

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-2736

Appeal MA11-194

Toronto Police Services Board

May 22, 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 required that the appellant pay a fee. This order partly waives their fee.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 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 relating to police conduct during the June 2010 G20 summit weekend. The requester specified that he was seeking records that were created in the last 10 years, along with records created prior to that that continue to be used. The request was for the following information:

1. policies regarding prisoner care and control created by the Chief of Police, as required by s. 13(1)(l) of the Adequacy Regulation;

2. policies regarding property and evidence control, created by the Chief of Police, as required by s. 13(1)(n) of the Adequacy Regulation including policies created pursuant to the Policing Standards manual s.4(a) at LE-020 regarding compliance with s. 132 of the *Police Services Act (PSA)* for property that was taken from the individuals arrested during the G20;
3. records of when meals and water were provided to prisoners of the Eastern Avenue Detention Centre, created pursuant to the Policing Standards Manual s. 1(f) at LE-016;
4. records regarding the specifications for the Eastern Avenue Detention Centre, including but not limited to
 - a. when prisoners were permitted to make a phone call;
 - b. when prisoners were permitted access to legal counsel
 - c. the number of cells and capacity of each cell;
 - d. the maximum capacity of the detention centre;
 - e. the facilities provided in each cell, for example, benches, beds, and toilets;
 - f. how long individuals were to be held at the detention centre;
 - g. the average temperature of the cells;
 - h. the content of and location of the 'right to counsel poster' required pursuant to the Policing Standards Manual s. 1(g) at LE-016; and
 - i. photographs and/or drawings of the Eastern Avenue detention Center layout.

[2] The police advised that there are currently multiple on-going investigations, some before the courts and some before the Toronto Police Service's Professional Standards Unit. On this basis, the police advised that portions of the requested records are excluded from the *Act* pursuant to section 52(3) of the *Act*.

[3] The police further advised that portions of these records would be severed pursuant to sections 8(1) (law enforcement), 9(1) (relations with other governments) and 14(1) (personal privacy) of the *Act*.

[4] The police advised that pursuant to section 45 of the *Act*, a fee of \$771.00 applies to prepare the records for disclosure and a fee of \$0.20 per page would apply to photocopy the records. The appellant was advised that a 50% deposit is required prior to completing the request.

[5] The requester (now the appellant) appealed the police's decision.

[6] During the course of mediation, the police issued a decision dated May 19, 2011 denying the appellant's request for a fee waiver. The appellant advised that she would like to have this matter to proceed to adjudication to address the denial of the request for fee waiver. As the parties were unable to resolve this appeal through the process of mediation, this file was transferred to the adjudication stage of the appeal process where an adjudicator conducts an inquiry.

[7] 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*.

[8] In this order, I partly waive the police's fee.

DISCUSSION:

Should the fee of \$771.00 be waived?

[9] Section 45(4) of the *Act* requires an institution to waive fees, in whole or in part, in certain circumstances. Those provisions state in part:

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;

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

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.

[11] 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].

[12] 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].

[13] 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

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

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

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

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

[15] 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].

[16] 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

[17] 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

[18] 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]

[19] The police provided representations concerning the fee waiver for the request that is the subject to this appeal and for two other requests that are subject to related appeals.¹ With respect to the portions of the police's representations that are responsive to this appeal,² 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

¹ MA10-481-3 (Order MO-2730) and MA10-482-3 (Order MO-2734-I).

² MA11-194.

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 they did not charge the appellant a search fee in this file.

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

[21] 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".

[22] 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.

[23] 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.

[24] The appellant states that this appeal is similar to that 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 charge.

[25] 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.

[26] 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.

[27] 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.

[28] 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

[29] 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

[30] The appellant's fee waiver request concerns a fee of \$771.00 for preparation time for the appellant's request. The appellant does not dispute the police's fee of \$0.20 per page for photocopies of the records and I will not be considering the photocopy charges in this order. As stated above, this request sought records regarding training or instructions for police officers involved in the June 2010 G20 summit weekend.

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

Preparation time

22.7 hours at \$30.00 per hour (2 minutes per page for 681 pages)	\$681.00
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3 hours at \$30.00 per hour for the time for Consultation with subject-matter experts	<u>\$90.00</u>
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Total fee (without photocopy charges)	\$771.00
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[32] 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.

[33] 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.

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

[35] Section 45(1)(b) includes time for severing a record.³ Generally, this office has accepted that it takes two minutes to sever a page that requires multiple severances.⁴ 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 39 pages required severing. At two minutes per page for 39 pages at \$30.00 per hour, this fee should have been \$19.50 not \$681.00.

[36] 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]
- identifying and preparing records requiring third party notice [MO-1380]
- assembling information and proofing data [Order M-1083]

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

[38] In terms of the photocopy fee, the police state that they will charge the appellant \$0.20 per page, which is the proper amount under section 6 of Regulation 823.

[39] The police's fee contains charges for amounts not prescribed by the *Act* or Regulation 823. 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. 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.

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

³ Order P-4.

⁴ Orders MO-1169, PO-1721, PO-1834, PO-1990.

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

[40] 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. Nevertheless, I find the appellant's suggestions at reducing the scope of the request and the alternate format is evidence that she attempted to work with the police. Overall, I find that this factor weighs in favour of granting a fee waiver.

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

[41] The police did not charge the appellant a search fee. Therefore, this factor weighs against a fee waiver.

Whether the request involves a large number of records

[42] According to the police's decision of March 21, 2011, a total of 681 pages of records were identified as responsive. As the request involved a large number of records, this factor weighs against of a fee waiver.

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

[43] 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

[44] 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

[45] 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:

Preparation time: 39 minutes at \$30.00 per hour \$19.50
(2 minute per page for 39 pages)

Total fee without photocopy charges \$19.50

[46] Therefore, I have reduced the fee from \$771.00 to \$19.50. In addition, the police are entitled to charge the appellant \$0.20 per page photocopy fee for every page of the records provided to her.

ORDER:

I partially waive the police's fee of \$771.00 and reduce it to \$19.50.

Original Signed by: _____
Diane Smith
Adjudicator

_____ May 22, 2012