hour for developing a program or programs to create unique identifiers, as this activity was outlined under the first bullet point. Moreover, as I understand the term, "ingestion" involves the running of a computer program to take in data and process or organize it for use. In my view, this is not recoverable under the *Act* because it neither qualifies as "developing a program or other method" as contemplated by section 6.5 of Regulation 823 nor as preparation under section 6.4 of the regulation. Accordingly, I will disallow a portion of the overall fee claimed for ingestion, as claimed under this heading.

As for ensuring that personal information was not released by carrying out "confirmation and compliance checks," I am not persuaded that this is an activity that amounts to developing a computer program or another method of producing the records for the appellant. Rather, I find that this activity is akin to severing a record for disclosure and therefore constitutes "preparation" under section 45(1)(b) of the *Act*. Accordingly, the activity falls under paragraph 4 of section 6, which is charged out at $30.00 per hour.

Mapping and connecting unique identified numbers to the original numbers to ensure accuracy

The police argue that it would be "absurd" not to permit charging the appellant for the data verification function described in the representations which, the police submit, was necessary to ensure the accuracy of the identifier required to comply with the appellant's request. In a certain sense, data verification is similar to data cleansing because both activities are aimed at ensuring the accuracy of the data set. However, in my view, the similar purpose of the activities does not bring manual data verification within the scope of section 6.5 of Regulation 823 because it requires neither programming nor another method of producing the record. Rather, my understanding is that the described "mapping and connecting" of the unique identifiers for the purpose of ensuring accuracy takes place following the generation of the data sets. Accordingly, based on my consideration of the SME's evidence, I have concluded that the police are entitled to charge a fee for this data verification function, but not under section 6.5 of Regulation 823. I find that this activity is properly characterized as a cost of preparing the record for disclosure under section 45(1)(b) of the *Act*, and I will permit the corresponding fee of $30.00 per hour under section 6.4 of Regulation 823 for it.

Program writing to ensure suitable format for ingestion into the main system

As it has been described by the police, I am not satisfied that the activity featured in the fourth bullet point adds anything new to the activities described under the first bullet point. Since I have already allowed the police to charge fees for "developing a computer program or other method of producing a record" under section 6.5 of Regulation 823 for certain, identified program writing, I will not allow the police to charge additional programming fees under this particular bullet point.

Write data-cleaning codes, run subsets, test and filter data to ensure programs are running correctly

Again, in my view, the activities captured by this description partially duplicate others listed before them. I have already indicated that I will permit the police to charge fees under section 6.5 of Regulation 823 for data cleansing (or data cleaning). However, the *Act* does not permit charging fees for "running subsets," "testing," or "filtering" data. Further, I note that the SME acknowledges that the Visual Basic application he created to test the UMF data was used for this purpose and was left to run "completely unattended."[15] Previous orders of this office have established, and I agree, that time spent by the computer to compile or process data is not chargeable under the *Act* (see Orders M-1083 and MO-1456). Accordingly, I find that the activities described under this bullet are either already accounted for in the programming fees allowed above, or not allowable at all.

Cross-checking and searching: the remaining 10% of the fee claimed

Respecting the SME's time spent "cross-checking and searching" the data, I find that this activity does not fit within section 6.5 of Regulation 823. In my view, this activity does not amount to developing a "computer program" or developing another "method of producing a record," as contemplated by that provision. Furthermore, in my view, this activity appears to resemble the manual data verification activity described under the third bullet point in the separate list. Accordingly, I find that it fits within section 6.4 of Regulation 823 and may be charged out at $30.00 per hour.

Conclusions about fee apportionment

Although the police submit that the activities described in the five-point bulleted list account for 90% of the SME's time, with "cross-checking and searching" accounting for the remaining 10%, I have concluded that it would not be practicable to use these rough percentages in reaching my conclusions about apportioning the fee. Furthermore, I am not convinced that it would be appropriate to impose a mechanical calculation involving, for example, the attribution of 18% of the total fee to each of the five bullet points to reach the 90%. Rather, on review of my findings with respect to each of the bullet points, I am of the view that imposing such a calculation would be artificial and would also not result in a "reasonable" fee under the *Act* and Regulation 823, at least in part because I have discounted many of the activities described as duplicates of those described elsewhere. Indeed, in my view, the unfairness of this type of apportionment (to the police) would be particularly pronounced because I have found that the programming fees described under the first bullet are permissible there, but not where reference to that same programming activity is duplicated in the other bullet points.

Instead, based on the totality of the evidence before me, especially the evidence provided by the SME, I find that sections 45(1)(b) and 45(1)(c) of the *Act* and sections 6.4 and 6.5 of Regulation 823 support the police charging the appellant for the SME's time as follows:

[15] On page two of his "Outline of Search/Preparation and Production of Data."

- 65% of the 149 hours (or 96.85 hours) as "developing a computer program or other method of producing a record" under section 6.5 of Regulation 823 at $60.00 per hour, which amounts to $5811.00;
- 25% of the 149 hours (or 37.25 hours) as "preparing a record for disclosure" under section 6.4 of Regulation 823 at $30.00 per hour, which amounts to $1117.50;
- 10% of the 149 hours (or 14.9 hours) represents the time for which I will disallow the charging of a fee because the activities falling into that portion of the fee, such as the unattended computer run-time, are not chargeable under the *Act* and regulation.

Accordingly, I will permit the police to charge the appellant a fee of $6,928.50 for taking the necessary steps to process this request. Subject to my discussion of the fee waiver issue, therefore, this finding requires the police to refund the amount of $5521.50 to the appellant. I will now consider whether a fee waiver is warranted in the circumstances of this appeal.

FEE WAIVER

Section 45(4) of the *Act* requires an institution to waive fees, in whole or in part, in certain circumstances. The relevant parts of this provision for this appeal state:

> 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:
>
> (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; …

Section 8 of Regulation 823 sets out additional matters for a head to consider in deciding whether to waive a fee, and this includes whether the person requesting access to the record is given access to it (see section 8.1).

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).

The 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. On appeal of the decision by an institution to deny a request for a fee waiver, in whole or in part, I may uphold or modify the institution's decision (Orders M-914, P-474, P-1393 and PO-1953-F).

Preliminary Issue – Estoppel

As a preliminary matter respecting the fee waiver issue, I must address the submission by the police that the appellant "ought to be estopped from arguing that the fee should be waived." As I understand the argument, it is rooted in the following excerpt from the Court of Appeal decision, as set out in the representations submitted by the police:

> Assuming that [the appellant] is willing to pay the costs prescribed by Reg. 823 in relation to developing the computer program needed to collate and anonymize the information he is seeking, the definition of "record" in s. 2(1)(b) presents no obstacle to his requests.[16]

In their reply representations, the police make reference to estoppel for the first time. The police submit that:

> Estoppel occurs where one party by its words or conduct, makes a promise or assurance which is intended to effect their legal relations and to be acted upon. Once another party has taken him at his word and acted upon it, the one who gave the promise must abide by it.
>
> … In this case, the requester knew that there was going to be a significant amount of time and effort required to produce the records. He also knew that the exact time and effort could not be determined, given that there were ongoing consultations. When the material was available, he was told [the fee]… Although questioning the amount of the fee is his right, he is estopped from arguing that there ought to be no fee or from arguing that the fee should bear no relationship to the amount of work actually involved. … He is estopped from arguing anything other than that the fee should be reasonable based upon the time invested.

I reject this submission by the police. The fee waiver provisions in section 45(4) of the *Act* are mandatory. The appellant is entitled to request a fee waiver and the police are, in turn, statutorily obligated to waive the fee under section 45(4) of the *Act* if certain conditions are satisfied.

Furthermore, and aside from the mandatory nature of the fee waiver provisions in section 45(4), I find that the principle of issue estoppel is inapplicable in the present appeal. The principle was recently discussed in the Ontario Court of Appeal case, *Penner v. Niagara (Police Services Board),*[17] where the court explained that issue estoppel is intended to prevent the re-litigation of an issue that a court or tribunal has decided in a previous proceeding.

In that appeal, the Court of Appeal considered the lower court's decision respecting the Niagara Police's efforts to estop an individual from including issues decided in a disciplinary hearing under the *Police Service Act* in a related civil action he had initiated against the same police officers. At paragraphs 23 and 24, the court explained how the police could successfully invoke the doctrine of issue estoppel and thereby succeed in their application:

[16] *Toronto Police*, *supra* footnote 3, at paragraph 60.
[17] 2010 ONCA 616.

> [The police] must show three things:
>
> (i) the same question was decided in the disciplinary proceedings;
> (ii) the judicial decision said to create the estoppel is final; and
> (iii) the parties, or their privies, to the judicial decision are the same persons as the parties, or their privies, to the proceedings in which the estoppel is raised.
>
> Even if these three requirements of issue estoppel have been met, the court retains the discretion to refuse to apply it if doing so would be unfair or work an injustice. See *Danyluk* … and *Minott*.[18] …
>
> Once a court is satisfied that the three requirements of issue estoppel have been met, the court must then decide whether to exercise its discretion not to apply it. This discretion exists because issue estoppel is intended to achieve a just result between the parties. Before applying issue estoppel a court should ask itself: "is there something in the circumstances of this case such that the usual operation of the doctrine of issue estoppel would work an injustice?" The court's discretion is case specific – it "must respond to the realities of each case." See *Schweneke*…[19]

In my view, based on my reading of *Penner*, it is plain and obvious that the issue of the appellant's entitlement to a waiver of the fee levied for the processing of his access request has *not* been decided in any other court or tribunal proceeding. Thus, the police's claim that the appellant is estopped from arguing this issue by his past actions – there being no other proceeding referred to by them – fails to satisfy the first requirement (set out above) for applying the doctrine. In this context, therefore, I find the submission that the appellant ought to be prevented from seeking a fee waiver, or that he is estopped from "arguing anything other than that the fee should be reasonable," is without merit. Moreover, even if the three criteria outlined in *Penner* were satisfied on the facts of this appeal, I would question whether applying the principle here would "achieve a just result between the parties." In my view, the concerns expressed by the police about the fairness of the appellant seeking a fee waiver are adequately addressed under the review of the second part of the fee waiver test, that is, whether it would be "fair and equitable" to waive the fee in the circumstances.

As I have not been persuaded by the police that the doctrine of issue estoppel applies, I find that the appellant's request for a fee waiver is not precluded by the operation of issue estoppel or by any of the findings or comments of the Court of Appeal in *Toronto Police*, cited above.

Review of fee waiver decision

To begin, there are two parts to my review of the police's decision under section 45(4) of the *Act*. I must first determine whether the appellant has established the basis for a fee waiver under the

[18] *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460*; Minott v. O'Shanter Development Co.* (1999), 42 O.R. (3d) 321 (C.A.).
[19] *Schweneke v. Ontario* (2000), 47 O.R. (3d) 97 (C.A.), cited at paragraph 38 of *Penner, supra*.

criteria listed in subsection (4). If I find that a basis has been established, I must then determine whether it would be fair and equitable for the fee to be waived.

The burden of proof for establishing that its fee is reasonable and is calculated in accordance with the relevant provisions in the *Act* and regulations rested with the police. In the case of my review of the request for a fee waiver, however, the burden of proof rests with the appellant.

The appellant relies on sections 45(4)(b) (financial hardship) and 45(4)(c) (dissemination of the information will benefit public health and safety) in support of the request for a fee waiver. Accordingly, I must first determine whether the appellant has established the basis for a fee waiver under either of these sections.

Part 1 basis for fee waiver: financial hardship – section 45(4)(b)

In bearing the burden of proof to establish financial hardship under section 45(4)(b), the appellant must 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 and P-1393). The fact that the fee is large does not necessarily mean that payment of the fee will cause financial hardship (Order P-1402).

Representations

In the initial request for a fee waiver on the grounds of financial hardship, the appellant argues that the large fee in this matter amounts to a deterrent or barrier to access, given the state of the media business. The appellant explains:

> My employer, the *Toronto Star*, owned by parent company Torstar, is Canada's largest newspaper and *thestar.com* is among the most visited news websites in Canada. …
>
> The *Toronto Star* is also in an industry that is struggling, as existing, advertising-based business models continue to erode. Across North America, news staff are being laid off and bought out. Newsrooms and budgets are shrinking. … The *Star* is not immune to this. Just last week, it was reported that the *Star* is contemplating the elimination of scores of jobs from its editorial staff, representing about 20 per cent of the newsroom.[20]

In denying the appellant's fee waiver request initially, the police had advised him that because his employer had paid the full amount ($12,450.00), "it is difficult to interpret that payment has been … a deterrent to access the information. … [T]he requester [is] being held accountable for the costs incurred in developing it." The initial representations of the police focus on the argument that the *Toronto Star* itself reported a growth in revenue and profits in 2010 and that in this context, the appellant cannot justifiably claim financial hardship.

[20] Here, the appellant refers to several news articles enclosed with the fee waiver request submitted to the police.

Included with the appellant's representations is a letter from the investigations editor at the *Toronto Star* in support of his assertion that the payment of the fee in this appeal "caused financial hardship" to the newspaper. The letter refers to "sharp cost-cutting, the layoff of staff, and a general lack of resources," and the editor continues by stating:

> Yet when faced with a choice of educating readers about the very real issue of racial profiling we had no choice but to pay the $12,450 at issue. … You should also be aware that the legal road to that decision cost us in excess of $230,000 … [o]ver a seven year period. …
>
> To have to fight so hard to even begin our reporting is very, very difficult and limits the amount of other journalism we can do.
>
> What would we have uncovered if we could have spent the $12,450 elsewhere? Or the $230,000?

The appellant submits that the payment of the fee must be looked at "from the newsroom level," including its budget, which is not indicative of the financial picture of the parent company as a whole, contrary to the position advanced by the police. The appellant continues:

> This was as major investment in investigative journalism, an example of what many observers fear is becoming extinct due to cost. The $12,450 programming fee is, to my knowledge, the steepest that has ever been paid by a media outlet – and paid for after a mammoth legal fight to win access. … [T]he decision to pay the fee was not lightly made … [and] the fact my employer paid the fee does not mean that such a fee did not – and cannot – stand as a deterrent. …

In their reply representations, the police argue that the legal fees paid by the *Toronto Star* are "completely irrelevant" to the fee waiver issue at least in part because:

> The appellant was ultimately successful in the Court of Appeal. That Court awarded him legal costs. Those legal costs were paid – end of story.
>
> The investigations editor states that they decided to pay the $12,450 because they wanted to educate their readers. He also notes that of course the *Toronto Star* is a "thriving newspaper." They made a massive request that required a lot of work to respond to – they should pay the reasonable costs for that work, as per the *Act*.

Analysis and Findings

As the appellant raised financial hardship as the basis for claiming a fee waiver, he bears the onus of providing sufficient information concerning the newspaper's finances, including information about income, expenses, assets and liabilities, to establish this basis for the waiving of fees.

In my view, the appellant has not provided sufficiently detailed financial information respecting his employer's financial circumstances to meet this burden. I note that he has referred to the economic and fiscal pressures in the newspaper industry, generally. He has also submitted that (to his knowledge) the fee in this matter represents the "steepest" fee ever paid by a media outlet; and he (and the investigations editor) would have me view this fee in conjunction with the $230,000 in legal costs associated with pursuing access to the information through this office and the courts over a protracted period. For its part, the police argue that the appellant's financial position is adequately secure to pay the reasonable fee to process this "massive" request, and that the appellant's legal costs are irrelevant.

As stated, based on the evidence provided by the appellant, I have concluded that there is insufficient evidence to establish that the payment of the fee would impose financial hardship. In saying that, however, I reject the submission of the police that the appellant's legal costs in seeking to obtain access to this information are "irrelevant" to the financial hardship issue, and that the Court of Appeal's award of costs addressed that particular burden.[21] In my view, the required financial outlay to pursue access to information denied by the police through multiple court proceedings may very well have been a relevant consideration in assessing the appellant's overall financial picture, since those legal costs represent expenses incurred by the appellant that are directly related to this matter and would not have been incurred otherwise. Notwithstanding this point, however, it remains the case that the evidence provided by the appellant is not sufficiently detailed regarding "income, expenses, assets and liabilities" to establish this basis for a fee waiver. While I recognize that the fee, even as reduced by this order, is fairly substantial, that fact alone is not sufficient to trigger the application of section 45(4)(b) (Order P-1402).

Given my finding that financial hardship under section 45(4)(b) has not been established by the appellant, it is not necessary for me to consider whether it would be fair and equitable to waive the fee on this basis. However, I will now consider the appellant's claim that a waiver is warranted on the basis of benefit to public health or safety.

Part 1 basis for fee waiver: public health or safety – section 45(4)(c)

A fee waiver may also be granted where it can be established that dissemination of a record will benefit public health or safety under section 45(4)(c) of the *Act*. In past orders of this office, the following factors have been found to be relevant in determining whether dissemination of information will benefit public health or safety:

- 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
    - disclosing a public health or safety concern, or

[21] The Court of Appeal decision restoring the provisions of Order MO-1989 (entered March 5, 2009) contains the following cost award against the police in the appellant's favour (at provision four): $15,000 for the judicial review proceedings and $25,000 for the appeal review proceedings, both inclusive of GST and disbursements, for a total of $40,000.

    - 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 and PO-1962)

This office has found that dissemination of the record will benefit public health or safety under section 45(4)(c) (or the equivalent section 57(4)(c) in the provincial *Act*) where, for example, the records relate to:

- compliance with air and water discharge standards [Order PO-1909]
- expansion of a landfill site [Order PO-2514]
- environmental concerns associated with the issue of extending cottage leases in provincial parks [Order PO-1953-I]
- complaints against licensed daycare centres (Order PO-2515-F)
- illegal parking in designated bike lanes (Order MO-2102)
- quality of care and service at long-term care facilities (Orders PO-2278, PO-2333 and PO-2886)

Representations

In the initial fee waiver request submitted to the police, the appellant asserted that dissemination of the requested information would benefit public health or safety because of the perspective it would provide on how the police operate, including the phenomenon of racially-based policing. The appellant noted that "the analysis and dissemination of Toronto police arrest data by the *Toronto Star* in 2002 resulted in policy shifts and initiatives," and he provided an excerpt from a speech given by the deputy police chief at a recent conference hosted by the police in support of this assertion. In the excerpt, the deputy chief alludes to the role played by the 2002 "Race & Crime" series in the *Toronto Star* in leading to the acknowledgement of racial profiling and the measures taken in response to address the "overarching factors of prejudice and discrimination." The appellant also explains the other uses to which the police data had been used in 2002 and notes that:

> As well, the dissemination of the information in 2002 led to an inquiry by the Ontario Human Rights Commissioner into the effect of racial profiling in society in general, and police services and other agencies across the country are now more cognizant of the impacts of biased enforcement, whether it be intended or not.

The police's decision to deny the request for a fee waiver on the grounds of public health or safety rests on the position taken that the appellant had "noted key transformations since 2002; [but had] not argued the impact on the public's health and safety." In the initial representations provided during this inquiry, the police merely re-state this position and comment that since the appellant has not provided any further details respecting the public health or safety basis for fee waiver, its position "remains constant."

The appellant strongly disagrees with the suggestion that insufficient evidence has been provided to establish that the *Toronto Star*'s analysis and dissemination of the data has resulted in a positive impact on the public's health or safety. He submits that proof of the impact of the dissemination of the information is evident in the original and follow-up newspaper series ("Race Matters") in 2010.[22] The appellant explains that the stories using police data as a foundation "have improved public understanding of policing, and police methods" and have also led to the police re-examining a policy that "forbids it from examining race-based statistics." The appellant also refers to the publication of the series as having "led to a unique charter partnership between the board, the service and Ontario's Human Rights Commission."

The appellant argues that the data analysis provided "fodder" for a broad public discussion on the issue of police disproportionately stopping, questioning and documenting black people in Toronto. The appellant submits that the *Toronto Star* series explored this question in detail, and this resulted in the police asking for, and receiving, a copy of the related *Star* video, "presumably for training purposes." In summary, the appellant maintains that:

> … the relationship between a community and police is very much about public health and safety, and … improving understanding and shining light on inequities has a net effect of improving public health and safety. Police need the trust of a community to effectively police. Without it, they have less cooperation and fewer witnesses coming forward. Crimes go unsolved. Less trust in police in certain neighbourhoods and communities means neighbourhoods and communities that are less safe.

Neither party provided further submissions in reply or sur-reply respecting the public health or safety basis for a fee waiver in this appeal.

Analysis and Findings

I have considered the parties' submissions and, for the reasons that follow, I am satisfied that the appellant has adduced sufficient evidence to establish that section 45(4)(c) – the public health or safety basis for fee waiver – applies in the circumstances of this appeal.

In considering the various factors that assist in determining whether a public health or safety basis for fee waiver exists, I would begin by noting that the appellant has *already* widely disseminated the information from the police data, in the form of the "Race Matters" series published in the *Toronto Star* last year.

Next, I am satisfied by the evidence that the subject matter of the police data released to the appellant is a matter of public rather than private interest. I note that in Order MO-1336, Adjudicator Laurel Cropley emphasized that the focus of the section is public health or safety, not merely a public interest. In other words, the records themselves must illuminate the connection between the public interest and an established public health or safety issue (see also Orders PO-2592 and PO-2726). In this appeal, the police cannot, and do not, seriously dispute

[22] www.thestar.com/racematters

the appellant's assertion that the subject matter of the records reflects a matter of broad public interest; nor, in my view, can it be disputed that police must have the trust of a community to police effectively. I also accept the appellant's submission that the public interest is inextricably tied to public safety in this way, and to the relationship between the police and the communities they serve. In my view, analysis of the police data relating to racially-based policing is directly related to, as the appellant claims, "improving understanding and shining light on inequities," with "a net effect of improving public health and safety."

Finally, as I understand it, the *Toronto Star* series both resulted from, and generated, a significant amount of public debate on racially-based policing (see Order PO-2515-F). In this context, I am persuaded by the evidence that dissemination of the information *has* yielded a public benefit by disclosing the public health or safety concern identified in the foregoing discussion. Moreover, I am satisfied that the dissemination contributed meaningfully to the development of the public (and police) understanding of this important public health or safety issue.

For all of these reasons, I conclude that the appellant has established the basis for fee waiver on the grounds of public health or safety under section 45(4)(c) of the *Act*. Having concluded that section 45(4)(c) of the *Act* applies, the appellant is entitled to a few waiver, provided it is "fair and equitable" to do so in the circumstances.

Part 2 of fee waiver: fair and equitable

For a fee waiver to be granted under section 45(4), it must be "fair and equitable" 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 and PO-1953-F)

Representations

In his initial request for a fee waiver, the appellant argued that it would be fair and equitable to waive the fee in this instance because of the length of time that has passed since the requests for access to the two databases were made. The appellant refers to willingness on his part to discuss ways to reduce the burden on the police. Finally, the appellant also relies of the fact that the police did not provide a fee estimate to him, but rather suggested (verbally) that the fee would be close to the $800 charged for the CIPS data released in 2002.

The police responded to the appellant's "fair and equitable" arguments by noting that these two requests were bound to result in a higher fee than in 2002, given the addition of the MANIX/FIR databases, and the attendant time taken to produce what was requested, notwithstanding the narrowing of the requests by the appellant. The police also submit that it would not be fair and equitable to waive the fee because the appellant was given additional information at no charge and was also actively involved with the police in the modification, supplementation and design of the information extraction to specifically suit his needs.

The appellant's representations on the fair and equitable part of the fee waiver question, as provided during the inquiry, are relatively brief. The appellant reiterates that the requests were originally submitted in 2003 and he submits that a fee waiver or reduction would be fair and equitable because of the time it took, including police efforts to use "every available means to oppose release," which led to "considerable cost to the *Star* to obtain what a court eventually ordered police to release." In his supporting letter, the *Toronto Star* investigations editor adds that "should a refund be provided we will use that money in the pursuit of other journalism projects that will stir debate and inform the public."

Analysis and Findings

In the section above, I concluded that dissemination of the information obtained from the police in response to the appellant's request has yielded a benefit to public health or safety within the meaning of section 45(4)(c) of the *Act*. However, after considering the factors that are relevant in deciding whether or not a fee waiver would be fair and equitable, I have concluded that the factors that weigh in favour of granting a fee waiver are outweighed by those that weigh against granting it.

I will now address the factors outlined above, as they are relevant to the determination of whether it would be "fair and equitable" to grant a fee waiver to the appellant.

In considering the manner in which the police responded to the request, I accept the appellant's submission that this factor should weigh in favour of granting a fee waiver. There was an extremely lengthy process, and series of proceedings, prior to the Court of Appeal ultimately ordering the police to produce the records to the appellant. These proceedings were initiated by the denial of access by the police, leading to an appeal to this office on the access issue, which resulted in Order MO-1989 by Adjudicator DeVries. This order was judicially reviewed at the behest of the police; the arguments regarding the definition of "record" in section 2(1)(b) of the *Act* presented at the Divisional Court in challenging Adjudicator DeVries' findings were successful and Order MO-1989 was quashed. Finally, on appeal to the Court of Appeal by the appellant and this office, the Divisional Court decision was set aside and the provisions of Order MO-1989 were restored. In my view, therefore, the length of time lapsed *is* relevant to the determination of "fair and equitable" before me now, particularly because the appellant operates in an industry where the currency of the information is so crucial. As stated earlier in this order, "news is news precisely because of its immediacy" (see footnote 10). Accordingly, I find that the manner in which the police responded to the request weighs in favour of granting a fee waiver in the circumstances of this appeal.

I have also considered the extent to which the police and the appellant worked constructively with each other to narrow and/or clarify the request. I am satisfied that *both* the police and the appellant cooperated with each other to achieve a result that provided the appellant with access to the desired data, with some concessions on the part of the appellant. In my view, this factor is neutral, and I find that it does not weigh either for or against the granting of a fee waiver in the circumstances.

Next, based on the representations provided by the police, I am satisfied that the police provided some services without charging the appellant for them. While the police may not have provided "records" to the appellant, *per se*, without charging him for them, I have taken into account the fact that the police did not charge the appellant for any fees other than those described as "programming" under section 6.5 of Regulation 823, even though they were entitled, even required, to do so under the *Act*. Accordingly, I find that this factor weighs modestly against the granting of a fee waiver to the appellant.

There is another factor that weighs against a finding that it would be fair and equitable to waive the fee in this appeal and that is the fact that the request involved – and produced – a large amount of information. Indeed, the data produced in response to the appellant's request was voluminous. It is also relevant that, aside from the severing of the records to account for the mandatory personal privacy exemption in section 14(1) of the *Act*, the appellant was granted complete access, albeit following the resolution of the court proceedings. In the circumstances, I find that this factor weighs moderately against the granting of a fee waiver to the appellant.

I am mindful of the Legislature's intention to include a user-pay principle in the *Act*, as evidenced by the provisions of section 45 and Regulation 823 (Order M-914). Accordingly, in my view, the factor that is most persuasive in my determination that it would not be fair and equitable to waive the fee in this appeal, is the consideration that waiver of the fee would shift an unreasonable burden of the cost of processing the request from the appellant to the police. This is especially true given the reduction of the allowable fee – and consequent refund – that I will be ordering following my review of the fee calculation issue, above. I find that this factor weighs heavily against the granting of a fee waiver to the appellant.

Furthermore, under section 45(4)(a) of the *Act*, an institution is required to compare the assessed cost and the actual cost of processing the request. Although this factor has not been addressed under a separate heading in this order, I have considered it in making my findings. Again, as I have significantly reduced the fee the police will be permitted to charge, this has removed any reasonable likelihood that the actual cost to the police would be less than the amount of payment the appellant will have made (see Orders PO-2299 and MO-2163). Accordingly, I find that the consideration of section 45(4)(a) also weighs against granting a fee waiver.

In summary, I conclude that the balance is tipped against the granting of a fee waiver in the circumstances of this appeal, and I therefore find that it was fair and equitable for the police to decline to waive the fee.

ORDER:

1. I order the police to refund the amount of $5,521.50 to the appellant, which represents the difference between the $12,450.00 already paid and the $6,928.50 fee I have found to be "reasonable" under the *Act* and regulations.

2. I uphold the decision of the police to not grant a fee waiver to the appellant.

Original signed by: March 8, 2011
Daphne Loukidelis
Adjudicator