Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-2756

Appeal MA11-478

York Regional Police Services Board

June 27, 2012

Summary: The appellant sought access to certain records about the operation and maintenance of breathalyzer machines. This order partly upholds the police's fee estimate and does not waive the fee.

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

OVERVIEW:

[1] The York Regional Police Services Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for information concerning breathalyzers. In particular, the requester sought the following information:

> 1. The alcohol standard log for each Intoxilyzer 8000C for the period January 1, 2009 to date [of the request].
>
> 2. The maintenance log for each Intoxilyzer 8000C including the original purchase invoice, and any work orders or invoices for repairs or software modifications to the Intoxilyzer since it was purchased.
>
> 3. The manufacturer's certificate of calibration for each of these Intoxilyzers.

> 4. The maintenance log for any simulator acquired with or for these Intoxilyzers during the period January 1, 2009 to date including the original purchase invoice, manufacturer's or other certificate of calibration, manufacturer's or other quality control form, and any work orders or invoices for repairs to the simulator or simulators since purchase.

[2] The requester also requested that the police waive the fee associated for searching and preparing the records on the basis that the disclosure of the information would benefit public health and safety.

[3] The police provided the requester an interim access decision and fee estimate in the amount of $720.00 and noted that the time to search for the records would be 12 hours. The police noted that there may be additional preparation and photocopying fees, but they did not have an estimate of the additional charges at the time of the decision.

[4] The police denied the requester's request for a fee waiver. The requester, now the appellant, appealed that decision.

[5] During mediation, the appellant advised the mediator that he was requesting a fee waiver on the basis that dissemination of the records would benefit public health and safety and that he believed that the fee for the search time to locate the records was excessive. The police denied the appellant's fee waiver request.

[6] Accordingly, the file was referred to adjudication where an adjudicator conducts an inquiry. Representations were received from the police and the appellant and were shared in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction Number 7*.

[7] In this order, I allow the police to charge the appellant a fee of $236.50 and uphold the police's decision to not waive the fee.

ISSUES:

A. Should the fee estimate of $720.00 be upheld?

B. Should the fee be waived under section 45(4)(c) of the *Act*?

DISCUSSION:

A. Should the fee estimate of $720.00 be upheld?

[8] Where the fee exceeds $25, an institution must provide the requester with a fee estimate [Section 45(3)].

[9] Where the fee is $100 or more, the fee estimate may be based on either

- the actual work done by the institution to respond to the request, or
- a review of a representative sample of the records and/or the advice of an individual who is familiar with the type and content of the records [Order MO-1699].

[10] The purpose of a fee estimate is 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 and MO-1699].

[11] 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].

[12] In all cases, 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].

[13] This office may review an institution's fee and determine whether it complies with the fee provisions in the *Act* and Regulation 823, as set out below.

[14] Section 45(1) requires an institution to charge fees for requests under the *Act*. That section reads:

> A head shall require the person who makes a request for access to a record to pay fees in the amounts prescribed by the regulations for,
>
> (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.

[15] More specific provisions regarding fees are found in section 6 of Regulation 823. This section 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.

[16] The police submit that in order to calculate an estimate of fee involved in providing the requester with the requested information regarding the intoxilyzers, they sought the advice of the officer responsible for preparing these types of records for parties charged with impaired driving offences as part of the criminal court disclosure process.

[17] The police state that they have eight Intoxilyzer 8000C models. These intoxilyzers are used in connection with 15 simulators. The estimate was prepared using one intoxilyzer with one simulator, as follows:

> 1. Intoxilyzer 80-005105 and CDE download — 5 minutes to search electronically, download and convert to PDF (8 intoxilyzers x 15 simulators x 5 minutes for each = 600 minutes).
>
> 2. Intoxilyzer 80-005105 weekly Breath Test Log (since purchase) — 45 minutes to search electronically, download and convert to PDF (8 intoxilyzers x 45 minutes for each = 360 minutes).

> 3. Intoxilyzer 80-005105 Maintenance — 5 minutes to search electronically, download and convert to PDF (8 intoxilyzers x 5 minutes for each = 40 minutes).
>
> 4. Simulator DR6135 Maintenance — 5 minutes to search electronically, download and convert to PDF (15 simulators x 5 minutes for each = 75 minutes).

[18] Based on the sample record, the officer estimated that it would take approximately 1075 minutes[1] to prepare this portion of the requested records.

[19] The police state that the weekly breath test entry search[2] resulted in 45 pages of records containing personal information that required severance. As there are eight intoxilyzers, the police estimate that there are 360 pages of records that require severance. At one minute per page, severing will take approximately 360 minutes.

[20] In addition, the police state that the estimated search time to locate the other responsive records, namely the purchase invoices, the inspection work orders and the certificate of calibration, was 30 minutes of search time.

[21] The total search and preparation time (including severing third party personal information) for the records was estimated by the police at 1465 minutes,[3] which at $0.50 per minute amounts to a fee estimate of $732.50. The fee requested by the police was $720.00.

[22] The police estimated the total number of pages to be photocopied or printed from the computer at 3560, with a cost of $0.20 per page is $712.00. The police state that this additional fee was not charged to the appellant.

[23] The appellant concedes that the severance of 360 pages may take 360 minutes, however, he questions why it is necessary to run eight separate searches of the breath test log at 45 minutes each,[4] rather than one search of the entire database prior to severance activities. The appellant states that it makes no sense that the police would:

> …multiply "8 intoxilyzers x 15 simulators x 5 minutes each". If the data is relevant to one of our requests then the number of intoxilyzers would be added to the number of simulators, not multiplied. The appellant disputes in its entirety these 600 minutes claimed.

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[1] 600+360+40+75=1075
[2] Item 2 above.
[3] 1075 + 360 +30=1465.
[4] Item 2 above.

[24] Of the police's time to search for the alcohol standard logs, the appellant conceded that 400 minutes was reasonable.

[25] With respect to the police's search of the intoxilyzers and simulator maintenance logs, the appellant states that the maintenance logs for Intoxilyzer 8000C's should be quite short since these instruments have only been in use since about 2008. He also states that the computer time to retrieve each simulator maintenance log should be similar to that for each intoxilyzer maintenance log. The appellant suggests that the process should take less than one minute for each intoxilyzer and for each simulator.

[26] The appellant conceded the 30 minutes for searching the manufacturer's certificate of calibration. He also conceded another eight minutes for a search of the maintenance log for any simulator acquired from January 1, 2009 to the date of the request.

[27] In total, the appellant concedes that 446 minutes for search and preparation time (400 + 30 + 8 + 8) is reasonable in this appeal.

[28] In reply, the police note that they maintain their records concerning alcohol standard changes and calibration checks within an electronic records management system. They state that this manner of data collection optimizes the police service's operational efficiency and records-keeping accuracy. However, the police argue that responding to this particular access request requires the search, download and PDF conversion of both the CDE Download log and Weekly Breath Test Log. Moreover, since the Weekly Breath Test Log includes the personal information of accused individuals, considerable manual redaction is required.

[29] The police conceded that they misinterpreted the information concerning the time required to obtain the CDE Download logs. There should only be one search per intoxilyzer. As such, the police state that the appropriate time estimate should have been 40 minutes not 600 minutes for this component of the fee estimate and, therefore, the time of 1075 minutes is reduced by 560 minutes to 515 minutes. Therefore, the total search and preparation time claimed by the police is now 905 minutes.[5] This results in a revised fee estimate of $452.50.

[30] In sur-reply, the appellant states that the police's representations contain a mathematical error and that their time of 905 minutes should be 545 minutes. The appellant challenges the police's time spent searching their breath test log when he is seeking is disclosure of the alcohol standard log.

Analysis/Findings

[5] 1465 minutes originally claimed minus the 560 minutes deducted by the police from their fee estimate.

[31] As stated above, the appellant agrees that a search and preparation time of 446 minutes is reasonable. Considering that the *Act* allows institutions to charge appellants at the rate of $30.00 per hour or $0.50 per minute, the fee agreed upon by the appellant is $223.00 in this appeal.

[32] The police have agreed that the appropriate search and preparation time is 905 minutes for a total fee of $452.50. After receipt of the appellant's sur-reply representations, I asked a staff member to contact the police to ascertain exactly how both these figures were arrived at. In response, the police's freedom of information coordinator stated that it was going to take both herself and the officer conducting the search each 12 hours of time to respond to the request, for a total of 24 hours (1440 minutes) at $30.00 per hour. This calculation results in the police's fee estimate now totaling $720.00 not the $452.50 figure set out in their representations.

[33] The appellant has challenged the police's searching of the breath test log (estimate of 360 minutes) when he requested the alcohol standard log. The police have indicated in order to respond to the request for alcohol standard logs, both the CDE download (40 minutes) and the breath test log need to be searched. The police reduced the fee to search the CDE download from 600 minutes to 40 minutes. The electronic search of each CDE download is estimated by the police at 5 minutes each for a total of 40 minutes. The police have estimated 360 minutes to electronically search the breath test log at 45 minutes for each of the eight intoxilyzers. They have not indicated why it would take 45 minutes to search one database yet 5 minutes to search another database for each intoxilyzer to obtain the alcohol standard logs. I find that it is reasonable for the police to charge 5 minutes per intoxilyzer for the breath test log, which is the same time it took them to search the CDE download.

[34] The appellant states that the maintenance logs search time of 40 and 75 minutes (total 115 minutes) for the intoxilyzers and simulators should take only eight minutes each. He provided a detailed explanation in his representations as to why the search time should be reduced. The police's response is that the estimate is based on the time it took to search their electronic database. They also indicated that they have 15 simulators for the eight intoxilyzers that need to be searched. The appellant asked in his representations for confirmation that all 15 simulators were numbered DR6135 as set out in his request. The police did not indicate in their representations that all 15 simulators were DR6135 as set out in the request; however, they did indicate that all 15 simulators were used with the eight intoxilyzers.

[35] Based upon my review of the appellant's detailed representations, I find that the police's electronic search time of 5 minutes to electronically search for the information about the maintenance logs is not reasonable. I am reducing this search time to one minute per intoxilyzer for each of the eight intoxilyzers and one minute for each of the 15 simulators for a total of 23 minutes, as I find the appellant's representations on this

issue to be persuasive as to a reasonable electronic search time for the maintenance logs.

[36] Based upon my review of the appellant's detailed representations made in response to the police's representations, and taking into account the police's reduction of their search time to 40 minutes for one of the databases needed to obtain the alcohol standard log records, I find that a reasonable search and preparation time is as follows:

Search of CDE download	40 minutes
Search of breath test log	40 minutes
Search of maintenance logs for intoxilyzers and simulators	23 minutes
Preparation time to sever 360 pages	360 minutes
Total	473 minutes

[37] At $30.00 per hour or $0.50 per minute, the total fee estimate that I am upholding in this appeal is, therefore, $236.50.

[38] I will now consider whether this fee estimate should be waived.

B. Should the fee be waived under section 45(c) of the *Act*?

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

> 45. (4) A head shall waive the payment of all or any part of an amount required to be paid under subsection (1) if, in the head's opinion, it is fair and equitable to do so after considering,
>
> > (c) whether dissemination of the record will benefit public health or safety;
>
> 8. The following are prescribed as matters for a head to consider in deciding whether to waive all or part of a payment required to be made under the Act:
>
> > 1. Whether the person requesting access to the record is given access to it.

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

[40] 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].

[41] 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].

[42] 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

[43] 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]

[44] 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].

[45] The police submit that in determining whether to waive the fee for this request they considered the time involved in gathering the records, the volume of the records, the person requesting the records, and the impact on this organization in producing the requested records.

[46] The police state that they automatically produce these types of records at no charge as part of the criminal disclosure process to any person charged by them with impaired driving offences.

[47] In determining whether dissemination of the records would benefit public health and safety it was determined by the police that the subject matter is really of a private interest. They state that the records would only be of interest to anybody involved in an impaired driving charge and not the public at whole. They also state that the subject matter does not directly relate to public health or safety as the responsive records are basically created from individuals having to blow into screening devices when being investigated for impaired driving offences and the maintenance of those devices.

[48] The appellant submits that that the police's breath testing program is a matter of interest and concern to every member of the public concerned with accurate, precise, specific, and reliable forensic science measurement in the fair and effective prosecution of drunk drivers. The appellant states that public confidence in the breath testing system and the requirements, both under the *Highway Traffic Act* and the *Criminal Code*, to provide breath samples, can only be maintained in a free and open system in which the public can lay trust in the accuracy of the instruments as well as safety in their use.

[49] The appellant states that it is not the practice across Ontario for police to produce these types of record and, as a result, defense counsel must frequently engage in expensive and time-consuming applications to obtain this kind of information for their clients, many of whom are of modest means.

[50] The appellant further submits that even if the police service involved in this request does routinely make this information available to those charged with impaired driving, this information is not routinely made available to victims of crime, judges, crown attorneys, persons responsible for rehabilitation, and defense lawyers generally because:

> 1. The records disclosed by York Regional Police in an individual case are limited to a particular Intoxilyzer, within a very limited time frame, and concerning a particular subject test.
>
> 2. The records disclosed to an accused cannot be shared with any other member of the public because it relates only to the defense of that particular charge.

[51] The appellant states that the records disclosed by the crown in a criminal case do not provide the level of context and completeness necessary to address the public health and safety interests as they do not address overall quality assurance concerns. Further, he argues that criminal law disclosure cannot be shared among lawyers, scientists, and to the general public as in the decision of the Ontario Court of Appeal in *D.P. v. Wagg*.[6]

[52] The appellant states that he is an Ontario lawyer with a criminal law practice and has provided Continuing Professional Development to lawyers at programs sponsored by the Law Society of Upper Canada and the Ontario Criminal Lawyers Association. The appellant has conducted many Intoxilyzer Tutorials for lawyers in 2011 and 2012. The appellant states that he is a very active member of the Ontario Criminal Lawyers Association (CLA) and frequently disseminates information about technical Intoxilyzer issues on the CLA listserv.

[53] The appellant proposes that the records be disseminated to the Ontario Criminal Lawyers Association and to the public on the internet in a manner similar to the records the appellant received from the Peel Regional Police Service (Peel). The appellant directed me to a website concerning the records from Peel, which reads:

> This database has been built using data obtained through Freedom of Information applications from police services and Ontario Government Ministries. It is designed to provide criminal law lawyers and experts in private practice with an index to important maintenance and calibration documents in the possession of the source police service or government Ministry. Lawyers and experts will be able to use this information to identify the relevant actual documents that they wish to request in criminal law disclosure and in their own Freedom of Information applications. Publication of this database will assist the police and government by facilitating more specific requests for data by defense lawyers and experts in private practice. It should be remembered that many persons charged with criminal offences are of modest means and some of them are defended on Legal Aid certificates. Cost efficiency by police in providing such information and lawyers defending criminal

[6] [2004] O.J. No. 2053.

> charges should be encouraged without compromising the rights of an accused person (of significant or modest means) to make full answer and defense under Charter section 7 and to a fair hearing under Charter section 11(d). Efficient use of Court resources requires that disclosure requests be specific and relevant. Dissemination of this index will encourage relevant disclosure requests. Dissemination of this index will encourage greater transparency, reliability, and quality assurance in the evidentiary breath testing system. An open and reliable evidentiary breath testing system will promote public health and safety. It should be noted in some jurisdictions it is the responsibility of the police or the state government to publish this type of data online as a matter of public health and safety.

[54] In reply, the police state that while the appellant has raised issues concerning the public's interest in the records, having regard to the integrity of the criminal justice system, he has failed to demonstrate how that public interest relates directly to a public health and safety issue. Further, they state that the dissemination of records pertaining to the inner workings of the Intoxilyzer 8000C will not disclose a public health or safety concern in relation to drinking and driving nor will it contribute to the development or understanding of any public health or safety issues related to drinking and driving.

[55] The police submit that the arguments pertaining to the sufficiency of criminal disclosure should be made in criminal court as they have no bearing on whether a fee should be waived in the interests of public health and safety, as the public interest in criminal justice and the public interest in health and safety are not interchangeable.

[56] In sur-reply, the appellant states that the request deals with public transparency of the reliability of the instruments (forensic measuring devices) used by police and government to control drunk driving. These are measuring devices that need to be accurate, precise, specific, and reliable if public health and safety are to be protected. If these forensic measuring devices are not publicly known to be accurate, precise, reliable, and specific then victims of crime, judges, crown attorneys, persons responsible for rehabilitation, and defense lawyers will lose confidence in Ontario's system of controlling drunk driving.

Analysis/Findings re: part 1

[57] Based upon my review of the parties' representations, including the appellant's detailed representations, I find that, even though the appellant will disseminate the records, dissemination of the records would not disclose a public health or safety concern, or contribute meaningfully to the development of understanding of an important public health or safety issue.

[58] The appellant is concerned about overall quality assurance issues regarding breathalyzer machines and relies on the information in a report from 1994.[7] I find that the information in this 17 year old report does not disclose a current public health or safety concern about the machines that are the subject matter of the records.

[59] Based on my review of the appellant's representations, I find that dissemination of the information in the records concerning the operation of the intoxilyzers at issue would not yield a public benefit within the meaning of section 45(4)(c) of the *Act*. Although drunk driving is a public safety concern, I find that dissemination of the records, which are about the operation and maintenance of breathalyzer machines for a specific police force for a specific time, would not benefit public health or safety. Therefore, part 1 of the test has not been met and I will not grant a fee waiver in the circumstances. However, for the sake of completeness, I will consider part 2 of the test.

Part 2: fair and equitable

[60] 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]

[61] The police submit that the records that would need to be produced in order to respond to this access request would take hours to complete and involve thousands of pages. It would take the officer away from his assigned duties and interfere with and/or hinder their established disclosure process.

[62] The appellant did not address this issue directly in his representations.

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[7] Quality Assurance in Breath-Alcohol Analysis - Kurt M. Dubowski, Ph.D., Journal of Analytical Toxicology, Volume 18, October 1994.

Analysis/Findings re: part 2

[63] After considering all of the factors listed above concerning whether a fee waiver is fair and equitable, I find that part 2 of the test has not been met in this appeal.

[64] In particular, the police have reduced their fee and have stated that they will not be requesting from the appellant the photocopy fee for approximately 3560 pages of records which at a cost of $0.20 per page would have amounted to $712.00. In addition, I have further reduced the police's fee in this order to $236.50. This request involves a large number of records and I find that waiver of the fee that I have found to be appropriate in this appeal would shift an unreasonable burden of the cost from the appellant to the police.

[65] Therefore, I find that part 2 of the test has not been met.

ORDER:

1. I do not uphold the police's fee estimate of $720.00.

2. I allow the police to charge the appellant a fee of $236.50 for records responsive to his request.

3. I uphold the police's decision not to grant the appellant a fee waiver.

Original signed by: June 27, 2012
Diane Smith
Adjudicator