Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-4269

Appeal MA20-00353

Peel Regional Police Services Board

November 7, 2022

Summary: The appellant made an access request under the *Municipal Freedom of Information and Protection of Privacy Act* to the Peel Regional Police Services Board (the police) for records relating to the police's use of Clearview AI facial recognition technology. After the police issued a fee estimate and interim access decision, the appellant submitted a fee waiver request, which the police denied. The appellant appealed both the fee estimate and fee waiver denial. In this order, the adjudicator upholds the police's fee estimate of $685. However, after reviewing the relevant factors, including the benefit to public health or safety that will result from dissemination of the records, she orders the police to waive the fee estimate by 50%.

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

Order Considered: Order PO-4244.

BACKGROUND:

[1] The issues in this order are whether the fee estimate of the Peel Regional Police Services Board (the police) for access to records about Clearview AI (Clearview) should be upheld, and whether the fee estimate should be waived in the circumstances.

[2] Clearview is a developer of facial recognition technology. According to its website, it developed a web-based intelligence platform for law enforcement to use as a tool to help generate high-quality investigative leads. Its platform, powered by facial

recognition technology, includes the largest known database of 20+ billion facial images sourced from public-only web sources, including news media, mugshot websites, public social media, and other open sources.[1]

[3] The appellant, a postdoctoral fellow working on a research project, submitted a request to the police under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

> All documents – including but not limited to receipts, correspondence (sent and received), briefs, memorandums, solicitations for software trial(s), instructions, or otherwise – pertaining to use of facial recognition technology by the police force and/or any of its members between 1 January 2017 and the date for which this application is processed.

[4] The police issued a fee estimate advising that the time required to search for the records is one hour and to prepare the records is 393 hours, bringing the total fee to process the request to $11,820.

[5] The appellant appealed the police's decision to the Information and Privacy Commissioner of Ontario (IPC).

[6] During mediation, the appellant narrowed his request, now seeking the following information:

> Receipts, correspondence between members of the police and facial recognition software providers, correspondence between members of the media and the police, briefs, memorandums, and instructions pertaining to use of facial recognition technology by the police force and/or any of its members between 1 January 2017 and July 10, 2020.

[7] The police provided the appellant "a list of email domains searched and located by the [police's] IT department in their search for facial recognition correspondence." The appellant reviewed the list and narrowed the number of domains he was interested in. The appellant also clarified that he only seeks records relating to Clearview.

[8] The police then issued a revised fee estimate advising that "after narrowing the scope of your Freedom of Information request for all documents pertaining to facial recognition technology to be about Clearview exclusively," the number of hours to conduct a search was eight hours and the number of hours for preparation was 14.5 hours. The police also included a $10 fee for the cost of a CD-ROM on which to provide the records to the appellant. The total fee estimate was thus $685. In order to proceed with processing the request, the police asked that the appellant pay a 50% deposit toward the fee.

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[1] See https://www.clearview.ai/overview (accessed on September 19, 2022).

[9] The police also issued an interim access decision advising that they anticipated partially releasing the information, withholding some information under the exemptions in sections 12 (solicitor-client privilege) and 14(1) (personal privacy) of the *Act*. The police also noted that they anticipated there would be non-responsive information that would be redacted from the records.

[10] The appellant then made a fee waiver request to the police, which the police denied.

[11] The parties did not reach a mediated resolution, and the appeal was moved to the adjudication stage of the appeals process, where the parties made representations on both the fee estimate and fee waiver issues. The police included an affidavit with their representations, sworn by a law clerk employed by the police.

[12] In this order, I uphold the police's fee estimate, but order them to grant the appellant a 50% fee waiver.

ISSUES:

1. Should the police's fee estimate of $685 be upheld?
2. Should the fee be waived, in whole or in part?

DISCUSSION:

Issue A: Should the police's fee estimate of $685 be upheld?

[13] As set out above, the fee estimate before me is made up of the following:

- search time of eight hours, totaling $240,
- preparation time of 14.5 hours, totaling $435, and
- a $10 charge for a CD-ROM.

[14] As a result, the total fee estimate is $685.

Fee estimates and deposits

[15] Institutions are required to charge fees for requests for information under the *Act*. Section 45 governs fees charged by institutions to process requests.

[16] Under section 45(3), an institution must provide a fee estimate where the fee is more than $25. The purpose of the fee estimate is to give the requester enough information to make an informed decision on whether or not to pay the fee and pursue

access.[2] The fee estimate also helps requesters decide whether to narrow the scope of a request to reduce the fee.[3]

[17] The institution can require the requester to pay the fee before giving them access to the record.[4] If the estimate is $100 or more, the institution may require the person to pay a deposit of 50 percent of the estimate before it takes steps to process the request.[5]

[18] Where the fee is $100 or more, the fee estimate can 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.[6]

[19] In each case, the fee estimate must include a detailed breakdown of the fee and statement as to how the fee was calculated.[7]

What items can the institution charge for?

[20] Section 45(1) sets out the items for which an institution is required to charge a fee:

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.

[21] The specific fee provisions relevant to this appeal are in section 6 of Regulation 823.[8]

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[2] Orders P-81, MO-1367, MO-1479, MO-1614 and MO-1699.
[3] Order MO-1520-I.
[4] Regulation 823, section 9.
[5] Regulation 823, section 7(1).
[6] Order MO-1699.
[7] Orders P-81 and MO-1614.
[8] Section 6 of Regulation 823 provides:

> 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.

Representations

[22] The police submit that they worked with the appellant to narrow the request in order to reduce the fee significantly, from over $11,000 to $685. They submit that their fee estimate is based on work they have already done and that they provided the appellant with a detailed breakdown of the fee and a detailed statement as to how it was calculated.

[23] The police submit that all the fees listed in their estimate are provided for in section 45(1) of the *Act* and section 6 of Regulation 823. Specifically, they note that these fees include the time spent manually searching for the records and the time spent preparing them for disclosure, charged at the rate specified in the Regulation of $30 an hour (i.e., $7.50 for every fifteen minutes), as well as $10 for the CD-ROM on which to provide the records to the appellant.

[24] The police also submit that the actual cost to the police of processing the request was substantially higher than their fee estimate. They provided detailed information about what was involved in their search, much of which is found in the affidavit and exhibits filed with their representations.

[25] The police explain that processing the request involved collaboration among departments in order to ascertain how to search various databases and emails (internal and external). They note that potential records covered a timeframe of about three and a half years, and that the first search yielded over 53,000 potentially relevant emails alone, comprising over 15 GB of data. Over 887 domains were identified, which were narrowed down to 143 domains after staff's manual review for emails relating to facial recognition. From there, and as noted above, the appellant identified the domains of interest and narrowed his request to records specifically relating to Clearview. In total, the police carried out three data extractions in order to identify the records responsive to the appellant's narrowed request.

[26] The police note that these initial searches and extractions were needed to allow the appellant to identify the records he was seeking access to and that the narrowed request still yields over 1000 responsive records. They submit (and the law clerk attests in her affidavit) that these steps took over 14 hours of staff time.

[27] In response to the police's representations, the appellant asserts that the police

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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.

have not provided him with an "in-depth breakdown" of the fee.

Analysis and findings

[28] For the following reasons, I uphold the police's fee estimate of $685.

[29] In their fee estimate, the police broke down how the fee was determined, specifying the time they spent searching for and preparing records, in accordance with section 45(1) of the *Act*. They charged $7.50 for each 15 minutes of search and preparation time, in accordance with section 6 of Regulation 823.

Search time

[30] The police charged the appellant for 8 hours of search time. I find this to be a reasonable amount of time to assess for the search, considering the number of records involved and the steps the police undertook to locate them. The appellant's request, though narrowed at mediation, still seeks a wide variety of records including email correspondence, receipts, briefs, memorandums and instructions relating to the use of facial recognition technology by police. The police have described the process of searching for correspondence spanning a three-and-a-half-year period, and containing the search terms "facial recognition" or "facial rec." The police state, and I accept, that they carried out a total of three data extractions, and provided the appellant with a list of domains to assist him in narrowing the records that would be of interest to him. They initially produced over 15 GB of potentially responsive emails, which was eventually narrowed to under 1 GB so that it could be further narrowed by the appellant.

[31] The police state (and their law clerk attests) that these steps, in fact, took 14 hours. I accept that to be the case. Ultimately, however, the police charged the appellant for 8 hours of search time. I find this amount reasonable given the police's representations and evidence describing the steps they took to respond to the appellant's request, particularly given that the searches, in fact, took 14 hours.

[32] Section 6 of Regulation 823 provides for a charge of $7.50 for every 15 minutes of search time (i.e. $30/hour). The police's fee of $240 for search time of 8 hours is therefore in accordance with the Regulation.

Preparation time

[33] The police charged the appellant $435 for 14.5 hours to prepare the records for disclosure, which I also find reasonable in the circumstances. In their representations, the police submit that there are over 1,000 responsive records. In the interim access decision letter that followed their revised fee estimate, the police stated that they anticipated granting the appellant partial access to the records, withholding some information pursuant to the exemptions at sections 12 (solicitor-client privilege) and 14(1) (personal privacy) of the *Act*. The police also stated they would redact information that was not responsive (i.e., related) to the access request.

[34] I acknowledge that while the police stated their intention to sever the records, and identified the exemptions they expect to claim, the police did not specify the number of pages that may require severing. According to section 6 of Regulation 823, institutions may charge $7.50 for every 15 minutes (or $30 an hour) spent preparing records, which can include time spent severing a record.[9] The IPC has generally accepted that it takes two minutes to sever a page that requires multiple severances.[10]

[35] Based on the foregoing, the 14.5 hours (870 minutes) claimed by the police for preparation of the records for disclosure would amount to severing 435 pages. This represents roughly 40% of the over 1000 records the police estimate are at issue, if each record is one page – and a smaller percentage if any of the records are more than one page. I find this estimate of the percentage of pages requiring redaction to be reasonable in the circumstances. Further, as the police have claimed multiple exemptions, it stands to reason that the redacted pages would require multiple severances. For this reason, I accept as reasonable the police's preparation time of 14.5 hours.

[36] Section 6 of Regulation 823 provides for a fee of $7.50 for every 15 minutes of search time (i.e. $30/hour). The police's fee of $435 for preparation time of 14.5 hours is therefore in accordance with the Regulation.

[37] In reaching these conclusions, I have considered the appellant's argument that the police's fee estimate does not provide a detailed breakdown of how the fees were calculated. I agree that the police's breakdown, particularly in respect of the preparation time, could have been more comprehensive, and in general it is preferable for the institution to provide more detail than what the police provided here. However, even in the absence of an in-depth breakdown, the IPC has upheld fee estimates where the circumstances permit an assessment of their reasonableness.[11] I also note that the appellant has not provided arguments specifically contesting the amount of time the police assessed for either their search or preparation. In the circumstances, for the above reasons, I find the police's assessments to be reasonable.

CD-ROM

[38] The appellant does not appear to contest the $10 fee for the CD-ROM. In any case, this charge is stipulated in the Regulation and I uphold it.

Conclusion

[39] For the above reasons, I find the police's fee estimate of $685 to be reasonable and I uphold it.

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[9] Order P-4.
[10] Orders MO-1169, PO-1721, PO-1834 and PO-1990.
[11] See for example Orders PO-1962 and MO-3492.

Issue B: Should the fee be waived?

[40] The fee provisions in the *Act* establish a "user-pay" principle. The fees referred to in section 45(1) and outlined in section 6 of Regulation 823 are mandatory unless the requester can show that they should be waived.[12]

[41] The *Act* requires an institution to waive fees, in whole or in part, if it is fair and equitable to do so. Section 45(4) of the *Act* and section 8 of Regulation 823 set out matters the institution must 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,
>
> > (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.
>
> 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.

[42] A requester must first ask the institution for a fee waiver, and provide detailed information to support the request. If the institution either denies this request, or chooses to waive only a portion of the fee, the IPC may review the institution's decision, and can uphold or modify the institution's decision.[13]

[43] On the issue of fee waiver, the police submitted representations and an affidavit of a law clerk in the department of Executive Administration. They note that the onus is

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[12] Order PO-2726.
[13] Section 45(5), Orders M-914, MO-1243, P-474, P-1393 and PO-1953-F.

on the appellant to demonstrate that the fee should be waived.[14] The police take the position that after considering the relevant factors set out in section 45(4) of the *Act* and section 8 of Regulation 823, fairness and equity do not require the waiving of fees.

[44] The appellant submits that he should be granted a fee waiver on the basis of the financial documentation he provided, the public interest considerations he raises and his participation in mediation, including his efforts to narrow the request. To support his claim, the appellant provided some information about his assets and bank account balances but did not include information about his income or expenses.

[45] Further particulars of the parties' positions are set out below.

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

[46] Where the actual cost to the institution in processing the request is higher than the fee charged to the requester, this may be a factor weighing against waiving the fee.[15]

Representations

[47] As set out above in my discussion of the fee estimate, the police maintain that the actual cost to them in processing the request was substantially higher than their fee estimate. The appellant did not address this issue.

Analysis and Findings

[48] The police provided detailed representations enumerating the steps they undertook to search for records, as set out above. In light of the time the police spent searching for records, which I accept amounts to 14 hours, and the 8 hours of search time ultimately charged in the revised fee estimate, I agree with the police that the actual costs to the police are higher than the fee they charged. This factor weighs against the granting of a fee waiver.

Section 45(4)(b): financial hardship

[49] For section 45(4)(b) to apply, the requester must provide evidence regarding their financial situation, including information about income, expenses, assets and liabilities.[16] If financial hardship is established, this is a factor that weighs in favour of a fee waiver.

Representations

[50] The police submit that the appellant's evidence is insufficient to determine his

[14] The police cite Order PO-2726.
[15] Order PO-3755. See also Order PO-2514.
[16] Orders M-914, P-591, P-700, P-1142, P-1365 and P-1393.

financial position or that paying the $685 fee would cause him financial hardship. They note that his evidence includes online banking images, a partial credit card statement and a statement that he does not own property or a vehicle. The police note that the appellant did not submit information confirming his income or expenses. Citing Order PO-3602, they submit that a current bank account balance is not evidence of financial hardship.

[51] The appellant maintains that he provided ample documentation to demonstrate his finances and assets.

Analysis and findings

[52] I am not convinced, based on the evidence before me, that payment of the $685 fee would cause the appellant financial hardship. The appellant provided little evidence of his financial situation. Along with his fee waiver request to the police, the appellant submitted screenshots of his online banking and credit card balances. As the police noted, the appellant stated in his request for a fee waiver that he has no property or vehicle, "in short…no sizeable assets." He provided no additional information.

[53] While I appreciate that the appellant is a doctoral student and his income may be modest, I am not prepared in the circumstances to infer financial hardship, given the lack of evidence of his income and the relatively modest amount of the fee in dispute. In their initial representations, the police pointed out that the appellant's evidence of his financial position is lacking. I agree with that assessment. The appellant had an opportunity to provide more detailed documentation in his responding representations, which he did not do.

[54] Accordingly, I find that the appellant has not established financial hardship under section 45(4)(b).

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

[55] The focus of section 45(4)(c) is whether dissemination of the requested records will benefit "public health or safety." Previous IPC decisions have found that it is not enough to show that there is a "public interest" in the records – the public interest must relate to gaining information about a public health or safety issue.[17] If present, this factor weighs in favour of a fee waiver.

[56] The following factors may be relevant in determining whether distribution of a record will benefit public health or safety:

- whether the subject matter of the record is a matter of public rather than private interest,

[17] Orders MO-1336, MO-2071, PO-2592 and PO-2726.

> • whether the subject matter of the record relates directly to a public health or safety issue,
>
> • whether distribution of the record once disclosed would yield a public benefit
>
> a. by disclosing a public health or safety concern; or
>
> b. by contributing meaningfully to the development of understanding of an important public health or safety issue, and
>
> • the probability that the requester will share the contents of the record with others.[18]

Representations

[57] The appellant submits that dissemination of the record is in the public interest, arguing that

> [t]his request…relates to the [police's] use of a database operated by a third-party provider named Clearview AI that contains more than three billion images of the public scraped from the internet, including social media platforms, without the consent of those in the images… it is in the public's interest to know how police are using images that were produced and uploaded to the internet for reasons other than policing…at the time [that] the [police] used this software, there were no laws or regulations governing or overseeing their use of such software. Phrased differently, individual officers…did not have authorization to use such software, which the [police have] publicly admitted to…

[58] The appellant alleges that in early 2020, the police "initially denied their use of Clearview's software," then a few months later, admitted that their members used the software after a customer list was leaked (the police deny this). The appellant notes that the police appear in a list of users along with the following quote from a spokesperson: "Some Peel Regional Police members had tested the program; however, no member of the service had used the technology in any active investigations. Peel Regional Police, at this time, is still not using the program."[19] The appellant cites several

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

[19] The appellant cites a BuzzFeed News article that is accompanied by a table of "88 international government-affiliated and taxpayer-funded agencies and organizations listed in Clearview's data as having employees who used or tested the company's facial recognition service before February 2020." See Ryan Mac, Caroline Haskins & Antonio Pequeño IV, "Police In At Least 24 Countries Have Used Clearview AI. Find Out Which Ones Here," *Buzzfeed News* (25 August 2021), online: www.buzzfeednews.com.

more articles about the police's use of Clearview's software.[20]

[59] The appellant argues that there is a public interest in dissemination of the records at issue "to more clearly ascertain the events surrounding the PRPSB use of Clearview's software and the PRPSB admission that it had, in fact, used such software." He submits that the information he receives through his access request will be used in a study on Canadian law enforcement's use of images. His findings will be published in a book that is under contract with a publisher.

[60] The police deny that they ever publicly confirmed or denied the use of Clearview AI in 2020 as asserted by the appellant. In any event, they submit that the appellant has not demonstrated that the public interest he raises is connected to a live public health or safety issue. They submit that for section 45(4)(c) to apply, the public interest in question must relate to gaining valuable information about a public health or safety issue. The police argue that "[i]t is unclear how a third party company's technology that was never ultimately used for policing in Peel pertains to either."

Analysis and findings

[61] For the following reasons, I find that the dissemination of the records at issue in this appeal will benefit public health and safety. I will address in turn each of the four factors listed in paragraph 56 above.

Whether the subject matter of the records is a matter of public rather than private interest, and relates directly to a public health or safety issue

[62] The subject matter of the records is the police's use, or potential use, of Clearview's facial recognition technology. For the following reasons, I find that the police's use or potential use of this technology is a matter of public rather than private interest, and that it relates directly to a public health or safety issue.

[63] The use of this technology has significant consequences for the public's right to privacy. In a statement on Toronto Police Service's use of Clearview AI technology, Ontario's former Information and Privacy Commissioner asked other police forces who, according to media reports, may have also been using the technology, to stop and contact the IPC. He flagged the widespread privacy concerns at stake, stating that the "indiscriminate scraping of the internet to collect images of people's faces for law

[20] Wenffdy Gillis & Kate Allen, "Peel and Halton police reveal they too used controversial facial recognition tool", *The Toronto Star* (14 February 2020), online: www.thestar.com.
Nathan Munn, "Police Forces in Canada Are Quietly Adopting Facial Recognition Tech", *Vice News* (23 June 2020), online: www.vice.com.
Rahul Gupta, Privacy vs. safety: Peel police struggle with use of controversial facial recognition technology (19 February 2020), online: thepointer.com.

enforcement purposes has significant privacy implications for all Ontarians."[21]

[64] According to some of the news articles cited by the appellant, the police have made public statements acknowledging that they had tested Clearview's product and indicated they had stopped using the technology pending review and consultation with the IPC.[22] Given that people's images were at risk of being used in policing without their knowledge, I agree with the appellant that the public has an interest in knowing more about the police's potential use of personal images uploaded to the internet.

[65] Furthermore, in my view, this is a public health or safety issue, and not just a matter of public interest as asserted by the police. This case involves records related to the potential use of police powers that directly affect individuals' privacy rights, in the name of public health or safety. The subject matter of the records is the use of Clearview's facial recognition technology by the police. Considering the police's contemplation of use of facial recognition technology for law enforcement and security purposes, the number of people potentially affected, the amount of personal data at issue, and the related privacy concerns, I find that this is a matter of public interest that relates directly to a public health or safety issue.

Whether distribution of the record once disclosed would yield a public benefit by contributing meaningfully to the development of understanding of an important public health or safety issue.

[66] For the following reasons, I also find that distribution of the records at issue would yield a public benefit by contributing meaningfully to the development of understanding of an important public health or safety issue.

[67] The adjudicator's reasoning in the recently issued Order PO-4244 is relevant to the present appeal and I agree with it. That case concerned a request for records related to police powers under a provincial emergency stay-at-home order in response to the third wave of COVID-19. The emergency order initially granted police the power to stop and question individuals about their reasons for leaving their homes, but that aspect of the stay-at-home order was retracted after a public outcry. The adjudicator in that case found that disclosure of the records before her would contribute meaningfully to the development of understanding of an important public health issue, "namely the Ontario government's cost-benefit analyses of the potential use of emergency police

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[21] Brian Beamish, "Statement on Toronto Police Service Use of Clearview AI Technology", *Information and Privacy Commissioner of Ontario* (14 February 2020), online: www.ipc.on.ca.

[22] See Toronto Star, supra note 20: "A Peel Regional Police spokesperson Sgt. Joe Cardi confirmed Friday that a 'demo product of the Clearview AI software' was provided to the service for testing purposes only. Peel police Chief Nishan Duraiappah has since directed that testing 'cease until a full assessment is undertaken pursuant to a concurrent ongoing facial recognition review project.'
'Our review team is working closely with the Information and Privacy Commissioner's Office as well as other police organizations to ensure any future application of facial recognition technology is in keeping with privacy legislation, guidelines and contemporary standards,' Cardi said".

powers to curtail individual rights during a public health or other crisis events."[23] She found that disclosing the responsive records would contribute to discussions about government powers to re-introduce such measures in the event of future crises, and she found this weighed in favour of a fee waiver.

[68] Similarly, in this case, the use of facial recognition technology by law enforcement is the subject of ongoing debate, notably in the challenge it presents in balancing the competing societal interests of individual privacy and public safety.

[69] In a recent joint statement on police use of facial recognition technology, Ontario's Information and Privacy Commissioner Patricia Kosseim, along with her federal, provincial and territorial (FPT) counterparts, announced the issuance of guidance on the use of facial recognition technology by law enforcement and called for an updated legislative framework, including setting out acceptable circumstances for police use, privacy protections and appropriate oversight. In this statement, the commissioners noted potential advantages of facial recognition technology and cautioned against its pitfalls:

> The use of FR [facial recognition] by police agencies in Canada ultimately raises important questions about the kind of society we want to live in. The capabilities of this technology are significant, and when used responsibly and in the right circumstances, its application could provide benefits for public safety. For instance, this technology can be used in complex investigations to help solve serious crimes, to locate missing persons, and to support national security objectives.
>
> At the same time, the use of FR involves the collection and processing of highly sensitive personal information…FR can collect this information at scale, for minimal cost, enabling police agencies to identify and potentially surveil individuals covertly and in large numbers.
>
> The prospect of police agencies integrating FR into law enforcement initiatives raises the possibility of serious privacy harms unless appropriate protections are in place. Canadians must be free to participate voluntarily and actively in a modern society without the risk of being routinely identified, tracked and monitored. While certain intrusions on this right can be justified in specific circumstances, individuals do not forego their right to privacy, including their anonymity, merely by participating in the world in ways that may reveal their face to others, or that may enable their image to be captured on camera.[24]

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[23] Order PO-4244, para 67.

[24] "Recommended legal framework for police agencies' use of facial recognition, Joint Statement by Federal, Provincial and Territorial Privacy Commissioners", *Office of the Privacy Commissioner of Canada* (2 May 2022), online: www.priv.gc.ca.

[70] The commissioners' joint statement highlights the live debate around the issue, as do the news articles submitted by the appellant. The concerns set out in those articles around police use of facial recognition technology, and specifically Clearview's software and database, include concerns about privacy, accuracy,[25] racial bias[26] and mass surveillance.[27]

[71] There has also been significant enforcement action against the application of this technology, particularly the mass scraping of facial images from publicly accessible online sources without consent, and their subsequent use in the context of law enforcement. A joint investigation by the Privacy Commissioner of Canada (OPC) and three provincial privacy commissioners[28] into Clearview's practices found that the latter's collection, use and disclosure of the personal information by means of its facial recognition tool ran afoul of federal and provincial privacy laws applicable to the private sector.[29] In a related investigation into the RCMP's use of Clearview's technology, the OPC found that Canada's national police force contravened the *Privacy Act*[30] when it collected personal information from Clearview that, at its source, had been unlawfully collected.[31] Beyond Canada, there has also been global enforcement action taken against Clearview, for example by the UK and Australian data protection authorities.[32]

[72] The scrutiny that has been brought to bear on Clearview, and the RCMP, is illustrative of the live debate around this highly controversial technology and its use. That Clearview is challenging many of the orders made against it in court[33] does not detract from my ultimate finding: that the police's use or potential use of its technology is a matter of public health or safety and that the records at issue before me would help inform debate about this issue. In other words, it is the ongoing and significant concern and controversy around the privacy and safety implications of Clearview AI's facial

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[25] BuzzFeed, *supra* note 19.
[26] BuzzFeed, *supra* note 19.
Vice News, *supra* note 20.
[27] BuzzFeed, *supra* note 19.
[28] Quebec, British Columbia and Alberta.
[29] "Joint investigation of Clearview AI, Inc. by the Office of the Privacy Commissioner of Canada, the Commission d'accès à l'information du Québec, the Information and Privacy Commissioner for British Columbia, and the Information Privacy Commissioner of Alberta", *Office of the Privacy Commissioner of Canada* (2 February 2021), online: www.priv.gc.ca.
[30] R.S.C., 1985, c. P-21.
[31] "Police use of Facial Recognition Technology in Canada and the way forward", *Office of the Privacy Commissioner of Canada* (10 June 2021), online: www.priv.gc.ca.
[32] "OAIC and ICO conclude joint investigation into Clearview AI", *Office of the Australian Information Commissioner* (3 November, 2021), online: www.oiac.gov.au.
"ICO fines facial recognition database company Clearview AI Inc more than £7.5m and orders UK data to be deleted", *UK Information Commissioner's Office* (23 May 2022), online: www.ico.org.uk.
"Clearview AI breached Australians' privacy", *Office of the Australian Privacy Commissioner* (3 November 2021), online: www.oiac.gov.au.
[33] The OPC does not have order-making powers, but Clearview is challenging the orders issued by other jurisdictions. See, for example: Jeremy Hainsworth, "U.S. 'mass surveillance' company challenges B.C. privacy watchdog order", Victoria Times Colonist (24 January 24, 2022), online: www.timescolonist.com.

image scraping practices, and not the legality or illegality of the technology per se, that requires that information about such practices be made public so that there can be informed debate around these important issues.

[73] Finally, while I have not seen the records at issue in this appeal, I have no trouble finding, given the broad nature of the appellant's access request, that some of the records contain information that will contribute to ongoing public discussions about facial recognition and law enforcement, potentially including the police's deliberations with regards to the adoption of this technology.

Probability that the requester will share the contents of the records with others

[74] Lastly, I find it likely the appellant will share the contents of the records with others. His stated purpose for filing this access request is to use the records for his academic research on Canadian law enforcement's use of images. The results of his research are to be published in a book he has been contracted to write.

[75] As a result, I find that dissemination of the records will benefit public health or safety, within the meaning of section 45(4)(b). This finding supports the granting of a fee waiver.

Regulation 460, section 8: whether access is granted

[76] When assessing whether to order a waiver of the fee, I must also consider whether the appellant will be given access to the records. The police submit that they are granting the appellant partial access. In other words, the police are not "simultaneously denying a request and seeking compensation for the administrative burden imposed."

[77] In the circumstances, I agree with the police that this is not a relevant factor in deciding whether a fee waiver is warranted.

Other relevant factors

[78] The institution (and, on appeal, the IPC) must consider any other relevant factors when deciding whether it would be fair and equitable to waive the fee. 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 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 offered a compromise that would reduce costs,
- whether the institution provided any records to the requester free of charge, and
- whether the waiver of the fee would shift an unreasonable burden of the cost from the requester to the institution.[34]

Representations

[79] The parties address two main additional factors in arguing whether or not a fee waiver is "fair and equitable" in the circumstances.

Working constructively to narrow and clarify the request

[80] The police submit that they responded to the request promptly and worked diligently to compile all potentially relevant documentation in response to very broad search parameters in both the original and narrowed requests. They note the significant efforts needed to gather the initial search results.

[81] The police submit that they worked with the appellant to clarify and narrow the scope of the request, including providing him with a list of potentially relevant domains searched and located by the IT department, in order to clarify which domains he was interested in data extraction from.

[82] The police argue that the 1,000 records at issue is a very large number. They note the appellant has not offered a compromise to further reduce costs, and neither can they envisage one. While the police admit they did not provide any records free of charge, they maintain that waiving the fee would shift an unreasonable burden of the cost from the appellant to the police.

[83] The appellant submits that he made considerable efforts during mediation to gain clarity about and reduce the fee. He argues that despite these efforts, the police's fee remained high. The police take issue with the appellant's assertion that the police have "not exercised much movement in its position and the fee." They point out that the initial fee estimate of $11,820 was significantly reduced to $685 through mediation.

Detailed index of records

[84] The appellant further submits that the police have not provided a detailed index of the records he will receive, and that since the content of those records was not clearly communicated to him, it is not fair for him to have to pay the fee without knowing precisely what the records are. He adds that the police did not provide a list of

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

records that would be disclosed or potentially redacted, were he to pay the fee.

[85] The police submit that during mediation, they provided the appellant a detailed invoice, including a list of domains searched. They claim that the appellant's request for a detailed index of every responsive record is "unduly onerous, burdensome, and far exceeds [the police's] legislated duties," particularly in light of the unbilled time they spent facilitating the requests.

Analysis and findings on other relevant factors

[86] In my view, both the police and appellant made efforts to constructively narrow the request, leading to a reduction in the fee. They are to be commended for their cooperation in this regard. In the circumstances, this factor neither weighs in favour nor against the granting of a fee waiver.

[87] The appellant maintains that the fee should be waived because the police did not provide him with a detailed index of the records they plan to disclose or redact. In my view, the police have provided the appellant sufficient information to help him decide whether to pay the fee and pursue access. I note, for example, that the appellant himself reviewed the list of email domains and selected those of interest to him. The absence of a detailed index of records is not a factor weighing in favour of a fee waiver in the circumstances.

Considering all the factors – is it fair and equitable to waive the fee?

[88] In deciding whether the police should waive the fee, in whole, or in part, I must consider whether it would be fair and equitable to waive the fee. This requires consideration of the factors listed in the regulation, as well as any other relevant factors.

[89] An important overall consideration is whether waiver of the fee would shift an unreasonable burden of the cost of processing the request from the appellant to the police. I am mindful of the legislature's intention to include a user-pay principle in the *Act*. The user-pay system 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) are mandatory unless the appellant can present a persuasive argument that it would be fair and equitable to grant a fee waiver.[35]

[90] As I found above, both the police and appellant made efforts to constructively narrow the request, leading to a reduction in the fee. In my view, this factor weighs neither in favour nor against the granting of a fee waiver.

[91] I found above that the actual cost to the police of processing the request

[35] Order PO-2726.

exceeds the fee. This factor weighs against granting a fee waiver. I have also found that payment of the fee would not cause the appellant financial hardship. This too, weighs against granting a fee waiver.

[92] However, I have concluded that dissemination of the records will benefit public health or safety. Given the serious controversy around the use of Clearview's facial recognition technology, including multiple privacy offices' investigations into Clearview, I place significant weight on this factor.

[93] Taking into account all the relevant factors, I find that it would be fair and equitable to grant a partial fee waiver. I have considered, in particular, the user-pay principle and the significant work the police have done to date in processing the request, including their costs over and above the fees charged. In my view, however, dissemination of the records will contribute greatly to meaningful debate on a subject with significant public health or safety considerations. Given the importance of those considerations, I find that the balance tips in favour of a partial waiver of the fee estimate. In all the circumstances, I find it fair and equitable to order a waiver of 50% of the police's fee estimate, or a waiver of 50% of the final fee should it differ from the fee estimate.

ORDER:

1. I uphold the police's fee estimate of $685.

2. I order the police to waive 50% of their fee estimate. I also order the police to waive 50% of their final fee, if it differs from the fee estimate.

Original Signed by: November 7, 2022

Gillian Shaw
Senior Adjudicator