

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3834

Appeal MA18-465

Toronto Police Services Board

September 19, 2019

Summary: The appellant made an extensive, detailed, multi-part request to the Toronto Police Services Board (the police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for information related to gun seizures and gun-related crime. The police issued a \$13,560 fee estimate in response, which they declined to waive upon the appellant's request. In this order, the adjudicator finds that the police charged the appellant for manual searches at a rate that is not allowed under the applicable Regulation, and that at the allowable rate, the fee estimate for search time should be \$6,810 in total. She also upholds the police's decision to deny a fee waiver, and dismisses the appeal.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 45(1) and (4), Regulation 823, sections 6, 7(1), and 8.

Order Considered: Order PO-3936.

OVERVIEW:

[1] The Toronto Police Services Board (the police) received a multi-part request under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA*, or the *Act*) from an individual on behalf of a specified organization regarding gun seizures and gun violence, as follows:

Thirty[-]six months of gun seizures and description of both the guns and those arrested in connection of those seizures up to and including December 31, 2017.

(A) The time and date of these seizures to include the divisions in which the seizure occurred and the unit involved. i.e. the division group (scout cars and division CIB) or specialized units. i.e. TAV, Guns and Gangs Taskforce etc. to include joint forces operations.

(B) Tracing of the seized gun's origins. Were they found to be stolen from licensed gun owners or imported illegally or "other" if "other" could be applied in this description.

(C) Tracing of the seized gun's histories. Relying on ballistic data bases of CPIC, NCIC and the Interpol Global database. Which of the seized guns were found to have been involved in previous crimes?

(D) List the Toronto Police Service weapons lost or stolen since 1957 and indicate their status i.e. recovered or still missing and outstanding not recovered.

(E) List the status of those arrested. Were they in Canada legally or not? Did they have previous criminal records? and, if so, for what offences? Were they on parole, probation or did they have outstanding warrants for their arrest?

(F) Indicate the descriptions of those arrested. Male or female and indicate the race of those arrested.

(G) For the 36 months in question please indicate the number of persons either shot and killed or wounded by firearms to include their sex and race apply that same criteria to those arrested for these offences.

(H) Who are the murder victims for 2017? Indicate their sex, race and the manner in which they were murdered. Indicate the present status of these cases, i.e. arrest made charges laid or unsolved and outstanding.

[2] In response to the request, the police issued a fee estimate of \$13,560. They also requested a 50% deposit of \$6,780 so that they could proceed with the request. In addition, the police stated that some portions of the responsive records might be withheld under the exemptions at sections 8 (law enforcement) and 14 (personal privacy) of the *Act*. The police's decision also referred the appellant to a specified section of the police's website for information regarding murder victims.

[3] The requester, now the appellant, appealed the police's decision to the Office of the Information and Privacy Commissioner of Ontario (the IPC, or this office).

[4] During mediation, the mediator had discussions with the police and the appellant. The police explained that the \$13,560 fee was due to the need to manually search records. The appellant considered narrowing the scope of his request, seeking records that did not require manual searches, in response to which the police issued a revised fee estimate of \$420. However, the police were advised about two weeks later that the appellant had reverted back to the original scope of his request and had submitted a fee waiver request. The police denied the appellant's fee waiver request.

[5] The appellant advised the mediator that he wished to proceed to adjudication, so the appeal was moved to the adjudication stage, where an adjudicator conducts a written inquiry.

[6] I began an inquiry under the *Act* by sending a Notice of Inquiry, setting out the facts and issues on appeal, to the police. The police provided representations, which were shared in full with the appellant for a response along with the Notice of Inquiry. The appellant submitted representations in response, which were shared with the police for a reply. The police declined to provide further representations in reply.

[7] For the reasons that follow, I find that the police may only charge a fee of \$6,810, and I uphold the police's decision to deny a fee waiver.

ISSUES:

- A. Should the fee estimate of \$13,560 be upheld?
- B. Should the fee be waived?

DISCUSSION:

Issue A: Should the fee estimate of \$13,560 be upheld?

[8] The police provided the appellant with a fee estimate¹ of \$13,560, which was based only on search time, but for the reasons that follow, I find that only a fee estimate of \$6,810 is allowable for the search time claimed under the *Act*.

[9] 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.² The fee estimate also assists requesters to decide whether to narrow the scope of a request

¹ As required by section 45(3) of the *Act*, since the fee exceeds \$25.

² Orders P-81, MO-1367, MO-1479, MO-1614 and MO-1699.

in order to reduce the fees.³

[10] In his representations, the appellant describes his request as “extremely complex and far reaching,” and says that “[i]t is no surprise [the police] wanted \$13,560 to fulfil it.” He does not challenge the basis of the fee, but relies only on what he describes as “the overall public interest,” the “overall public wellbeing,” and the “public’s health [and] safety.” (The latter is a specific consideration set out in section 45(4)(c) of the *Act* in deciding on a fee waiver.)

[11] Despite the appellant’s apparent concession about the reasonableness of the fee estimate, I must first assess whether it should be upheld before I can consider whether all or part of it should be waived.

Basis of the fee estimate

[12] If the fee is \$100 or more (as it is in this case), 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.⁴

[13] Here, the police state that they based the fee estimate on the expert advice of members of two police units:

- the Analytics & Innovation Unit (AIU), which the police described as being responsible for coordinating the production and gathering of statistics from all areas of the police to ensure accuracy, timelines, quality and consistency, and which is “extremely familiar” with the requested information; and
- the Integrated Guns and Gangs Task Force (IGGTF), which the police described as the subject expert of information regarding gun seizures by the police.

[14] On the basis of these descriptions of the AIU and IGGTF units, I am satisfied that the police consulted individuals familiar with the type and contents of the requested records in order to come up with a fee estimate in response to the request.

Calculation of the fee estimate

[15] Section 45(1) requires an institution to charge fees for requests under the *Act*.

³ Order MO-1520-I.

⁴ Order MO-1699.

Section 45(1) says that an institution must charge fees 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.

[16] Regulation 823 contains more specific details about the fees that an institution must charge under section 45(1), including:

- the costs for photocopies (\$0.20/page)⁵;
- manual searching for a record (\$7.50 for each 15 minutes spent by any person)⁶; and
- developing a computer program or other method of producing a record from machine record (\$15 for 15 minutes spent by any person)⁷.

[17] An institution must include a detailed breakdown of the fee, and a detailed statement as to how the fee was calculated.⁸ 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.

[18] Here, the police's fee estimate is based entirely on fees charged for search time; fees related to photocopies, preparation time, and shipping were waived.

[19] The wording of their fee estimate breakdown (reproduced below) is somewhat unclear, but based on the hours claimed and the total charge, I conclude that the police allocated 226 hours for development of a computer program or other method of producing a record from machine record (at \$60/hour), but no time for a manual search (at \$30/hour), as follows:

Search time

⁵ Section 6(1) of Regulation 823.

⁶ Section 6(3) of Regulation 823.

⁷ Section 6(5) of Regulation 823.

⁸ Orders P-81 and MO-1614.

Total search time hours to locate and assemble document	226
Search time hours	No charge
Search time hours – chargeable	\$60/hour
Total charge for search and assembly of document	\$13,560

[20] As mentioned, I must consider the appropriateness of the police’s fee before I decide the fee waiver issue.

[21] Although the revised fee estimate of \$420 is not at issue (because the appellant chose to pursue access to all records, and not the narrowed request), it helps understand the extent of the manual searches required to process the original request. The police submit that during mediation, they explained that their fee estimate was based on the fact that most of the searching would have to be done manually: records would have to be read and assessed for the existence of responsive information, and not found through a computer query. As a result, the appellant (temporarily) reduced the scope of his request, removing “any item that would require a manual search” from the scope of the appeal, and narrowed the timeframe to 2017. The police then issued a revised fee estimate of \$420,⁹ of which only \$60 was for one hour of search time (to develop a computer script), as follows:

Search time

Total search time hours to locate and assemble document	1
Search time hours	No charge
Search time hours – chargeable	\$60/hour
Total charge for search and assembly of document	\$60

[22] Again, the language in the above breakdown is somewhat unclear, but based on the single hour identified for search time, the \$60 charge, and the narrowed scope (having removed manual searches), I can conclude that the \$60 charge was to develop a computer program or other method of producing a record from machine record.

[23] The clear implication of the reduced scope, search time, and corresponding charges is that the manual search would have taken 225 hours.

[24] However, the fee estimate at issue (which does include manual searches) does

⁹ The police also decided not to waive preparation fees for the narrower request, but that is not relevant to this appeal.

not identify *any* manual search time charged at the allowable \$30/hour. Instead, the entire 226 hours of search time is charged at \$60/hour, the rate for developing a computer program or other method of producing a record from machine record – despite the fact that the scope once again included records for which manual searches were required. The police did not explain this discrepancy. Accordingly, I cannot uphold a charge for manual searching at \$60/hour, and I only uphold the police charging \$30/hour for this type of search, which is the allowable rate under Regulation 823.

Reasonableness of search time

[25] Having clarified the allowable charges, the question then becomes whether I should uphold the 226 hours of search time claimed.

[26] The police state that their subject matter expert units (the AIU and IGGTF) advised that a total of 226 hours would be required to complete the appellant's original search request. As discussed, 225 hours of this was to do manual searches. I find further support for this conclusion in the police's explanation of the steps involved to extract responsive information from manually read records:

. . . . the appellant is not seeking access to actual records but to information contained inside the records

. . . .

In order to respond to this extensive request for information, this institution would have an AIU Analyst write a query to extract the records meeting the general criteria of the request. At that time these records would be *manually* read to obtain the specific information that is responsive to this request. *Most of the information that the appellant is seeking is contained in the body of the record.* This information is not searchable field that can be extracted with a query. [Emphasis added.]

[27] Although the police did not identify how many records would need to be read to respond to the appellant's request, their estimate was based on the advice of subject matter experts considering what the appellant acknowledged was a "complex and far reaching request." The police provided an example of the portions of the request that would require manual reading to search for responsive information that would not be in a searchable field: items E, G, and H, which deal with wide-ranging topics, which are reproduced below.

(E) List the status of those arrested. Were they in Canada legally or not? Did they have previous criminal records? [A]nd, if so, for what offences? Were they on parole, probation or did they have outstanding warrants for their arrest?

(G) For the 36 months in question please indicate the number of persons either shot and killed or wounded by firearms to include their sex and race apply that same criteria to those arrested for these offences.

(H) Who are the murder victims for 2017? Indicate their sex, race and the manner in which they were murdered. Indicate the present status of these cases, i.e. arrest made charges laid or unsolved and outstanding.

[28] Considering this example, the other detailed portions of the appellant's request, and the subject matter expertise of those who provided the estimate, I find that it is reasonable to accept that 225 hours of manual search would be required to process the appellant's request. Since the rate allowable by Regulation 823 is \$30/hour, the police can charge the appellant \$6,750 for manual searches (225 hours x \$30/hour = \$6,750).

[29] In addition, I accept that under the advice of the subject matter experts, the police would need one hour to create a computer script to write a query and extract information from the police's database. The allowable rate to do this under Regulation 823 is \$60/hour.

Deposit

[30] Under section 7(1) of Regulation 823, because the fee estimate is \$100 or more, the police are allowed to require the appellant to pay a deposit equal to 50 per cent of the estimate before taking any further steps to respond to the request.¹⁰ Therefore, I uphold the charging of this deposit, but given my findings above, the deposit to be charged will be 50% of \$6,810 (\$6,750 for manual searches + \$60 for computer script), which is \$3,405.

Fee estimate decision summary

[31] On the basis of my review, I have found that the police may charge the appellant \$6,810 for 226 hours of search time (225 hours are for manual searches, and one hour for development of a computer script to query and extract information in their database).

Issue B: Should the fee of \$6,810 be waived?

[32] For the reasons that follow, I uphold the police's decision to deny a fee waiver.

General principles

[33] The fee provisions in the *Act* establish a user-pay principle which is founded on

¹⁰ Section 7(1) of Regulation 823.

the premise that requesters pay the prescribed fees associated with 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.¹¹

[34] 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.¹²

[35] The institution or this office may decide that only a portion of the fee should be waived.¹³

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

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

(a) the extent to which the actual cost of processing, collecting and copying the record varies from the amount of the payment required by subsection (1);

(b) whether the payment will cause a financial hardship for the person requesting the record;

(c) whether dissemination of the record will benefit public health or safety; and

(d) any other matter prescribed by the regulations.

[37] The fact that the request here is made by a small not-for-profit organization is not determinative of the fee waiver issue.¹⁴

[38] Section 8 of Regulation 823 sets out additional matters for a head to consider in deciding whether to waive a fee. Those provisions say:

¹¹ Order PO-2726.

¹² Orders M-914, P-474, P-1393 and PO-1953-F.

¹³ Order MO-1243.

¹⁴ See, for example, Order PO-3936.

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.

Fair and equitable

[39] For a fee waiver to be granted under section 45(4), the test is whether any waiver would be “fair and equitable” in the circumstances.¹⁵ Factors that must be considered in deciding whether it would be fair and equitable to waive a fee are discussed below.

Section 45(4)(a): actual cost in comparison to the fee

The police submit, and I accept, that the cost of processing, collecting and copying the record will in all likelihood be greater than what is set out in the fee estimate. However, the police have stated that they will not be invoicing the difference to the appellant, and will stand by the original fee estimate. The fact that the police, and by extension Ontario taxpayers, will most likely be absorbing additional costs is a consideration that weighs against granting a fee waiver.

Section 45(4)(b): financial hardship

[40] In this case, the appellant said that he is not relying on this factor, but did refer to it in his representations.

[41] The fee estimate at issue is in the thousands of dollars, but the fact that the fee is large does not necessarily mean that payment of the fee will cause financial hardship.¹⁶

[42] For section 45(4)(b) to apply, the appellant must provide some evidence regarding his financial situation, including information about income, expenses, assets and liabilities,¹⁷ but he did not do so. His representations include a remark about not “cashing in a [r]etirement savings [a]ccount to pay,” but I find that that is insufficient evidence for section 45(4)(b) to apply. Therefore, without evidence that payment of the

¹⁵ See *Mann v. Ontario (Ministry of Environment)*, 2017 ONSC 1056.

¹⁶ Order P-1402.

¹⁷ Orders M-914, P-591, P-700, P-1142, P-1365 and P-1393.

fee will cause the appellant financial hardship, I find that this factor does not apply.

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

[43] This is the factor that the appellant relies on to request a full fee waiver.

[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.¹⁸

[45] 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
 - disclosing a public health or safety concern, or
 - 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.¹⁹

[46] I find that the first three of the above factors apply in the circumstances of this appeal, and weigh in favour of finding that section 45(4)(c) applies. Given the detailed wording of the request and the many subjects that it covers (including gun violence, seizure of illegally possessed guns, homicides, and the criminal history and/or immigration status of those arrested for gun-related crime), I accept that the subject matter of the request relates to public, not private, interests. I also find that, overall, the subjects covered by the request directly relate to public health or safety issues, and that overall, dissemination of the responsive records would benefit the public by contributing meaningfully to an understanding of these subjects.

[47] Elaborating on the issue of public benefit, I note that the police submit that the appellant did not show a connection between the responsive records and a public

¹⁸ Orders MO-1336, MO-2071, PO-2592 and PO-2726.

¹⁹ Orders P-2, P-474, PO-1953-F and PO-1962.

benefit on health or safety issues. Having reviewed the appellant's representations, I agree with the police's position as it pertains to several aspects of the request. However, considering the request as a whole, as well as public scrutiny of certain aspects of it already underway (concerning race-related information),²⁰ it is reasonable to accept that dissemination of several items of the request could benefit the public by contributing meaningfully to an understanding of those subjects. This is not undermined by the fact that the police already publish information relating to some aspects of the request. As a result, it is reasonable to accept that dissemination of records relating to the serious public health and safety issues mentioned in the request would yield a public benefit by contributing meaningfully to the understanding of those issues.

[48] However, I find that there is insufficient evidence that the fourth factor (likelihood of dissemination by the requester) is relevant in this appeal. Although he is the director of a named organization, the appellant did not provide sufficient evidence that that organization would disseminate the information, if disclosed. Rather, his representations repeatedly reference the media disseminating this information to the public, but I find that there is insufficient evidence that this would occur. Therefore, while it is *possible* that the appellant, the organization he heads, and/or the media would disseminate the contents of the records to the public, that is not enough for me to find that it is *likely* that the appellant will disseminate the records. Therefore, I find that this consideration is not relevant in this appeal.

[49] Nevertheless, considering the request as a whole, I find that much of the information relates to a serious public health or safety issue, and it is possible that the appellant will disseminate the contents of the records to the public. It is reasonable to believe that the public could benefit from a contribution to a meaningful understanding of this issue. This weighs towards finding that at a fee waiver would be fair and equitable in the circumstances. However, section 45(4)(c) is one consideration of several when assessing whether a fee waiver is fair and equitable; I have already discussed sections 45(4)(a) and (b), and will discuss section 45(4)(d) and other relevant factors, below.

Section 45(4)(d)/ section 8 of Regulation 823

[50] Under section 45(4)(d) and section 8 of Regulation 823, consideration is given to whether the institution provided the requester with the record and whether the fee is

²⁰ The appellant's representations (which were shared with the police, but to which the police did not respond) refer to an investigation by the Ontario Human Rights Commission (OHRC) relating to the treatment of minorities by the police. That investigation has led to the publication of the OHRC's interim report entitled *A Collective Impact: Interim report on the inquiry into racial profiling and racial discrimination of Black persons by the Toronto Police Service*, retrieved from <http://ohrc.on.ca/en/public-interest-inquiry-racial-profiling-and-discrimination-toronto-police-service/collective-impact-interim-report-inquiry-racial-profiling-and-racial-discrimination-black>.

\$5 or less, such that it is too small to justify payment. Here, the police granted partial access to the records and the fee is over \$5, so this section is not relevant.

Other relevant factors

[51] Any other relevant factors must also be considered when deciding whether or not a fee waiver is "fair and equitable". Relevant factors 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.²¹

[52] I find that the police worked constructively with the appellant, and that processing the original request would reasonably be expected to involve a large number of records (given the manual search time of 225 hours). The police also led the appellant to publicly available online information, and explained what would be involved in the manual search during mediation,²² which led the appellant to briefly narrow the scope of his request and a far-reduced \$420 fee estimate being issued. Furthermore, the police waived the fees that they were required to charge for preparation time, photocopies, and shipping. All of these facts weigh against finding that a fee waiver would be fair and equitable in the circumstances.

[53] For his part, the appellant recognizes that his request is very broad and requires much time to respond to.

²¹ Orders M-166, M-408 and PO-1953-F.

²² The police explained this in their submissions during the inquiry. I am not privy to any communications between the mediator and the parties to which mediation privilege applies.

Weighing the factors for and against a full or partial fee waiver

[54] Weighing the factors for and against a fee waiver, I find that it would not be fair and equitable to grant a fee waiver in the circumstances of this appeal. As discussed, I found that sections 45(4)(a), (b), and (d), as well as other relevant factors particular to the circumstances of this appeal (the waiving of preparation and other allowable fees), weigh against finding that a fee waiver would be fair and equitable in the circumstances. In my view, these considerations outweigh the fact that section 45(4)(c) is relevant; in particular, I find that the police's waiving of the preparation and other fees is sufficient to recognize the public health or safety value of the requested information. In light of this, and the user-pay principle in the *Act*, I find that waiving the allowable search fee of \$6,810 would shift an unacceptably high burden unto the police, and by extension, Ontario taxpayers, in order to process the appellant's request. As a result, the appellant's request for a fee waiver is denied.

ORDER:

1. I do not uphold the fee estimate of \$13,560. The police may only charge the appellant \$6,810 for the search fees described in this order.
2. I uphold the police's decision to deny a fee waiver.

Original signed by _____

Marian Sami
Adjudicator

September 19, 2019 _____