

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4286

Appeal MA21-00217

London Police Services Board

November 28, 2022

Summary: The London Regional Police Services Board (the police) received a request 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 \$401.50. 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.

OVERVIEW:

[1] The issues in this order are whether the fee estimate of the London Regional Police Services Board (the police) for access to records about Clearview AI (Clearview) should be upheld, and whether that fee 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 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 time extension of 30 days to respond to the request, then issued a fee estimate under section 45(1) of the *Act* of \$520.00 to process the request, including \$60 for photocopies, \$300 for 10 hours of search time, and \$150 for 300 minutes of preparation time.² The police also issued an interim access decision informing the appellant that a number of exemptions and exclusions may apply to the responsive records, including: 7(1) (advice or recommendations), 8(1)(c), (d), (h), (l), 8(2)(a) (law enforcement), 11 (valuable government information), 12 (solicitor-client privilege), 15(a) (publicly available), 14(1) (personal privacy), and 52(3)3 (employment-related records) of the *Act*.

[5] The appellant submitted a fee waiver request to the police pursuant to section 45(4) of the *Act*. The police requested additional financial information from the appellant in support of his request, and the appellant provided his online banking profile. The police responded asking for further specific documentation of the appellant's income, expenses, assets and liabilities. The appellant provided the police with his income and expenses. The police responded with a decision denying the fee waiver request.

[6] The appellant appealed the police's decision to the Information and Privacy Commissioner of Ontario (the IPC). During mediation, the police issued a revised fee estimate in the amount of \$401.50, which resulted from reducing the search time by two hours, eliminating the photocopy fee and adding a \$1.50 shipping fee.³ The police confirmed with the mediator that they maintain their position to deny the fee waiver request.

[7] The appellant continued to take issue with the fee estimate and the fee waiver denial, and the appeal moved to the adjudication stage of the appeals process. An

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

² These amounts add up to \$510. As explained below, the \$10 discrepancy appears to be due to the \$10 charge for a USB.

³ There remains a \$10 discrepancy in this revised fee estimate, as these items add up to \$391.50. However, I understand from other documents in the file that the \$10 represents the charge for a USB.

adjudicator conducted an inquiry in which she sought and received representations from the parties on the fee estimate and fee waiver issues. The appeal was then transferred to me to continue its adjudication.⁴

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

ISSUES:

- A. Should the police's fee estimate of \$401.50 be upheld?
- B. Should the fee be waived, in whole or in part?

DISCUSSION:

Issue A: Should the police's fee estimate of \$401.50 be upheld?

[9] The fee before me is made up of the following:

- search time of eight hours, totaling \$240,
- preparation time of five hours, totaling \$150,
- a \$10 charge for a CD-ROM, and
- a \$1.50 shipping fee.

[10] As a result, the total fee estimate is \$401.50.

Fee estimates and deposits

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

[12] 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.⁵ The fee estimate also helps requesters decide whether to narrow the scope of a request to reduce the fee.⁶

[13] The institution can require the requester to pay the fee before giving them

⁴ I have reviewed the appeal file and decided that I do not need any further representations in order to render a decision.

⁵ Orders P-81, MO-1367, MO-1479, MO-1614 and MO-1699.

⁶ Order MO-1520-I.

access to the record.⁷ If the estimate is \$100 or more, the institution may require the person to pay a deposit of 50 per cent of the estimate before it takes steps to process the request.⁸

[14] 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.⁹

[15] In each case, the fee estimate must include a detailed breakdown of the fee and statement as to how the fee was calculated.¹⁰

What items can the institution charge for?

[16] 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.

[17] The specific fee provisions relevant to this appeal are in section 6 of Regulation 823.¹¹

⁷ Regulation 823, section 9.

⁸ Regulation 823, section 7(1).

⁹ Order MO-1699.

¹⁰ Orders P-81 and MO-1614.

¹¹ 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.
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.

Representations

[18] The police submit that they based the fee estimate on the actual work done to respond to the request, and provided a breakdown of the fees. That breakdown shows that 14 individuals each spent times varying from 5 to 60 minutes searching for records, for a total of 480 minutes or eight hours.

[19] The police note that they had to search in a number of areas because, given the breadth of the request, potentially responsive records would be kept in a number of areas across the organization.

[20] The police explain that each individual involved in the search then provided the results of their searches to the freedom of information (FOI) analyst, who prepared the records for disclosure. The police's breakdown also shows that of 683 records, 300 require severing prior to disclosure.

[21] In response to the police's representations, the appellant asserts that the police have not provided an in-depth breakdown of the fees at issue, nor a detailed index of what records he will receive.

Analysis and Findings

[22] For the following reasons, I uphold the police's fee estimate of \$401.50.

[23] 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

[24] The police charged the appellant for 8 hours of search time and provided a breakdown of the time spent by each person involved in the search. I find this to be a reasonable amount of time to assess for the search, considering that 683 responsive records were found and the steps the police undertook to locate them. The appellant seeks a wide variety of records including email correspondence, receipts, briefs, memorandums and instructions relating to the use of facial recognition technology by police, and it stands to reason that the police would need to search in multiple areas to locate them.

[25] Section 6 of Regulation 823 provides for a charge \$7.50 per every 15 minutes of search time (i.e. \$30/hour). The police's fee of \$240 for search time of 8 hours is

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.

therefore in accordance with the Regulation.

Preparation Time

[26] The police charged the appellant \$150 for five hours to prepare the records for disclosure, which I also find reasonable in the circumstances. In their representations, the police specified that 300 pages require severing prior to disclosure. 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.¹² The IPC has generally accepted that it takes two minutes to sever a page that requires multiple severances.¹³

[27] As the police have claimed multiple exemptions, it stands to reason that the redacted pages would require multiple severances. As a result, I accept as reasonable the police's preparation time of 600 minutes or five hours.

[28] Section 6 of Regulation 823 provides for a fee of \$7.50 per every 15 minutes of search time (i.e. \$30/hour). The police's fee of \$150 for preparation time of five hours is therefore in accordance with the Regulation.

[29] 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 disagree, and note that the police provided an appendix of the steps required to conduct the search. While I acknowledge that the police could have provided more details about who conducted the searches, I also note that the appellant has not made arguments specifically contesting the amount of time the police assessed for either their search or preparation; his submissions focus on why he should be granted a fee waiver, which I address under Issue B below. In the circumstances, for the above reasons, I find the police's assessments to be reasonable.

CD-ROM and shipping fee

[30] 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. Shipping costs are provided for in section 45(1)(d) of the *Act* and I find that the \$1.50 charge is reasonable.

Conclusion

[31] For the above reasons, I find the police's fee estimate of \$401.50 to be reasonable and I uphold it.

¹² Order P-4.

¹³ Orders MO-1169, PO-1721, PO-1834 and PO-1990.

Issue B: Should the fee be waived?

[32] 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.¹⁴

[33] 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.

[34] 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.¹⁵

[35] The appellant submits that he should be granted a fee waiver on the basis of the financial documentation he provided and the public interest considerations he raises. To

¹⁴ Order PO-2726.

¹⁵ Section 45(5), Orders M-914, MO-1243, P-474, P-1393 and PO-1953-F.

support his claim, the appellant provided the police with financial information, including information about his income, expenses, assets and liabilities.

[36] The police submit that the appellant has failed to demonstrate financial hardship and that dissemination of the records will not benefit public health or safety.

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

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

[38] 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.¹⁶

[39] The police state that the actual cost to them in processing the request is reflected in their fee estimate. The appellant did not address this issue. In the circumstances, this is not a relevant factor weighing either for or against a fee waiver.

Section 45(4)(b): financial hardship

[40] For section 45(4)(b) to apply, a requester must provide evidence regarding their financial situation, including information about income, expenses, assets and liabilities.¹⁷ If financial hardship is established, this is a factor that weighs in favour of a fee waiver.

Representations

[41] The police submit that the appellant's evidence is insufficient to establish that paying the \$401.50 fee would cause him financial hardship, as contemplated by section 45(4)(b) of the *Act*. They state:

The requester has provided a copy of his online banking profile and a summary breakdown of income and expenses, without any additional supporting documentation. These documents show an individual who has approximately average annual income and average expenses. It is submitted that the requester has failed to provide sufficient information to suggest that a fee waiver is fair and equitable in the circumstances.

[42] The appellant maintains that he provided ample documentation to demonstrate his financial situation.

Analysis and Findings

[43] I am satisfied, based on the evidence before me, that payment of the fee would cause the appellant a mild degree of financial hardship.

¹⁶ Order PO-3755. See also Order PO-2514.

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

[44] In my view, the appellant provided the police with sufficiently detailed information about his income, expenses, assets and liabilities. I agree with the police that his income is roughly the median income for the province in which he resides. I also acknowledge that the fee is not particularly large.

[45] However, based on the information the appellant provided, and taking into account the size of the fee, I am prepared to find that payment of the fee would visit some degree of financial hardship on the appellant. However, I give this little weight in the circumstances. While I can appreciate that the appellant may have to budget to pay the fee, I find that the financial hardship to him will be minimal.

[46] Accordingly, while I find that the appellant has established financial hardship under section 45(4)(b), this factor weighs only slightly in favour of the granting of a fee waiver.

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

[47] 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 and safety issue.¹⁸ If present, this factor weighs in favour of a fee waiver.

[48] 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,
- 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.¹⁹

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

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

Representations

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

In early 2020 the LPS [London Police Service] initially denied their use of Clearview AI's software, further bringing this request into the public interest due to the fact that several months later the LPS reversed course and did admit to their [members'] using Clearview AI's software. The admission on the part of the LPS that its members did use such software only came once a leaked customer list from Clearview AI did, in fact, confirm that the LPS used such software.

[50] The appellant cites the following statement from the police's media relations officer:

"Early in 2020, it came to our attention that well-intentioned officers accessed Clearview AI technology after it had been marketed to them and shared as a potential investigative tool amongst the law enforcement community. While the London Police Service never formally adopted the technology, officers experimented with the software using their own images and those of family, friends and public figures. Clearview AI was utilized during one investigation but it yielded no results and no charges were laid. It is recognized that the use of this technology presents complex issues that engage broad public policy concerns with respect to privacy interests. As a result, the Chief provided clear direction to members that any use of such technology was to cease pending further review of the matter including how the use of such technology could impact upon privacy interests. Clearview AI is not presently in use at the London Police Service and there are no immediate plans to acquire or implement this technology.²⁰

[51] The appellant argues that there is a public interest in dissemination of the

²⁰ 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* (25 August 2021), online: BuzzFeed News <<https://www.buzzfeednews.com/article/ryanmac/clearview-ai-international-search-table>> (BuzzFeed).

"Did the London Police Service lie about the use of Clearview AI surveillance technology?", CBC News, March 4, 2020.

"London police clear up use of controversial Clearview AI facial recognition technology", Global News, March 9, 2020.

"London police Clearview AI review reveals 7 officers accessed the facial recognition technology", Global News, May 21, 2020.

"Details emerge about use of facial recognition software by London police", CTV News, May 21, 2020.

records at issue “to more clearly ascertain the events surrounding the LPS’s use of Clearview AI’s software and the LPS’s initial denial and later 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. He is under contract with a publisher to publish his results in a book.

[52] The police observe that information relating to the use of facial recognition by law enforcement agencies, including the London Police Service was, both prior to and following this FOI request, the subject of significant media attention. These media reports noted that the police’s use of facial recognition software was stopped by direction of the Chief immediately upon being made aware of its use.²¹

[53] The police state that there is no ongoing use of any facial recognition software by the LPS and that there is no connection between the public interest in the records and a public health and safety issue. They also contend that the requester has provided insufficient information with respect to how the requested information will be disseminated or utilized to meet the stated public interest.

Analysis and Findings

[54] 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 48 above.

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

[55] In my view, the use or potential use of Clearview’s facial recognition technology by the police is a matter of public rather than private interest, and that it relates directly to a public health or safety issue.

[56] The subject matter of the records is the police’s use, or potential use, of Clearview’s facial recognition technology. 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, former Commissioner Brian Beamish 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

²¹ The police cite a number of articles in support of their submissions on this point:

“London police officers may have accessed controversial facial recognition technology, force says”, Global News, March 4, 2020.

“London police Clearview AI review reveals 7 officers accessed the facial recognition technology”, Global News, May 21, 2020.

“Details emerge about use of facial recognition software by London police”, CTV News, May 21, 2020.

“Seven London police officers used now-banned facial-recognition software, review finds”, London Free Press, May 22, 2020.

people's faces for law enforcement purposes has significant privacy implications for all Ontarians."²²

[57] The police admit in their representations that Clearview AI technology was used in an investigation, though no charges were laid and the Chief directed that its use cease. Given that people's images were used or 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 use of personal images uploaded to the internet.

[58] 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 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. In making this finding, I acknowledge the police's submission that a public safety issue must go beyond police activity in its most general sense. I agree with this statement in principle, but in my view, police use of Clearview is a specific and highly contentious practice that rises to the level of being a matter of public health or safety.

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

[59] 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.

[60] 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 powers to curtail individual rights during a public health or other crisis events."²³ She

²² Brian Beamish, Information and Privacy Commissioner of Ontario, *Statement on Toronto Police Service Use of Clearview AI Technology* (14 February 2020), online: <https://www.ipc.on.ca/information-and-privacy-commissioner-of-ontario-statement-on-toronto-police-service-use-of-clearview-ai-technology/>

²³ Order PO-4244, para 67.

noted the value of the responsive records in 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.

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

[62] In a recent joint statement on police use of facial recognition technology, 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, they 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

[63] 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

²⁴ "Recommended legal framework for police agencies' use of facial recognition, Joint Statement by Federal, Provincial and Territorial Privacy Commissioners" (May 2, 2022), online: https://priv.gc.ca/en/opc-actions-and-decisions/advice-to-parliament/2022/s-d_prov_20220502/.

articles around police use of facial recognition technology, and specifically Clearview's software and database, include concerns about privacy, accuracy,²⁵ racial bias²⁶ and mass surveillance.²⁷

[64] 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 commissioners²⁸ into Clearview's practices found that its 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

[65] This 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 these enforcement orders in court³³ 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 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.

²⁵ BuzzFeed, *supra* note 20.

²⁶ BuzzFeed, *supra* note 20.

²⁷ BuzzFeed, *supra* note 20.

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*, February 2, 2021.

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*, June 10, 2021

³² "OAIC and ICO conclude joint investigation into Clearview AI", *Office of the Australian Information Commissioner*, 3 November, 2021.

"ICO fines facial recognition database company Clearview AI Inc more than £7.5m and orders UK data to be deleted | ICO".

"Clearview AI breached Australians' privacy", 3 November, 2021.

³³ As noted above, the OPC does not have order-making powers, but Clearview is challenging the orders issued by other jurisdictions. See, for example: "U.S. 'mass surveillance' company challenges B.C. privacy watchdog order", *Victoria Times Colonist*, January 24, 2022.

[66] 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 record with others

[67] Lastly, I find it likely the appellant will disseminate the content of the records, or communicate their substance. His purpose for filing this access request is to use the records for his academic research on Canadian law enforcement's use of images, to be published in a book. He has named the publisher and I disagree with the police that he has provided insufficient information to establish that he will disseminate the information in the records.

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

Regulation 460, section 8: whether access is granted

[69] When assessing whether to waive the fee, I must also consider whether the appellant will be given access to the records.

[70] The police have stated in their interim access decision that they will provide partial access to the records, and therefore I find that this factor neither weighs in favour of granting a fee waiver, nor against it.

Other relevant factors

[71] 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

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

The manner in which the police responded to the request; working constructively to narrow and clarify the request

[73] The appellant notes that the police extended the time for their initial response to his access request by thirty days, delaying his access to the records. He argues that he tried through the mediator to bring the fee to a more manageable amount. The police do not address this issue.

[74] In my view, the significance of the police's extension of 30 days is largely mitigated by their efforts during mediation to reduce the fee. The police dropped the photocopying fee and reduced the search time by two hours. The appellant's representations on this point merely state that the police should have waived the fee; the appellant does not mention having made any compromise that would reduce the police's costs.

[75] I conclude that these factors have no bearing in the circumstances on whether the fee should be waived.

Detailed index of records

[76] The appellant further submits that the police have not provided a detailed index of the records he will receive. He argues it is not fair for him to have to pay for records whose contents are not clearly communicated to him from the outset.

[77] The police take the position that they do not have to provide a detailed list of records with a fee estimate.

[78] In my view, the police have provided the appellant sufficient information to help him decide whether to pay the fee and pursue access. They told him how many records there were, what exemptions would be applied and to how many records. This is sufficient in the circumstances to enable the appellant to decide whether to pursue access. The absence of a detailed index of records is not a factor weighing in favour of a fee waiver in this case.

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

[79] 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

³⁴ Orders M-166, M-408 and PO-1953-F.

consideration of the factors listed in the regulation, as well as any other relevant factors.

[80] 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 a fee waiver is justified on the basis that it is fair and equitable to grant it.³⁵

[81] I found above that the payment of the fee would cause the appellant a small degree of financial hardship. This finding weighs slightly for granting a fee waiver.

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

[83] 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 articulated above. In my view, however, dissemination of the records will contribute greatly to meaningful debate on a subject with significant public health and 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 fee estimate of \$401.50.
2. I order the police to waive 50% of its fee estimate. I also order the police to waive 50% of their final fee, if it differs from the fee estimate.

Original Signed by: _____
Gillian Shaw
Senior Adjudicator

November 28, 2022 _____

³⁵ Order PO-2726.