Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3985

Appeal PA16-393

Ministry of the Solicitor General

August 20, 2019

Summary: The appellant made a request to the Ministry of Community Safety and Correctional Services (the ministry) under the *Freedom of Information and Protection of Privacy Act* for access to Use of Force reports filed by the Bracebridge Detachment of the Ontario Provincial Police (OPP) from 2011 to 2016.

The ministry granted partial access to the reports for 2016, which were kept in electronic format, denying access to portions of these records under the mandatory personal privacy exemption in section 21(1). In this order, the adjudicator partly upholds the application of this exemption, but orders the ministry to disclose the non-exempt portions.

The ministry issued a fee estimate for the reports for earlier years. In this order, the adjudicator upholds the ministry's fee estimate and finds that the appellant has not established the basis for a fee waiver under section 57(4).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 2(1) (definition of "personal information"), 21(1), 21(1)(b), 21(1)(c), 21(2)(a), 21(2)(f), 57(1), and 57(4)(c).

OVERVIEW:

[1] The appellant made a request to the Ministry of Community Safety and

Correctional Services[1] (the ministry) under the *Freedom of Information and Protection of Privacy Act* (*FIPPA* or the *Act*) for access to Use of Force reports filed by the Bracebridge Detachment of the Ontario Provincial Police (OPP)[2] from 2011 to 2016.

[2] The ministry issued a fee estimate and interim access decision. The ministry explained that, based on its retention schedule, Use of Force reports are retained for two years plus the current year.

[3] Given this, the ministry's fee estimate applied only to the available records, dating back to 2014. The ministry also explained that as Use of Force reports are filed according to year and not by individual detachment, a manual search through all Use of Force reports filed since 2014 would be required to complete the request. The ministry estimated its search fees at $630, based on an estimated search time of 21 hours charged at $30 per hour. The ministry did not provide estimated fees for photocopying or preparation of records, stating that these amounts are to be determined.

[4] With respect to access, the ministry anticipated granting partial access to records, with portions likely exempted from disclosure based on sections 14(1)(l) (facilitate commission of an unlawful act) and 21(1) (personal privacy) of the *Act*. The ministry noted this was an interim access decision only, and that a final access decision would be made once all the responsive records had been retrieved and reviewed.

[5] The appellant appealed the ministry's decision to this office. She also raised the question of whether the ministry's fee should be waived.

[6] During the mediation stage of the appeal process, the ministry advised that it would in fact be able to search reports dating back to 2011, and accordingly issued a revised fee estimate on October 21, 2016. The revised fee estimate was $1,200, based on a revised estimated search time of 40 hours charged at $30 per hour. In this decision, the ministry reiterated that it would need to conduct a manual search through all Use of Force reports, as they are filed by year and not by detachment. The ministry again indicated that the preparation and photocopying fees are to be determined.

[7] The ministry also noted that the fee could be reduced if the appellant should wish to narrow the scope of her request. The appellant advised the mediator that she did not wish to narrow the scope of the request.

[8] Also during mediation, the appellant submitted to the ministry a fee waiver request on the basis of financial hardship and benefit to public health and safety. In response, the ministry denied the fee waiver request on both grounds.

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[1] Now the Ministry of the Solicitor General.
[2] The OPP is part of the ministry.

[9] As the appellant wished to pursue the appeal with respect to the ministry's fee estimate, and fee waiver decision, the appeal was moved to the adjudication stage of the appeal process for a written inquiry under the *Act*. The ministry was sent a Notice of Inquiry seeking its representations on these issues.

[10] During the adjudication process but prior to responding to the Notice of Inquiry, the ministry issued a supplemental decision. In this decision, the ministry advised that, in the course of the appeal, it had learned that Use of Force reports for the requested timeframe (2011 to 2016) are stored electronically; however, reports stored prior to 2016 had been found to contain inaccuracies, due to errors introduced in the conversion of paper reports to electronic format using Optical Character Recognition. The ministry reported that this issue has since been resolved for electronic versions of Use of Force reports created in 2016 or later.

[11] As a result, the ministry was able to issue a decision on access for four responsive Use of Force reports created between January 1, 2016 and June 7, 2016.[3] Its decision was to grant partial access to these records, with severances of certain information on the basis of sections 14(1)(l) (facilitate commission of an unlawful act) and 21(1) (personal privacy) of the *Act*. The ministry also advised that some information had been removed from the records on the basis it is non-responsive to the appellant's request. The ministry did not charge the appellant for disclosing the four 2016 records.

[12] For the remainder of the requested records (i.e., Use of Force reports from 2011 to 2015), the ministry issued a revised fee estimate in the amount of $1,095, based on an estimated search time of 36.5 hours charged at $30 per hour. Again, the ministry indicated that photocopying and preparation fees are to be determined. The ministry also advised that written acceptance of the fee estimate together with a deposit of 50% of the estimated fee (i.e. $547.50) were required in order for the ministry to proceed with the appellant's request.

[13] The appellant advised this office that she is dissatisfied with the ministry's supplemental decision, and wished to appeal the ministry's severances to the newly disclosed records, as well as the ministry's revised fee estimate. The parties agreed to adding to this appeal these new issues arising from the ministry's supplemental decision.

[14] Representations were then sought and exchanged between the ministry and the appellant on all of the issues in this appeal in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction 7*.

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[3] The appellant's request was received by the ministry on June 7, 2016.

[15] In its representations, the ministry clarified that the only non-responsive information severed from the records is the address of the OPP Intranet site where the Use of Force reports were printed or downloaded from, and where they are stored. As the appellant is not interested in receiving this information, its severance as non-responsive is not at issue.

[16] As well, in its representations, the ministry indicated that it only applied section 14(1)(l) to the location codes at the top right hand corner of the first page of each of the four Use of Force reports. As the appellant is not interested in receiving these codes,[4] the application of the section 14(1)(l) exemption is no longer at issue in this appeal.

[17] As one of the Use of Force reports has only the non-responsive and the section 14(1) information severed from it, this Use of Force report is no longer at issue in this appeal.

[18] In this order, I order the ministry to disclose to the appellant the responsive information in the records that I have found not exempt under section 21(1). I also uphold the ministry's fee estimate in the amount of $1,239, and I do not order the ministry to waive this fee.

RECORDS:

[19] At issue in this appeal are the section 21(1) (personal privacy) severances made by the ministry to three 2016 Use of Force reports.

[20] Also at issue are the ministry's fee estimate for access to Use of Force reports from 2011 to 2015, and the ministry's denial of the appellant's fee waiver request.

ISSUES:

A. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

B. Does the mandatory personal privacy exemption at section 21(1) apply to the information at issue?

C. Should the fee estimate be upheld?

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[4] The appellant has indicated that she is not interested in receiving access to the codes, only the location of the incidents in the records. The codes in the records do not reveal the location of the incidents.

D. Should the fee be waived?

DISCUSSION:

Issue A: Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[21] The ministry has withheld some information in the records on the basis of the mandatory personal privacy exemption at section 21(1). For this section to apply, it must first be shown that the records contain "personal information." The term "personal information" is defined in section 2(1) as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> > (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
> >
> > (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
> >
> > (c) any identifying number, symbol or other particular assigned to the individual,
> >
> > (d) the address, telephone number, fingerprints or blood type of the individual,
> >
> > (e) the personal opinions or views of the individual except if they relate to another individual,
> >
> > (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
> >
> > (g) the views or opinions of another individual about the individual, and
> >
> > (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[22] The list of examples of personal information under section 2(1) is not exhaustive.

Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information.[5]

[23] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.[6]

[24] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.[7]

[25] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[8]

[26] The ministry states that parts of three Use of Force reports, which all relate to a single incident, contain the personal information of one affected person. According to the ministry, the personal information in the Use of Force reports includes:

> (a) Background information about the affected person, who was the subject of use or force, including their gender, information about the individual's emotional and mental health, and whether the individual was known to the police; and,
>
> (b) Details about the interaction between OPP police who responded to the incident requiring the use of force, and the affected person who was the subject of it, including the date and time when the use of force occurred, and some information about the location where it occurred.

[27] The ministry acknowledges that the three Use of Force reports do not contain the name of the affected person. It acknowledges that police who complete the reports are directed not to include names or other personal information in the reports. However, it submits that the records nevertheless do contain enough information to render the affected person identifiable within the meaning of the definition of "personal information."

[28] The ministry submits that as a result of the relatively small (in population), and mainly rural demographic profile of the area served by Bracebridge Detachment,

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[5] Order 11.
[6] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[7] Orders P-1409, R-980015, PO-2225 and MO-2344.
[8] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

revealing information contained in the Use of Force reports about a single, relatively recent use of force incident could be expected to reveal the identity of the affected person.

[29] The ministry also submits that disclosure could reasonably be expected to reveal highly sensitive personal information about the affected person. It states that the report could also be matched with personal information already available to the appellant, who is affiliated with a media source, thereby resulting in even more personal information about the affected person being made identifiable.

[30] The appellant states that removing the name of the subject should provide ample privacy to the affected person involved. She states that removing all of the narrative and all of the initial subject contact content is an overreaction to privacy concerns. She submits that any likelihood of its readers using that information to extrapolate the identity of the affected person could only be done by people close to them (family, close friends) who would reasonably be expected to have knowledge of the incidents based on their proximity to the subjects, regardless of these reports.

[31] In reply, the ministry reiterates its initial position that disclosure of the information at issue in the records would reveal the identity of the affected person.

Analysis/Findings

[32] All three Use of Force reports at issue concern the same incident. Each report was prepared by a different OPP officer who attended at the incident. None of the records contain the name of the affected person.

[33] I find that some of the information at issue in the records does not qualify as "personal information" because its disclosure could not reasonably be expected to identify the affected person.

[34] In particular, if neither the date nor the location of the incident in 2016 are disclosed, I find that the information that generally describes the interaction between OPP officers who responded to this incident requiring the use of force and the affected person could not reasonably be expected to identify that individual. This information also includes the type of incident and the general reason for the use of force.

[35] I am satisfied that notwithstanding the relatively small population serviced by the Bracebridge OPP Detachment, disclosure of this information could not reasonably be expected to identify the affected person. I find that the ministry has not explained how such a link could be made with respect to the information at issue in the three records.

[36] I also note that some of this information was already disclosed to the appellant, where it appears under Part A of the reports (background information). Therefore, I am ordering this information disclosed because it does not qualify as personal information and cannot therefore be exempt under section 21(1) of the *Act*. As well, no other

mandatory exemptions apply to this information.

[37] Based on my review of the remaining information at issue in the records, however, I find that this information could reasonably be expected to identify the affected person. These portions reveal information specific to the affected person and the incident, such as certain information related to the affected person's medical, psychiatric, or psychological history and the views or opinions of another individual about the affected person in accordance with paragraphs (b) and (g) of the definition of personal information in section 2(1), respectively. The information, including the exact date, and specific details about the affected person's background, contains sufficient detail to allow the affected person to be identified, if it were to be disclosed.

[38] Therefore, I find that some of the information in the records is personal information according to the definition of the term in section 2(1), because it could reasonably be expected to identify the affected person, even without that individual's name.

[39] I will now consider whether the personal privacy exemption in section 21(1) applies to exempt the personal information at issue in the records.

Issue B: Does the mandatory personal privacy exemption at section 21(1) apply to the information at issue?

[40] Where a requester seeks personal information of another individual, section 21(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 21(1) applies.

[41] The section 21(1)(a) to (e) exceptions are relatively straightforward. The section 21(1)(f) exception, allowing disclosure if it would not be an unjustified invasion of personal privacy, is more complex, and requires a consideration of additional parts of section 21.

[42] If the information fits within any of paragraphs (a) to (e) of section 21(1), it is not exempt from disclosure under section 21.

Sections 21(1)(b) and (c)

[43] The appellant submits that the information fits within sections 21(1)(b) and (c). These sections read:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> > (b) in compelling circumstances affecting the health or safety of an individual, if upon disclosure notification thereof is mailed to the last known address of the individual to whom the information relates;

> (c) personal information collected and maintained specifically for the purpose of creating a record available to the general public;

[44] The appellant states that section 21(1)(b) applies as the public has complained of excessive use of force and harassment by the OPP in the Bracebridge area, which is clearly a circumstance affecting the safety of the citizens of Bracebridge.

[45] The appellant states that section 21(1)(c) applies as the information collected will be specifically used for the purpose of creating a public record as the appellant's newspaper is the paper of record in the community, and has been for more than 100 years.

[46] In reply, the ministry submits that these sections do not apply in this appeal. I now turn to the exception in section 21(1)(f).

Analysis/Findings re sections 21(1)(b) and (c)

[47] Based on my review of the records, I agree with the ministry that the personal information in the records does not reveal compelling circumstances affecting the health or safety of the affected person under section 21(1)(b).

[48] The three records at issue explain the circumstances surrounding the use of force by the OPP in a specific incident in 2016 regarding the affected person. Based on the circumstances set out therein, I do not see how the information in them gives rise to compelling circumstances affecting the health or safety of the affected person, such that the exception in section 21(1)(b) is established. The purpose of section 21(1)(b) is to enable the disclosure of information in urgent circumstances to prevent a health and safety situation materializing or worsening concerning the affected person to whom the information relates.

[49] As well, I find that the personal information in the records was not collected and maintained by the ministry specifically for the purpose of creating a record available to the general public for the purpose of the exception in section 21(1)(c). For section 21(1)(c) to apply, the personal information must be collected and maintained by an institution under the *Act*, not by a newspaper.

[50] I have also considered the other exceptions in sections 21(1)(a), (d) and (e). None of these exceptions have been raised by the appellant, and I find that none of them apply in this appeal.

Sections 21(3) and (4)

[51] Under section 21(1)(f), if disclosure would not be an unjustified invasion of personal privacy, it is not exempt from disclosure.

[52] Sections 21(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy.

[53] If any of paragraphs (a) to (h) of section 21(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 21. Once established, a presumed unjustified invasion of personal privacy under section 21(3) can only be overcome if section 21(4) or the "public interest override" at section 23 applies.[9]

[54] The ministry does not claim that any of the presumptions in section 21(3) apply, nor do I find that any of them apply.

[55] Section 21(4) lists situations that would not be an unjustified invasion of personal privacy. In this appeal, section 21(4) has not been raised by the appellant, and I find that none of the exceptions listed in this section apply.

Section 21(2)

[56] If no section 21(3) presumption applies, section 21(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.[10] In order to find that disclosure does not constitute an unjustified invasion of personal privacy, one or more factors and/or circumstances favouring disclosure in section 21(2) must be present. In the absence of such a finding, the exception in section 21(1)(f) is not established and the mandatory section 21(1) exemption applies.[11]

[57] The list of factors under section 21(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 21(2).[12]

[58] The ministry relies on the factor in section 21(2)(f) which favours privacy protection. This section reads:

> A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
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> > the personal information is highly sensitive.

[59] To be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed.[13]

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[9] *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div.Ct.).
[10] Order P-239.
[11] Orders PO-2267 and PO-2733.
[12] Order P-99.
[13] Orders PO-2518, PO-2617, MO-2262 and MO-2344.

[60] The ministry submits that disclosure of the personal information at issue would constitute an unjustified invasion of the privacy of the affected person, who has not consented to the disclosure of their personal information.

[61] The ministry relies specifically on Order MO-2357, where a media requester requested records related to incidents of taser use by the Ottawa Police Service. In that order, the Ottawa Police denied the request and stated:

> If publicity was afforded to each incident where the tasers were used, the individual's identity and personal information could have been compromised The type of incidents where the tasers were used could vary from criminal activity to mental health issues, and it is not the intent of this Police Service to publish or divulge these incidents to the degree where the subjects could be identified or related to particular criminal activity.

[62] In Order MO-2357, the adjudicator upheld the decision of the Ottawa Police to deny access to the records at issue relying on the factor in section 21(2)(f).

[63] The appellant relies on section 21(2)(a), which favours disclosure. This section reads:

> A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> > the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny.

[64] Section 21(2)(a) contemplates disclosure in order to subject the activities of the government (as opposed to the views or actions of private individuals) to public scrutiny.[14]

[65] In order for this section to apply, it is not appropriate to require that the issues addressed in the records have been the subject of public debate; rather, this is a circumstance which, if present, would favour its application.[15]

[66] Simple adherence to established internal procedures will often be inadequate, and institutions should consider the broader interests of public accountability in considering whether disclosure is desirable for the purpose outlined in section

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[14] Order P-1134.
[15] Order PO-2905.

21(2)(a).[16]

[67] The appellant states that disclosure of the personal information at issue would subject the activities of the OPP to public scrutiny. She states:

> As the newspaper of record, this is exactly what we seek to accomplish. Simple adherence to established internal procedures of the OPP are inadequate here and the broader interest of public accountability is [paramount] in matters of Use of Force. The police have to be accountable to the people of Bracebridge.

Analysis/Findings re section 21(2)

[68] As I concluded above, the personal information remaining at issue is information that could reasonably be expected to identify the affected person. This information describes the affected person's medical, psychiatric or psychological history and their interaction with the OPP that could be used to identify the affected person. I find that the personal information at issue is highly sensitive and that the factor in section 21(2)(f) that favours privacy protection applies to it.

[69] By means of this order, and from previous disclosure by the ministry, the appellant is receiving sufficient information as to the circumstances surround the use of force by the police with respect to the incident in the three records at issue.

[70] I do not agree with the appellant that the disclosure of the remaining information at issue, which is information that could reasonably be expected to identify the affected person, would result in public scrutiny of the police such that the factor in section 21(2)(a) would apply. In my view, the information remaining at issue does not address any public interest concerns. As such, I find that the factor in section 21(2)(a) that favours disclosure does not apply.

[71] In order to find that disclosure does not constitute an unjustified invasion of personal privacy, one or more factors favouring disclosure in section 21(2) must be established. In the absence of factors favouring disclosure, the exception in section 21(1)(f) is not established, and the mandatory section 21(1) exemption applies.[17]

[72] I have considered the factors favouring disclosure listed in sections 21(2)(b) to (d) that favour disclosure, as well as the unlisted factors, including the unlisted factor about ensuring public confidence in an institution,[18] and find that none of these factors apply.

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[16] Order P-256.
[17] Orders PO-2267 and PO-2733.
[18] Orders M-129, P-237, P-1014 and PO-2657.

[73] Since I have found that there are no factors favouring disclosure of the withheld personal information, I find that the exception in section 21(1)(f) does not apply and the mandatory section 21(1) exemption applies to the withheld personal information.

Issue C: Should the fee estimate be upheld?

[74] The appellant takes issue with the ministry's fee estimate for access to responsive records from 2011 to 2015.

[75] Where the fee exceeds $25, an institution must provide the requester with a fee estimate.[19]

[76] 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.[20]

[77] 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.[21]

[78] The fee estimate also assists requesters to decide whether to narrow the scope of a request in order to reduce the fees.[22]

[79] In all cases, the institution must include a detailed breakdown of the fee, and a detailed statement as to how the fee was calculated.[23]

[80] This office may review an institution's fee and determine whether it complies with the fee provisions in the *Act* and Regulation 460, as set out below.

[81] Section 57(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;

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[19] Section 57(3).
[20] Order MO-1699.
[21] Orders P-81, MO-1367, MO-1479, MO-1614 and MO-1699.
[22] Order MO-1520-I.
[23] Orders P-81 and MO-1614.

> (b) the costs of preparing the record for disclosure;
>
> (c) computer and other costs incurred in locating, retrieving, processing and copying a record;
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> (d) shipping costs; and
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> (e) any other costs incurred in responding to a request for access to a record.

[82] More specific provisions regarding fees are found in sections 6, 7 and 9 of Regulation 460. Those sections read:

> 6. The following are the fees that shall be charged for the purposes of subsection 57(1) of the *Act* for access to a record:
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> 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.
>
> 7. (1) If a head gives a person an estimate of an amount payable under the Act and the estimate is $100 or more, the head may require the person to pay a deposit equal to 50 per cent of the estimate before the head takes any further steps to respond to the request.
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> (2) A head shall refund any amount paid under subsection (1) that is subsequently waived.
>
> 9. If a person is required to pay a fee for access to a record, the head may require the person to do so before giving the person access to the record.

[83] The ministry states that each OPP officer is generally required to submit a Use of

Force report when the officer uses a weapon or physical force that results in medical attention being needed.

[84] The ministry calculated the fee estimate by seeking the advice of the Manager of In-Service Training at the Provincial Police Academy (the manager), which is the part of the OPP responsible for training OPP officers. It states that:

> …the records are kept in a paper format and are categorized by the year in which they were located, not by the detachment where they were generated. That means that a member of [the manager's] staff would be required to search through an estimated 8500 records (or 1700 per year from 2011 to 2015) to locate Use of Force reports that had been created specifically by the Bracebridge Detachment. Bracebridge Detachment is one of 165 detachments in the OPP. Any search would have to sift through reports generated by all 165 detachments in order to locate those specifically created by a single one of them. We submit that in the circumstances, it is reasonable for this type of search to take 36.5 hours, which is the amount of time contained in our estimate.
>
> The ministry has not prepared the actual records to respond to the request. Section 7 of Regulation 460 states the ministry is not required to do so, until 50 per cent of the fee estimate is paid…
>
> The ministry submits that in addition to the fee estimate provided, multiple severances are likely required for at least some Use of Force reports. [The ministry bases] this on the four Use of Force reports created in 2016, which are likely to be similar to, if not the same as Use of Force reports generated from 2011 to 2015.

[85] The appellant did not provide representations on the amount of the fee estimate.

Analysis/Findings

[86] The ministry estimated the search fee at $1,095 for 36.5 hours of search time at $30 per hour.[24]

[87] The ministry based its search fee estimate on both the advice of an individual who is familiar with the type and contents of the requested records and a representative sample of the records, the records from 2016.

[88] Based on my review of the ministry's representations and the sample records from 2016, I find that the ministry's search fee estimate of 36.5 hours is reasonable as

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[24] See section 57(1)(a) of *FIPPA* and section 6.3 of Regulation 460, above.

there are approximately 8500 reports categorized by year over five years, not by detachment, which must be manually searched to identify any Bracebridge OPP Use of Force reports.

[89] I accept the ministry's representations that the reports dated between 2011 and 2015 cannot be searched electronically due to errors introduced into them from the conversion of paper reports to electronic format using Optical Character Recognition.

[90] The ministry did not issue a fee estimate for the preparation time and photocopying as the deposit has not been paid. Nevertheless, I note that in approximately the first six months of 2016, four responsive Use of Force Reports were generated. Each report is three pages long.

[91] Therefore, over a five-year period from 2011 to 2015, I find it reasonable to conclude that eight Use of Force Reports per year could be expected to have been generated, or 40 over five years, at three pages each. I conclude that this would result in 120 pages of photocopying at 20 cents per page[25] or $24 of photocopying charges.

[92] As well, each of the estimated 120 pages of the Use of Force Reports would require multiple severances of the personal information of the affected persons in the records. Section 57(1)(b) includes time for severing a record.[26]

[93] Section 57(1)(b) does not include time for

- deciding whether or not to claim an exemption[27]
- identifying records requiring severing[28]
- identifying and preparing records requiring third party notice[29]
- removing paper clips, tape and staples and packaging records for shipment[30]
- transporting records to the mailroom or arranging for courier service[31]
- assembling information and proofing data[32]

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[25] See section 57(1)(b) of *FIPPA* and section 6.1 of Regulation 460, above.
[26] Order P-4.
[27] Orders P-4, M-376 and P-1536.
[28] Order MO-1380.
[29] Order MO-1380.
[30] Order PO-2574.
[31] Order P-4.
[32] Order M-1083.

- photocopying[33]
- preparing an index of records or a decision letter[34]
- re-filing and re-storing records to their original state after they have been reviewed and copied[35]

[94] Generally, this office has accepted that it takes two minutes to sever a page that requires multiple severances.[36] Therefore, at two minutes a page for 120 pages for the estimated 40 Use of Force reports at $30 per hour, I conclude that a reasonable estimate of the preparation fee is $120.[37]

[95] Accordingly, I am upholding the ministry's fee estimate in the amount of $1,095 for its search fee, $120 for its preparation fee, and $24 for photocopying at a total estimated fee of $1,239.

Issue D: Should the fee be waived?

[96] Section 57(4) of the *Act* requires an institution to waive fees, in whole or in part, in certain circumstances. Section 8 of Regulation 460 sets out additional matters for a head to consider in deciding whether to waive a fee. Those provisions state:

> 57. (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.

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[33] Orders P-184 and P-890.
[34] Orders P-741 and P-1536.
[35] Order PO-2574.
[36] Orders MO-1169, PO-1721, PO-1834 and PO-1990.
[37] See section 57(1)(c) of *FIPPA* and section 6.4 of Regulation 460, above.

> 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.

[97] The fee provisions in the *Act* establish a user-pay principle which is founded on 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 57(1) and outlined in section 6 of Regulation 460 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.[38]

[98] 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.[39]

[99] The institution or this office may decide that only a portion of the fee should be waived.[40]

[100] In her representations, the appellant has only pursued a fee waiver under section 57(4)(c) on the basis that dissemination of the information in the records will benefit public safety. She did no longer pursue a fee waiver on the basis of financial hardship under section 57(4)(b).

[101] The appellant submits that dissemination of the Use of Force reports will benefit public health and safety as it will address the concern of possible police brutality and harassment, an issue that she has heard from the community of Bracebridge. She states that ensuring that the OPP do not use excessive force on members of the public is an important public safety issue and it is important to maintain a society free from authoritarian excess.

[102] The appellant submits that whenever a law enforcement officer uses force on a citizen, this should be readily accessible information, obtained at the stroke of a

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[38] Order PO-2726.
[39] Orders M-914, P-474, P-1393 and PO-1953-F.
[40] Order MO-1243.

keyboard - not hidden away in a basement. She states that this is the type of information a police service should aggregate for their own function and development and would, or should, have on hand for their own best practices.

[103] Therefore, she submits that the ministry's inability to effectively have this information on hand should not be financially borne by the appellant.

[104] In reply, the ministry states that:

> (a) The appellant has not presented any evidence about alleged concerns about "possible police brutality and harassment" from the community of Bracebridge, let alone evidence which justifies waiving fees, and deviating from the user-pay principle enshrined in the *FIPPA*;
>
> (b) The Use of Force reports track when police use force, which obviously may be for completely lawful and legitimate law enforcement related reasons. These reports are not… reliable indicators that there is brutality or harassment, as the appellant alleges;
>
> (c) There are other public reports regarding police performance, which …would address the appellant's concerns by providing more reliable data about potential police misconduct. For example, the Annual Reports which the Ontario Provincial Police and the Office of the Independent Police Review Director post on line contain public complaints statistics and how they are resolved; and,
>
> (d) The appellant is urging disclosure of reports specifically for Bracebridge, but the question of disclosure is clearly part of a larger OPP-wide (and therefore provincial) issue. This issue should be addressed on a province-wide basis, and not on the basis of a single detachment, as this appeal contemplates. In light of this concern, [the ministry] submit[s] it is especially inappropriate to consider waiving fees.

Analysis/Findings

[105] The ministry's Use of Force reports for the years of 2011 to 2015 are kept in paper format, whereas the reports from 2016 onwards are kept electronically. I have upheld a fee estimate of $1,239 for producing the reports from 2011 to 2015 is $1,239.

[106] For a fee waiver to be granted under section 57(4), the test is whether any waiver would be "fair and equitable" in the circumstances.[41] Factors that must be considered in deciding whether it would be fair and equitable to waive the fees are set

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[41] See *Mann v. Ontario (Ministry of the Environment)*, 2017 ONSC 1056.

out in sections 57(4)(a) to (d) and include whether dissemination of a record will benefit public health or safety under section 57(4)(c).

[107] The following considerations may be relevant in determining whether dissemination of a record will benefit public health or safety under section 57(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[42]

[108] The focus of section 57(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.[43]

[109] As the appellant is a media requester, and based on my review of her representations, I find that she will disseminate the content of the records.

[110] However, I agree with the ministry that although the subject matter of the records is of public interest, the appellant has not presented any evidence to support the alleged concerns about "possible police brutality and harassment" within the community of Bracebridge. As such, the appellant has not provided sufficient evidence that the records disclose a public health or safety concern as the waiver basis in section 57(4)(c) contemplates. Moreover, even if the appellant were to establish the grounds for a fee waiver under section 57(4)(c), it would still be necessary to show that a waiver is fair and equitable in the circumstances.[44]

[111] Any other relevant factors must also be considered when deciding whether or

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[42] Orders P-2, P-474, PO-1953-F and PO-1962.
[43] Orders MO-1336, MO-2071, PO-2592 and PO-2726.
[44] *Mann v. Ontario (Ministry of the Environment)*, 2017 ONSC 1056 (CanLII).

not a fee waiver is "fair and equitable," including:

- 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.[45]

[112] In looking at these other relevant factors, as well as the factors in sections 57(4)(a), (b) and (d), of note in this appeal is the factor as to whether the waiver of the fee would shift an unreasonable burden of the cost from the appellant to the ministry. I agree with the ministry that waiver of the fee in this appeal would shift an unreasonable burden of the cost from the appellant to the ministry. The records at issue are in paper format and the ministry needs to search the records in paper, not electronic, format to obtain accurate copies.

[113] However, the records from 2016 onwards are in electronic format and easily searchable. It also appears that the ministry provided the four 2016 records to the appellant free of charge.

[114] Therefore, considering all the circumstances, I find that it is not fair and equitable to grant a fee waiver in the circumstances of this appeal.

ORDER:

1. I order the ministry to disclose to the appellant by **September 18, 2019** the responsive information in the records that I have found not subject to section 21(1). For ease of reference, I have included with the copy of this order being

[45] Orders M-166, M-408 and PO-1953-F.

sent to the ministry a copy of the records with the information that should not be disclosed to the appellant marked.

2. I uphold the ministry's fee estimate in the amount of $1,239 and I dismiss the appellant's appeal of the ministry's decision not to waive this fee.

Original signed by | August 20, 2019

Diane Smith
Adjudicator