Information and Privacy Commissioner,
Ontario, Canada

Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

# INTERIM ORDER MO-2734-I

Appeal MA10-482-3

Toronto Police Services Board

May 17, 2012

**Summary:** The police received a request for records regarding training or instructions for police officers involved in the June 2010 G20 summit weekend. The police granted the appellant partial access to the records, denying access pursuant to the law enforcement exemption in section 8(1) of the *Act* and required that the appellant pay a fee. This order partially upholds the police's application of section 8(1)(e) and partly waives their fee.

**Statutes Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 8(1)(c), 8(1)(e), 45(4)(c).

## OVERVIEW:

[1] The Toronto Police Services Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records regarding training or instructions for police officers involved in the June 2010 G20 summit weekend. Specifically, the request was for the following information:

1. the arrest forms used during the G20;

2. the booking forms used during the G20;

3. records regarding training or instructions given to police in preparation for the G20 with respect to:

a) public order maintenance;

b) mass detentions or mass arrests, including procedures for filling out the arrest forms and for booking individuals during mass arrest situations;

c) searching, arresting or detaining individuals;

d) the impact of Ontario Regulation 233/10 made under the *Public Works Protection Act* on police powers to question, search arrest or detains individuals.

[2] The police issued a time extension decision. That decision was appealed to this office and MA10-482 was opened to address that issue. That time extension appeal resolved in mediation and that appeal file was closed.

[3] The police issued a decision dated February 14, 2011. In that decision, the police advised the appellant that a fee of $420.00 would apply to the records. The appellant paid the fee and then subsequently filed another appeal to this office on the basis that she did not receive a final decision regarding access to the responsive records. Appeal MA10-482-2 was opened to address that matter.

[4] During the course of that appeal, the police issued a decision dated March 18, 2011. As the police issued a decision, the matter under appeal in MA10-482-2 was resolved and that appeal file was closed.

[5] In their decision dated March 18, 2011, the police granted the appellant partial access to the records requested. Access to the remaining records was denied pursuant to sections 8(1) (law enforcement) and 11 (economic and other interests) of the *Act.*

[6] The appellant appealed the decision of March 18, 2011 to this office and this appeal file was opened as MA10-481-3. In addition to appealing the application of the exemptions, the appellant advised that she had requested a fee waiver in a letter dated April 1, 2011, however, did not receive a response to her request. As a result, the appellant advised that she is appealing that matter as well.

[7] At the outset of mediation in this appeal, the police issued a decision denying the request for fee waiver. The appellant advised the mediator that she is appealing that decision.

[8] In addition, the appellant advised that she was raising the issue of a compelling public interest to the records where section 11 has been claimed. As a result, section 16 of the *Act* was added as an issue in this appeal.

[9] After further consideration, the appellant agreed that she would not be pursuing access to a number of records. In a letter dated July 12, 2011, the police issued a revised decision granting full or partial access to a number of additional records.

[10] During mediation, the appellant advised that she believes additional information should exist in relation to training material as set out in part 3 of her request. As a result, the issue of whether the police have conducted a reasonable search for records relating to part 3 of the request has been added as an issue in this appeal.

[11] The parties were unable to resolve the remaining issues under appeal through the process of mediation and this file was transferred to the adjudication stage of the appeal process where an adjudicator conducts an inquiry. Representations were received from the police and the appellant and shared in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction Number 7*. During adjudication, the police issued a supplementary decision letter disclosing pages 64 and 65 of the records to the appellant. Therefore, sections 11(h) and 16 are no longer at issue.

[12] Furthermore, as the police indicated in their letter of January 17, 2012 that additional records have been located, the issue of the reasonableness of the police's search for responsive records will be considered in a subsequent order.

[13] In this order, I partially uphold the police's application of section 8(1)(e) and partly waive their fee.

## RECORDS:

[14] The information remaining at issue in this appeal is contained on pages 56, 59, 62, 87, 88, 116, 117, 132-134, 139-141, 160, 161, 165-166, 175, 184, 187-197, 199, 201-203, 205, 206, 208, 209, 211-220, 222, 224, 250-253, 258, 259 and 272 of the records. The police have claimed sections 8(1)(c) and (e) for all of this information.

## ISSUES:

A. Does the discretionary exemptions at sections 8(1)(c) and 8(1)(e) apply to pages 56, 59, 62, 87, 88, 116, 117, 132-134, 139-141, 160, 161, 165-166, 175, 184, 187-197, 199, 201-203, 205, 206, 208, 209, 211-220, 222, 224, 250-253, 258, 259 and 272 of the records?

B. Did the institution exercise its discretion under section 8(1)(e)? If so, should this office uphold the exercise of discretion?

C. Should the fee of $420.00 be waived?

## DISCUSSION:

### A. Does the discretionary exemptions at sections 8(1)(c) and 8(1)(e) apply to pages 56, 59, 62, 87, 88, 116, 117, 132-134, 139-141, 160, 161, 165-166, 175, 184, 187-197, 199, 201-203, 205, 206, 208, 209, 211-220, 222, 224, 250-253, 258, 259 and 272 of the records?

[15] Sections 8(1)(c) and (e) state:

> A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;
>
> (e) endanger the life or physical safety of a law enforcement officer or any other person;

[16] The term "law enforcement" is used in several parts of section 8, and is defined in section 2(1) as follows:

> "law enforcement" means,
>
> (a) policing,
>
> (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, or
>
> (c) the conduct of proceedings referred to in clause (b)

[17] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context [*Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.)].

[18] Except in the case of section 8(1)(e), where section 8 uses the words "could reasonably be expected to", the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.), *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

[19] In the case of section 8(1)(e), the institution must provide evidence to establish a reasonable basis for believing that endangerment will result from disclosure. In other words, the institution must demonstrate that the reasons for resisting disclosure are not frivolous or exaggerated [*Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)* (1999), 46 O.R. (3d) 395 (C.A.)].

[20] It is not sufficient for an institution to take the position that the harms under section 8 are self-evident from the record or that a continuing law enforcement matter constitutes a *per se* fulfilment of the requirements of the exemption [Order PO-2040; *Ontario (Attorney General) v. Fineberg*].

### *Section 8(1)(c): investigative techniques and procedures*

[21] In order to meet the "investigative technique or procedure" test, the institution must show that disclosure of the technique or procedure to the public could reasonably be expected to hinder or compromise its effective utilization. The exemption normally will not apply where the technique or procedure is generally known to the public [Orders P-170, P-1487, MO-2347-I and PO-2751].

[22] The techniques or procedures must be "investigative". The exemption will not apply to "enforcement" techniques or procedures [Orders PO-2034 and P-1340].

[23] The police provided representations for this appeal in conjunction with representations for two other appeals of the appellant.[1] They submit that that section 8(1)(c) infers the pre-existence of a *Criminal Code* offence to support the application of the exemption and that any other interpretation must, by definition be "enforcement techniques" and therefore not exempt under 8(1)(c). However, for the purposes of planned protest events with anticipated conflict, the police state that the tactical deployment of police personnel is a form of investigation. They state that the deployments actively gather data to be used for investigation later, even without the certainty that any offence will occur. The police state that such was the case with the G20 Summit.

[24] The police submit that disclosure of the police deployment techniques in the records will result in the disclosure of evidence-gathering police personnel in crowd control situations, thereby compromising their effective utilization. The police state that:

> A high profile event such as a Summit routinely garners negative attention and opposition. Any procedural disclosure, on its own merit, could reasonably be expected to hinder or compromise the efficacy of the police officer's job functions, made that much more difficult when the numbers

[1] Appeal files MA10-481-3 (Order MO-2730) and MA11-194.

of involved parties, innocent and otherwise multiply for such events.

[25] The appellant submits that section 8 does not apply where records are merely related to law enforcement or an investigation, and cannot be relied on using speculative reasons that are not supported by actual evidence.[2] The appellant states that her request sought G20 training materials and police policies and the police have not provided evidence to show that the release of this information would hinder the use of an investigative technique or endanger an individual.

[26] The appellant states that the records do not relate to "investigative techniques" under section 8(l)(c), but concern matters such as frontline tactics, radio usage, perimeter control, crowd control, etc. Furthermore, the appellant submits that the police have not identified or discussed a single specific technique in the records, nor explained why disclosure of the records would hinder the effective use of that technique.

[27] In reply, the police state that records contain specific terminology that could expose the operational tactics used to protect the public and police officers from harm, such as those displayed during the G20 Summit (vandalizing of vehicles, store windows being smashed etc.). According to the police, this information includes command words and diagrams (how officers should physically formulate based on those commands) when faced with crime and disorder, including large crowds. This type of specific information is considered investigative in nature, as it describes tactics and/or techniques to be used by officers who must act on the ongoing information received through investigative intelligence continuously being received. The police state that if this information were to become public, it has serious potential of being used in the future to thwart the police by identifying what and how they will act or react in any given situation. The police refer to a specific website which they state is dedicated to how to defeat police tactics.

[28] The police state that the information at issue in the records is continuously used by police officers in their everyday duties. The police reiterate their initial representations where they stated that the tactical deployment of police personnel at a planned protest with anticipated conflict is a form of investigation, as such deployments actively gather data to be used for investigation later, even without the certainty that any offence will occur. The police submit that providing access to police deployment techniques in the records will compromise their effective utilization.

[29] In sur-reply, the appellant submits that the request is for police policies on public order policing and that the formations that police officers use when policing crowds or demonstrations is not an investigative but an enforcement technique. The appellant states that even if some of the officers are gathering information, this does not make

[2] Order MO-2347-I, page 4.

the formation they are in investigative in nature. It only indicates that certain police officers may be investigating from their position in the formation. The appellant states that release of the records will not hinder the use of these tactics.

[30] The appellant also submits that even if it is possible to identify which police officer in the formation is one of the evidence gathering personnel, the police have not demonstrated how an individual could disrupt this evidence gathering function. Nevertheless, the appellant agrees to have the records severed to remove information about where in the formation the officers who gather evidence stand. The appellant argues that this should be sufficient to remove any aspect of investigative techniques from the records requested and to release them.

[31] The police were provided with an opportunity to reply to the appellant's sur-reply representations on section 8(1)(c), but chose not to.

*Analysis/findings on section 8(1)(c)*

[32] The information in the records concern officer training on how to respond to the disorderly conduct by G20 protesters. The purpose of the records is to train officers on how to maintain orderly crowd control and how to respond to disorderly crowds and emergency incidents. Several records include a description of various police formations or where police are to stand when dealing with crowds or riots. It is not apparent from a review of the records where evidence-gathering police personnel are to be situated in these formations. Nor is it apparent to me that the records contain investigative techniques or procedures.

[33] I also find that the command words and diagrams in the records are not investigative in nature. Although the command words and diagrams in the records describe tactics used by police officers who must act on the ongoing information received through investigative intelligence, these words and diagrams, like the remaining information at issue in the records, describe enforcement not investigative techniques or procedures. The police did not provide specific representations on the application of section 8(1)(c) to the particular information at issue in the records.

[34] As stated above, in order for section 8(1)(c) to apply, the techniques or procedures must be "investigative". The exemption will not apply to "enforcement" techniques or procedures.[3]

[35] Accordingly, I find that section 8(1)(c) does not apply to any of the information at issue in the records.

[3] Orders PO-2034 and P-1340.

### *8(1)(e): life or physical safety*

[36] The police submit that it is reasonable to expect the exempted information would be beneficial to those who would choose to be disruptive or cause harm during such a large, potentially volatile gathering. The police refer to the arrest at the G20 of a person who admitted his plans were to "listen in on police scanners during the summit and disseminate information to the protesters via Twitter." The police state that:

> The tactical deployment of Toronto Police personnel during crowd control situations is carefully designed to contain and control large numbers of assembled individuals and prevent injury to both the police and civilian populace alike. Much like the criteria employed to evaluate FAC [Firearms Certificate] applications, these deployments are not intended to combat organized groups with full knowledge of their design.
>
> One can assume that the dissemination of such information to protesters who by nature of their title are expressing an objection, by words or by actions, to particular events, policies or situations. The release of records regarding training or instructions given to police in preparation for any demonstrations is tantamount to handcuffing the police officers from maintaining peace and the public order that is their mandate. …The G20 can be compared to an Ontario Coalition Against Poverty (OCAP) rally where the emotions and beliefs are so polarizing that there is a greater possibility of disruption. The withheld information at issue relates to the specific manner in which a public event may unfold, the potential ramifications and the steps taken by public agencies to maintain and protect the integrity of the peaceful gathering…
>
> With the assistance of modern technology (e.g., Blackberrys, IPhones, etc.) and fore-knowledge of police tactics and formations, such groups employing "flash mob" or "black block" tactics could compromise and effectively nullify police deployments; compelling officers to use less desirable and more confrontational methods to maintain order. Such methods, like the use of armored vehicles, water cannon, sound cannon, pepper spray, dogs, and mounted units, are more akin to armed conflict then anything else, and are used only as a last resort by this police. In other jurisdictions around the globe, these crowd control methods are routinely used; tuning city streets into virtual war zones and typically resulting in numerous injuries.
>
> There is a reasonable basis to conclude that dissemination of this material, once carefully analyzed, will increase the likelihood of pitched baffles in the streets between police and highly motivated and sophisticated groups of individuals who proved themselves agile,

> adaptable, and frighteningly effective during the G20 Summit. It is evident that provoking confrontations with police was part of their objective. While it is easy to discount such warnings as wild exaggeration, it is not an overstatement to point out that these groups needlessly provoked other persons to disturb the peace - to the point of rioting— during the G20 Summit.
>
> When some G20 "protesters" were arrested, they were found to be in possession of changes of clothing, disguises (ski masks, bandannas, etc.), anti-tear gas measures (like vinegar, swim goggles, and respirator masks), and they even had clothing lined with fishhooks. In the days and hours leading up to the protests, caches of weapons were found at strategic points along the parade route. Preparations such as these indicate careful planning and a premeditation to incite violence and destruction. Individuals that participate in such actions do not need our assistance to produce an encore performance.
>
> Releasing the material at issue serves no practical benefit to the general public, nor does it contribute to any meaningful discussion of police accountability and responsibilities. However, by withholding the records outlining police deployment and tactics, the Service hopes to minimize the risk of future personal injury and/or property damage insofar as it lies within our ability.

[37] The appellant states that the police have not identified specific techniques that must remain secret or shown that those techniques could and would be exploited by would-be criminals, or explained how people's safety would be endangered.

[38] The appellant states that the police have overstated certain public safety threats in its submissions. The appellant submits that the records do not appear to be sensitive, or related to issues where the safety of individuals is at stake. The appellant relies on Order MO-2356, where Adjudicator Colin Bhattacharjee held that:

> As noted above, the police submit that disclosure of the withheld information in the Policy, Service or Conduct Report and the 12 procedures from their Policy and Procedure Manual "could put the police in harm's way and also endanger the many citizens and victims of crime." Moreover, they assert that disclosure could allow alleged offenders to "circumvent the techniques and procedures put in place and possibly cause harm to victims and officers." They further assert that disclosure would erode the trust between crime victims and police officers, which could result in "many cases" not being reported.

> In my view, the police's submissions in this appeal amount to a paraphrasing of section 8(1)(e) rather than evidence as to how or why disclosure of the withheld information in the records at issue could reasonably be expected to endanger the life or physical safety of a law enforcement officer or any other person. Although the nature of the section 8(1)(e) exemption allows an institution to submit evidence that is more muted than that required to satisfy the other section 8 exemptions, an institution must still provide some evidence beyond a mere paraphrasing of the words of the exemption. This would include some explanation as to why the reasons for resisting disclosure are not frivolous or exaggerated. In my view, the police's generic submissions on section 8(1)(e) do not meet this minimum threshold. (emphasis added by appellant)

[39] The police provide the same representations in reply for section 8(1)(e) as they did for section 8(1)(c) as set out above.

[40] In sur-reply, the appellant relies on her original representations. She also states that as it appears that the safety concern of the police is that individuals may be able to anticipate how the police would act or react in a given situation if they know the police tactical formations and the associated command words or signals, she agrees to have the records severed to remove any command words or signals from the formation diagrams. The appellant states that the police's position when policing demonstrations is not dangerous information, therefore, the release of the tactical formations used by them when policing crowds without the associated command words or signals will not endanger the safety of a law enforcement officer or any other person.

[41] The police did not provide representations in response to the appellant's sur-reply representations on section 8(1)(e).

*Analysis/findings on section 8(1)(e)*

[42] As stated above, the records concern training of officers on how they are to respond to disorderly conduct by G20 protesters. The records include police formation diagrams. The appellant is not interested in receiving the command words or signals from the formation diagrams in the records.

[43] A person's subjective fear, while relevant, may not be sufficient to establish the application of the exemption [Order PO-2003]. The term "person" is not necessarily confined to a particular identified individual, and may include any member of an identifiable group or organization [Order PO-1817-R].

[44] Based upon my review of the records, I agree with the appellant that once the command words or signals are removed from the records, a reasonable basis does not

exist for believing that endangerment will result from disclosure of some of the remaining information in the records. In my view, disclosure of some of the records without the command words or signals could not reasonably be expected to endanger the life or physical safety of a law enforcement officer or any other person. Once the command words or signals are severed from this information in the records, disclosure could not reveal the tactical deployment of the police during crowd control, which is the police's concern in their representations.

[45] However, I agree with the police that disclosure of some of the information in the records that consists of police deployment and tactics could reasonably be expected to be used in the future to thwart the police by identifying how the police will act in any given situation. These portions of the records describe or relate to the command words or signals. This information in the records could reasonably be expected to endanger the life or physical safety of a law enforcement officer or any other person. As such, this information is subject to section 8(1)(e) and should be withheld.

[46] Accordingly, I find that the police have established a reasonable basis for believing that endangerment could result from disclosure of some of the portions of the records, even where the command words and signals are removed.

[47] I will now consider whether the police exercised their discretion in a proper manner concerning the information that I have found subject to section 8(1)(e).

## B. Did the institution exercise its discretion under section 8(1)(e)? If so, should this office uphold the exercise of discretion?

[48] The section 8(1)(e) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[49] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

[50] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 43(2)].

[51] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant [Orders P-344, MO-1573]:

- the purposes of the *Act*, including the principles that
    - information should be available to the public
    - individuals should have a right of access to their own personal information
    - exemptions from the right of access should be limited and specific
    - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

[52] The police submit that they took into consideration that this request is part of a civil claim, which does allow for the information to be garnered via other sources that would allow for release in its entirety. They state that the exemptions applied have been true to the spirit of the *Act* while balancing the desire for disclosure of the members of the class action lawsuit represented by the appellant.

[53] The appellant did not address this issue directly but did provide representations on the public interest in the records. She submits that disclosure will add to the public debate regarding allegations of police misconduct during the G20 Summit. She also states that it is important to review and address the records in full to better understand whether systemic problems may exist at the training and policy levels.

[54] In reply, the police state that both the offices of the Independent Police Review Director (OIPRD) and the Special Investigative Unit (SIU) have been and are currently reviewing documents related to the G20 Summit. They state that these two specific oversight bodies have been tasked with the responsibility to hold police services in Ontario accountable for actions deemed inappropriate or wrong by the public.

[55] In sur-reply, the appellant states that there are very important public interests issues underlying the requests, as reported by the Ontario Ombudsman and the Canadian Civil Liberties Association. She states that:

> The public is interested in understanding police policies and training related to public order policing in order to, for example, shed light on why certain controversial tactics (e.g. "kettling") were employed by police during the G20.

***Analysis/findings***

[56] Based on review of the parties' representations and the information that I have found subject to section 8(1)(e), I find that the police exercised their discretion in a proper manner taking into account relevant considerations.

[57] The information that is subject to section 8(1)(e) is information whose disclosure I have found could reasonably be expected to endanger the life or physical safety of a law enforcement officer or any other person. This information is both significant and sensitive to the police. Therefore, I am upholding the police's exercise of discretion with respect to this information.

## C. Should the fee of $420.00 be waived?

[58] Section 45(4) of the *Act* requires an institution to waive fees, in whole or in part, in certain circumstances. The appellant submits that she should be granted a fee waiver on the basis of section 45(4)(c), which states:

> 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,

> whether dissemination of the record will benefit public health or safety; and

[59] Section 8 of Regulation 823 sets out additional matters for a head to consider in deciding whether to waive a fee. This section reads in part:

> 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.

[60] 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].

[61] 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 and PO-1953-F].

[62] The institution or this office may decide that only a portion of the fee should be waived [Order MO-1243].

### ***Part 1: basis for fee waiver***

[63] The following factors may be relevant in determining whether dissemination of a record will benefit public health or safety under section 45(4)(c):

1. whether the subject matter of the record is a matter of public rather than private interest

2. whether the subject matter of the record relates directly to a public health or safety issue

3. 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

4. the probability that the requester will disseminate the contents of the record

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

[64] 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].

[65] The police admit in their representations that items 1 and 2 have been satisfied by the appellant. The police did not provide direct representations on items 3 and 4 concerning the records at issue in this appeal.

*Analysis/findings re: part 1*

[66] Based upon my review of the records and the appellant's representations which address in detail part 1 of the test under section 45(4)(c), I find that part 1 of the test under section 45(4)(c) has been met and I find that dissemination of the records will benefit public health or safety. I will now consider whether part 2 of the test has been met.

### ***Part 2: fair and equitable***

[67] 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 requester worked constructively with the institution to narrow the scope of the request;
- whether the institution provided any records to the requester free of charge;

- 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]

[68] The police provided representations concerning fee waiver for the request that is the subject to this appeal and for two other requests that are subject to appeal.[4] With respect to the portions of the police's representations that are responsive to this appeal,[5] the police state that the appellant submitted one letter outlining eight separate requests. Within each of these requests were additional requests which in total came to fifty-four individual items to be addressed. The police submit that copious amounts of time (scheduled and random) were spent determining the existence and location of the responsive records for the eight requests. The police also noted that at mediation they provided additional records to the appellant free of charge.

[69] The police state that although the appellant asked for the information to be in digital format and narrowed the parameter of the past 10 years, this was not a significant factor in reducing the search time and the overall fee.

[70] The police state that they have already published significant information on the subject matter of the records which concern their response to the events during the G20, including their publication of a report on this subject, the "G20 After Action Report".

[71] The police state that in a time of budgetary constraints,

> [t]he appellant's basis for the records lay in the class action law suit... There exists a process for disclosure of these records through the Rules of Civil Procedure. [T]he fact remains that the mandatory provisions set out section 45 and Regulation 823 of the *Act* allows for a user-pay principle.

[72] The appellant submits that she took great care to draft her original requests to identify specific documents that would be easy to locate and to reduce the required search time. The appellant states that the request is not overly burdensome or onerous and is for specific policies and for records relating to two days of events in June 2010.

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[4] MA10-481-3 (Order MO-2730) and MA11-194.
[5] MA10-482-3.

[73] The appellant states that this appeal is similar to Order MO-2199, where a fee waiver was granted in part because the records related to a significant public safety interest and the request was for the kind of information that the police should consider for routine dissemination and disclosure. The appellant states that the records are policies that the police must maintain pursuant to the Ontario Regulation 3/99 and that the police should provide copies of these policies free of charge.

[74] The appellant submits that it is not relevant that the police have expended considerable resources to participate in reviews by external oversight bodies, such as the Special Investigations Unit (SIU). The cost and expense of doing so is completely unrelated to the time required to respond to the request. The appellant states that despite the police having already provided the public with information about what happened during the Toronto G20 Summit demonstration, concerns have been raised regarding whether they fully cooperated with the SIU investigations.

[75] Finally, the appellant states that it would be fair and equitable to require the police to waive the fee, rather than charge her or other members of the class action, in light of the alleged mistreatment and wrongful imprisonment they suffered at the hands of the Toronto police officers.

[76] In conclusion, the appellant states:

> The [police have] not dealt with these requests in a timely manner …and [have] done nothing to assist in narrowing the requests. [The appellant] carefully listed specific documents in her request to limit search time, narrowed the time frame for the request, and has acted cooperatively and constructively throughout. Furthermore, [she] seeks documents for highly important public interest purposes: to seek the truth, to hold authorities accountable, and to promote democratic rights and public safety.

[77] The police did not provide reply representations in direct response to the appellant's representations on part 2 of the test.

*Analysis/findings re: part 2*

[78] I will now consider each of the factors listed above in deciding whether to grant a fee waiver.

The manner in which the institution responded to the request

[79] The appellant's fee waiver request concerns a fee of $420.00 for the appellant's request. The appellant has already paid this fee.

[80] As stated above, this request sought records regarding training or instructions for police officers involved in the June 2010 G20 summit weekend.

[81] In the police's decision letter of February 14, 2011, the police broke down this fee as follows:

| | | |
|---|---|---|
| Search time | 2 hours at $30.00 per hour | $60.00 |
| Preparation time | 7.5 hours at $30.00 per hour (2 minutes per page for 225 pages) | $225.00 |
| | 3 hours at $30.00 per hour for the estimated time for consultation with subject-matter experts located at two separate facilities within the city - Toronto Police College and Public Order Unit | $90.00 |
| Photocopying | 225 pages at $0.20 per page | $45.00 |
| | Total fee | $420.00 |

[82] Section 45(1) of the *Act* provides that:

> 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.

[83] More specific provisions regarding fees are found in section 6 of Regulation 823, which reads:

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

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

2. For records provided on CD-ROMs, $10 for each CD-ROM.

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

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

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

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

[84] Considering the police's fee breakdown, it appears that their preparation time charges for improper items.

[85] Section 45(1)(b) includes time for severing a record.[6] Generally, this office has accepted that it takes two minutes to sever a page that requires multiple severances.[7] The police have instead charged the appellant a preparation fee for each of the responsive pages of records, as opposed to only those that required severance. In reviewing the records, I note that only 50 pages required severing. At two minutes per page for 79 pages at $30.00 per hour, this fee should have been $39.50 not $225.00.

[86] The police also charged the appellant $90.00 for consultation with subject-matter experts located at the police's Toronto Police College and the Public Order Unit. Section 45(1)(b) does not include time for

- deciding whether or not to claim an exemption [Order P-4, M-376, P-1536]

- identifying records requiring severing [MO-1380]

[6] Order P-4.
[7] Orders MO-1169, PO-1721, PO-1834, PO-1990.

- identifying and preparing records requiring third party notice [MO-1380]
- assembling information and proofing data [Order M-1083]

[87] Accordingly, this fee of $90.00 appears to be an improper fee under the *Act*.

[88] In terms of the photocopy fee, the police have charged $0.20 per page, which is the proper amount under section 6 of Regulation 823. They have charged this fee for all 225 pages of responsive records the appellant received.

[89] Therefore, the amount and type of fees charged to the appellant support a finding that the manner in which the police responded to the request weighs in favour of a fee waiver. The appellant was charged for matters that were not prescribed by the *Act* or Regulation 823. This resulted in a higher fee being paid by the appellant. As well, this higher fee may have resulted in additional time being spent by the appellant in submitting a fee waiver request and providing representations in support of this request to the police and to this office.

Whether the institution worked constructively with the requester to narrow and/or clarify the request

Whether the requester worked constructively with the institution to narrow the scope of the request

[90] Although the appellant narrowed her request to a ten year time period and agreed to obtain records in electronic format, the police state that this did not impact the fee amount. The police indicated in its February 28, 2011 decision letter that they would charge the appellant an additional $60.00 for the 217 pages of records to be disclosed in full or in part and to be scanned on to a CD. This would have brought the cost of obtaining the records on a CD to a higher amount than receiving photocopies. The police did not indicate in their decision whether any of these records would have already been in electronic format, thereby not necessitating scanning onto a CD.[8] Overall, I find that these factors weigh in favour of granting a fee waiver.

Whether the institution provided any records to the requester free of charge

[91] The police did not provide the appellant with any records free of charge at the request stage. However, additional records or portions of records were provided to the appellant in the police's decision letters of July 12 and December 22, 2011. The police did not charge an additional fee for these records. Therefore, this factor weighs against a fee waiver.

[8] Order MO-2530.

Whether the request involves a large number of records

[92] According to the police's decision of February 14, 2011, a total of 225 pages of records were identified as responsive. In their February 28, 2011 letter, the police indicated that a total of 217 pages of records were to be released in full or in part. The police charged a photocopy fee to the appellant based on 217 pages of records. As the request did not involve a large number of records, this factor weighs in favour of a fee waiver.

Whether the requester has advanced a compromise solution which would reduce costs

[93] The appellant has advanced compromise solutions such as limiting the scope of the request to a 10 year period and agreeing to obtain the records on a CD. This factor weighs in favour of a fee waiver.

Whether the waiver of the fee would shift an unreasonable burden of the cost from the appellant to the institution

[94] Based on the circumstances of this appeal, I find that waiver of the fee would shift an unreasonable burden of the cost from the appellant to the police. The appellant represents a class of litigants who require the records to support of their action against the police. There is no indication that this class could not afford the fee in this appeal. The police have provided representations concerning their budgetary restraints. This factor, therefore, weighs against a fee waiver.

*Conclusion*

[95] In this appeal, I have found that there are factors both for and against granting the appellant a fee waiver. Overall, the factors in support of a fee waiver prevail and part 2 of the test has been met. I find that it would be fair and equitable to grant the appellant a fee waiver in this appeal. However, given my findings concerning the user pay principle set out above, I find that a full fee waiver is not warranted in this appeal. Accordingly, I will grant a partial fee waiver and waive the fee for the amounts that I found were improperly charged to the appellant. Therefore, I allow the police to charge the following fee to the appellant:

| | | |
|---|---|---|
| Search time | 2 hours at $30.00 per hour | $60.00 |
| Preparation time | 79 minutes at $30.00 per hour<br>(2 minute per page for 79 pages) | $39.50 |
| Photocopying | 217 pages at $0.20 per page | $43.40 |
| | Total fee | $142.90 |

[96] Therefore, as the appellant has paid the police $408.40 for this appeal and I have reduced the fee to $142.90, she is entitled to a refund to $265.50.

## ORDER:

1. I partially uphold the police's decision to withhold certain portions of the records at issue under section 8(1)(e) of the *Act*. For ease of reference, I am enclosing a copy of the records with the police's copy of the order highlighting the portions of the records to be withheld by them.

2. I order the police to disclose to the appellant the remaining records or portions of records by **June 8, 2012.**

3. In order to verify compliance with order provision 2, I reserve the right to require the police to provide me with a copy of the records that I have ordered disclosed to the appellant.

4. I partially waive the fee paid by the appellant and order the police to refund the amount of $265.50 to her.

5. I remain seized of this appeal in order to deal with any outstanding issues arising from this appeal.

Original Signed by: May 17, 2012
Diane Smith
Adjudicator