Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-4411

Appeal MA20-00299

Toronto Police Services Board

July 13, 2023

Summary: The police received a request under the *Act* for records relating to their use of facial recognition technology. The police identified one record as responsive to the request, an internal procedure document, and issued a decision denying access to it pursuant to the exemptions at sections 7(1) (advice or recommendations) and 8(1)(c) (law enforcement – reveal investigative techniques or procedures) of the *Act*. The appellant appealed the police's decision to deny access to the procedure document and also took the position that additional records should exist. During mediation the appellant reformulated his request to specify that he was seeking records relating to the police's use of the Clearview AI facial recognition platform and the police conducted a new search, identifying more responsive records. The police issued a fee estimate of $592.50 to continue processing the reformulated request. The appellant appealed the police's fee estimate and refusal to grant him a fee waiver, which he requested after receiving the fee estimate.

In this decision, the adjudicator finds that neither of the exemptions at section 7(1) nor 8(1)(c) applies to the internal procedure document and orders the police to disclose it to the appellant. The adjudicator upholds the police's fee estimate. 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 percent.

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

Orders considered: Orders PO-4244, MO-4286

OVERVIEW:

[1] This order determines whether access should be granted to an internal procedure document of the Toronto Police Service, regarding its use of facial recognition technology. It also addresses whether a fee estimate issued, in response to a request made to the Toronto Police Services Board (the police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating the use of Clearview AI facial recognition technology, should be upheld

[2] Clearview AI 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 30+ billion facial images sourced from the public internet, including news media, mugshot websites, public social media, and other open sources.[1]

[3] The requester is a postdoctoral fellow working on a research project about facial recognition technology. In his initial request, he sought access to all documents, receipts, briefs, memorandums, instructions otherwise, regarding facial recognition technology, between January 1, 2017 and June 2, 2020.

[4] Following receipt of the request, the police located one responsive record, an internal procedure document, and issued a decision denying access to it pursuant to the discretionary exemptions at sections 7(1) (advice or recommendations) and 8(1)(c) (law enforcement – reveal investigative techniques or procedures) of the *Act*.

[5] The requester, now the appellant, appealed the police's decision to the Office of the Information and Privacy Commissioner of Ontario (the IPC). A mediator was assigned to help assist the parties reach a mediated resolution.

[6] During mediation, the appellant claimed that additional records should exist. Working with the mediator, the appellant reformulated his request to specify he was seeking access to records related to Clearview AI facial recognition technology. His reformulated request was for:

> All receipts, correspondence between members of the police and Clearview AI, correspondence between members of the media and the police, briefs, memorandums, and instructions pertaining to use of Clearview AI's facial recognition platform by the police force and/or any of its members between 1 January 2017 and June 2, 2020.[2]

[7] The police identified 1177 emails as responsive to the reformulated request and issued a fee estimate of $592.50, requesting that, in accordance with the *Act*, the

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[1] See https://www.clearview.ai/overview (accessed on July 13, 2023).
[2] In this order, I will refer to this request as the "reformulated request."

appellant pay 50 percent of the fee estimate before it continued to process the request.[3] The police advised that some portions of the records responsive to the reformulated request may be withheld from disclosure under the discretionary exemptions in sections 8 (law enforcement) and 12 (solicitor-client privilege) and the mandatory exemption at section 14(1) (personal privacy) of the *Act*.

[8] Following receipt of the fee estimate, the appellant submitted a fee waiver request to the police, which they denied.

[9] The appellant confirmed that he is pursuing access to the procedure document. He also confirmed that he is appealing the police's fee estimate and their denial of his fee waiver with respect to the records that were identified as responsive to his reformulated request.

[10] As a mediated resolution was not reached, the appeal was transferred to the adjudication stage of the appeal process where an adjudicator may conduct an inquiry. The adjudicator originally assigned to the appeal sought and received representations from the police and the appellant which were shared between them in accordance with the confidentiality criteria as set out in *Practice Direction 7* of the IPC *Code of Procedure.*[4]

[11] The appeal was transferred to me to complete the inquiry. Upon review of the file and the representations of the parties, I determined that I had the information necessary to continue the inquiry and issue an order resolving the issues on appeal.

[12] In this order I find that neither the advice or recommendations exemption at section 7(1) nor the law enforcement exemption for investigative techniques or procedures at section 8(1)(c) apply to the procedure document and do not uphold the police's decision to withhold it. I order the police to disclose it to the appellant.

[13] Also, in this order, I uphold the police's fee estimate to search and locate the records in response to the appellant's reformulated request and I prohibit the police from charging any fees to prepare the records for disclosure. I also waive 50 percent of the fee.

RECORD:

[14] The record at issue is a three-page internal procedure document titled

[3] Where an estimate is $100 or more, section 7(1) of Regulation 823 permits an institution to require a deposit of 50 per cent of the estimate before it takes further steps to process the request. This will be discussed below under Issue D.

[4] The non-confidential portions of the respondent's representations were shared, with the appellant. The adjudicator then shared the appellant's representations, in their entirety, with the respondent, seeking reply representations on the issue of the applicability of section 16, the public interest override, which was raised by the appellant in his representations.

"Procedure Number 04-04 Facial Recognition System" (the procedure document).

ISSUES:

A. Does the discretionary exemption at section 7(1) for advice or recommendations given to an institution apply to the procedure document?

B. Does the discretionary exemption at section 8(1)(c) for law enforcement activities apply to the procedure document?

C. Should the police's fee estimate of $592.50 be upheld?

D. Should the fee be waived?

DISCUSSION:

Issue A: Does the discretionary exemption at section 7(1) for advice or recommendations given to an institution apply to the procedure document?

[15] Section 7(1) of the *Act* exempts certain records containing advice or recommendations given to an institution. This exemption aims to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.[5]

[16] Section 7(1) states:

> A head may refuse to disclose a record if the disclosure would reveal advice or recommendations of an officer or employee of an institution or a consultant retained by an institution.

[17] "Advice" and "recommendations" have distinct meanings. "Recommendations" refers to a suggested course of action that will ultimately be accepted or rejected by the person being advised. Recommendations can be express or inferred.

[18] "Advice" has a broader meaning than "recommendations." It includes "policy options," which are the public servant or consultant's identification of alternative possible courses of action. "Advice" includes the views or opinions of a public servant or consultant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take.[6]

[19] "Advice" involves an evaluative analysis of information. Neither "advice" nor

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[5] *John Doe v. Ontario* (*Finance*), 2014 SCC 36, at para. 43.
[6] See above at paras. 26 and 47.

"recommendations" include "objective information" or factual material.

[20] Section 7(1) applies if disclosure would "reveal" advice or recommendations, either because the information itself consists of advice or recommendations or the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.[7]

[21] The relevant time for assessing the application of section 7(1) is the point when the public servant or consultant prepared the advice or recommendations. The institution does not have to prove that the public servant or consultant actually communicated the advice or recommendations. Section 7(1) can also apply if there is no evidence of an intention to communicate, since that intention is inherent to the job of policy development, whether by a public servant or consultant.[8]

[22] Examples of the types of information that have been found *not* to qualify as advice or recommendations include:

- factual or background information,[9]
- a supervisor's direction to staff on how to conduct an investigation,[10] and
- information prepared for public dissemination.[11]

[23] Sections 7(2) and (3) create a number of mandatory exceptions to the section 7(1) exemption. If the information falls into one of these categories, it cannot be withheld under section 7(1). None of these exceptions apply in the circumstances of this appeal.[12]

Representations

The police's representations

[24] The police submit that the procedure document outlines the manner in which the facial recognition program works and the steps to be undertaken by a police officer

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[7] Orders PO-2084, PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563.
[8] *John Doe v. Ontario (Finance)*, cited above, at para. 51.
[9] Order PO-3315.
[10] Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.).
[11] Order PO-2677
[12] Section 7(2) creates a list of exceptions, none of which have been argued by the appellant or apply in the circumstances of this appeal. Section 7(3) also creates an exception for information that is more than 20 years old; it is not relevant here.

when conducting facial recognition search. The police submit that the record also provides advice and recommendations as to the best course of action as to how the results should be interpreted and treated.

[25] Arguing that the record does not fall within one of the exceptions in section 7(2), the police submit that the record does not contain a body of facts, a report or study on the performance of efficiency of the police; nor, the police say, does it contain a final plan or a proposal to change a program or establish a new program. The police also submit that it does not contain budgetary estimate for a program or a report of a committee or similar body that has been established to prepared a report on a particular topic.

[26] With respect to exercising its discretion not to disclose the information, the police submit that they considered the purpose of the *Act*, the purpose of the exemption at section 7(1), as well as a number of other relevant factors and determined that there were no factors that favoured the release of the record.

The appellant's representations

[27] The appellant's representations do not address whether or not the exemption for advice or recommendations applies to the record; his representations focus on his view that regardless of whether the any exemption, including the exemption at section 7(1), applies to the record, the public interest override at section 16 should apply to require its disclosure.

Analysis and finding

[28] Having considered the procedure document, as well as the representations of the police, in my view, the exemption at section 7(1) was not intended to protect information of the type in the procedure document and it does not apply.

[29] As indicated above, section 7(1) was designed to protect the free flow of advice in the deliberative process of government decision-making and policy making. In this regard, there must be a relationship of advisor and decision-maker (the individual receiving the advice); the decision-maker must be in a position to accept or reject the advice. Additionally, previous IPC orders have established that section 7(1) was not intended to apply to the contents of manuals, guidelines or policies and procedures created for the purpose guiding employees in the performance of their job responsibilities.[13]

[30] The procedure document at issue in this appeal is not part of a deliberative process. It sets out a particular way of proceeding that has been developed for officers and other police employees to follow when deciding to use facial recognition technology in the course of police work.

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[13] Orders P-363, P-811, PO-1928, PO-2034, MO-1729, MO-2207.

[31] The procedure document does not contain "advice." It does not set out a range of policy options to be considered by a decision-maker or alternative possible courses of action to be taken. I do not accept that an officer or employee following the procedure document is "decision-maker" with respect to that information or otherwise in a position to accept or reject the steps set out in that document.

[32] The procedure document also does not contain "recommendations" in the sense that it presents a suggested course of action that may be accepted or rejected in the context of a deliberative process. The procedure document prescribes the process that police officers and other police employees must follow when performing a particular task during the course of their job responsibilities.

[33] I find, therefore, that the procedure document neither contains nor reveals information that can be characterized as advice or recommendations within the meaning section 7(1) of the *Act*. As a result, I find that it is not exempt from disclosure under that section.

[34] As indicated above, the appellant has raised the application of section 16 of the *Act*, the "public interest override" provision which provides for the disclosure of records that would otherwise be exempt under another section of the *Act*. Section 16 states:

> An exemption from disclosure of a record under sections 7, 9, 9.1, 10, 11, 13 and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

[35] As I have found that the exemption at section 7(1) does not apply to the record, it is not necessary for me to consider whether section 16 applies to override that exemption. I will next consider whether the exemption for law enforcement at section 8(1), which is not subject to the public interest override, applies.

Issue B: Does the discretionary exemption at section 8(1)(c) for law enforcement activities apply to the record?

[36] The police submit that the record is also exempt from disclosure under the law enforcement exemption at section 8(1)(c) which considers information that would reveal investigative techniques or procedures. Section 8(1)(c) states:

> A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> > reveal investigative techniques and procedures currently in use or likely to be used in law enforcement[.]

[37] The term "law enforcement" is defined in section 2(1) and includes "policing" or "investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings[.]" The IPC has

found that "law enforcement" can include a number of situations, including a police investigation into a possible violation of the *Criminal Code*.[14]

[38] Section 8(1)(c) is one of a number of law enforcement exemptions in section 8(1) that considers whether the harm from disclosure of the record "could reasonably be expected to" occur.

[39] Previous orders of the IPC have established that the law enforcement exemption must be approached in a sensitive manner, because it is hard to predict future events in the law enforcement context, and so care must be taken not to harm ongoing law enforcement investigations.[15]

[40] However, the exemption does not apply just because a continuing law enforcement matter exists,[16] and parties resisting disclosure of a record cannot simply assert that the harms under section 8 are obvious based on the record. They must provide detailed evidence about the risk of harm if the record is disclosed.

[41] Parties resisting disclosure must show that the risk of harm is real and not just a possibility.[17] However, they do not have to prove that disclosure will in fact result in harm. How much and what kind of evidence is needed to establish the harm depends on the context of the request and the seriousness of the consequences of disclosing the information.[18]

[42] The technique or procedure must be "investigative"; that is, it must be related to investigations. The exemption will not apply to techniques or procedures related to "enforcing" the law.[19]

Representations

The police's representations

[43] The police submit that the record is a procedure describing how the facial recognition technology is to be used by the police. They submit that the procedure is investigative in nature as it is used to identify unknown suspects in criminal investigations. They submit that disclosure of the procedure could reasonably be expected to interfere with its effective use and, if it were known to the public, would allow those engaged in criminal enterprise to circumvent this law enforcement measure.

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[14] *Orders M-202 and PO-2085.*
[15] *Ontario* (*Attorney General*) *v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).
[16] Order PO-2040 and *Ontario* (*Attorney General*) *v. Fineberg*, cited above.
[17] *Merck Frosst Canada Ltd.* v. *Canada* (*Health*), [2012] 1 S.C.R. 23.
[18] *Ontario* (*Community Safety and Correctional Services*) *v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4; *Accenture Inc.* v. *Ontario* (*Information and Privacy Commissioner*), 2016 ONSC 1616.
[19] Orders PO-2034 and P-1340.

[44] The police also submit in the summer of 2020, with Toronto City Council, the police approved the publication of up-to-date procedures of public interest that govern interaction with the public in a form deemed not to endanger the efficacy of investigative techniques and operations. The police submit that the procedure document was not made publicly available at that time as it was deemed not to meet that criteria.

The appellant's representations

[45] Again, the appellant does not specifically address or respond to the possible application of the section 8(1)(c) exemption claim to the record and focusses his representations on his view that, regardless of any exemptions claimed, the record should be disclosed due the application the public interest override. In this regard, the appellant submits that 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. He also submits the fact that there are no laws or regulations governing or overseeing the police's use of such software further supports his view that information about how the police use such technology should be publicly available.

[46] It should be noted, however, that based on the wording of section 16, reproduced above, the public interest override cannot apply to information that is found to be exempt under any of the law enforcement exemptions, including that set out in section 8(1)(c) of the *Act,* which is claimed here.

Analysis and finding

[47] Section 8(1)(c) of the *Act* states that a head may refuse to disclose a record if its disclosure could reasonably be expected to reveal investigative techniques and procedures current in use or likely to be used in law enforcement. For section 8(1)(c) to apply, the police must show that disclosing the investigative technique or procedure to the public could reasonably be expected to interfere with its effective use. The exemption normally will not apply where the technique or procedure is generally known to the public.[20]

[48] Based on my review of the procedure document and the police's representations, I find that the police have not provided sufficiently detailed evidence to support a conclusion that disclosure of the information that it contains could reasonably be expected to reveal confidential techniques and procedures used by the police in their investigations. I also do not accept that their evidence supports a finding that the disclosure of the procedure document could reasonably be expected to hinder the function and use of the facial recognition technology in current or future investigations as contemplated by section 8(1)(c) of the *Act*.

[49] The procedure document sets out steps that officers and other specifically

[20] Orders P-170, P-1487, MO-2347-I, PO-2751 and MO-4253.

identified employees are to follow when facial recognition technology is used for investigative purposes. In my view, it is high-level information that gives a broad overview of procedural steps that must be taken, such as what forms must be completed, where the results must be documented, which employees should be advised and what procedural steps those employees should take, in turn.

[50] I do not accept that the disclosure of this type of general procedural information, could, as submitted by the police, reasonably be expected to interfere with the police's effective use of facial recognition technology. I also do not accept that if this information were known to the public, it would allow those engaged in criminal enterprise to circumvent law enforcement's effective use of facial recognition technology.

[51] I acknowledge the police's submission that Toronto City Council and the police decided in 2020 not to publish the procedure document when it otherwise published a number of other procedures of public interest. However, this submission does not explain the reasons why the procedure document was not published or, more importantly, explain how its disclosure could reasonably be expected to give rise to the harms at section 8(1)(c).

[52] I also acknowledge that the procedure document may relate to "an investigative technique or procedure," namely, the use of facial recognition technology. However, I have not been provided with sufficient evidence to satisfy me that the disclosure of the high-level procedural steps set out in the procedure document could reasonably be expected to hinder or compromise the effective utilization of facial recognition technology as an investigative technique or procedure.

[53] Accordingly, I do not uphold the police's decision that the procedure document is exempt under section 8(1)(c) and I will therefore order it to be disclosed to the appellant.

Issue C: Should the police's fee estimate of $592.50 be upheld?

[54] Section 45 of the *Act* governs fees charged by institutions to process requests for information made under the *Act*.

[55] Section 45(1) of the *Act* requires institutions to charge fees for requests. The fees that an institution is to charge for access to a record are set out in section 6 of Regulation 823.

[56] Under section 45(3) of the *Act*, 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.[21] The fee estimate also helps requesters decide whether to narrow the

[21] Orders P-81, MO-1367, MO-1479, MO-1614 and MO-1699.

scope of a request to reduce the fee.[22]

[57] The institution can require the requester to pay the fee before giving them access to the record.[23] 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.[24] 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.[25]

In all cases, the institution's fee estimate must include:

- a detailed breakdown of the fee; and
- a detailed statement as to how the fee was calculated.[26]

[58] The IPC can review an institution's fee estimate and can decide whether it complies with the *Act* and regulations. The burden of establishing the reasonableness of an institution's fee estimate rests with the institution, in this case, the police.[27]

Representations

The police's representations

[59] The police submit that the IPC should uphold its fee estimate of $592.50 for the additional records located in response to the appellant's request, as reformulated at mediation. They submit that section 45(1) of the *Act* requires the person who made a request for access to a record pay fees in the amounts prescribed by Regulation 823. The police submit that the fee estimate was calculated in accordance with the regulation.

[60] The police submit that the fee was based on an estimate provided by an employee from the Information Security Office, Risk Management Unit and that the employee is familiar with the type and content of the requested records.

[61] The police explain that the responsive records are emails kept on police computer services. They explain that to locate them, the employee conducting the search must write a query to abstract emails based on search terms agreed on by the

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[22] Order MO-1520-I.
[23] Regulation 823, section 9.
[24] Regulation 823, section 7(1).
[25] Order MO-1699.
[26] Orders P-81 and MO-1614.
[27] Order M-1123.

appellant. The police submit that the employee estimated that it would take 15 minutes of preparation to turn the request into a search query and that it would take one minute per email to confirm whether or not a record was responsive to the appellant's request. The police submit that the employee advised that they could not draft a search query to exclude marketing emails or duplication where different members of the police were carbon copied on the email. The police submit that when the search query was run it produced 1177 emails.

The appellant's representations

[62] The appellant submits that the police have not provided an in-depth breakdown of its fee estimate. He submits that despite repeated attempts through the mediator to gain clarity on the fee in an effort to reduce it the police provided little explanation. He also submits that he has not been provided with an index or list of the documents that are responsive to his request and he does not agree to pay for documents whose contents are not clearly communicated to him from the outset.

Analysis and findings

[63] For the following reasons, I uphold the police's fee estimate of $592.50.

[64] The police have charged a fee estimate of $592.50 to continue to process the request as reformulated by the appellant during mediation. They have stated that this fee is in accordance with the amounts prescribed in Regulation 823. Despite the fact that they did not provide the appellant with a sufficiently detailed breakdown of the fee in the fee estimate, I accept that, in their representations, they have provided a sufficiently detailed statement as to how the fee estimate was calculated[28] and that the fee is in accordance with the amounts prescribed in Regulation 823.

[65] In their representations, the police indicate that it took an employee 15 minutes to draft the query for the search to be conducted for emails responsive to the appellant's reformulated request. The police submit that once that search query was run, 1177 emails were identified. However, they also submit that given the limits of the system, the query is likely to have identified a number of emails that are not responsive to the appellant's reformulated request,[29] as well as duplicate results. As a result, to determine which of the 1177 emails generated by the query are responsive to the appellant's request, they will need to be reviewed. The police submit that an experienced employee has indicated that it will take one minute per email to determine whether the email is responsive or not.

[66] Although the police have not specifically broken down their fee estimate of $592.50, it is largely discernable through their representations. Under paragraph 3 of

[28] Orders P-81 and MO-1614.
[29] The police have indicated that some of the emails generated from the query would be marketing emails.

section 6 of Regulation 823 an institution is to charge $7.50 for each 15 minutes spent for manually searching a record. At one minute for 1177 emails, the police are entitled to charge $588.50 and I uphold this portion of the fee estimate.

[67] The police have not identified the portion of the $592.50 fee that reflects the charge for the 15 minutes taken to draft the query. However, when accounting for $588.50 of search time, $4.00 remains unaccounted for in the total charge of $592.50. In my view, the creation of a query to extract emails from the police's database is part of the time spent on the search for responsive records. As a result, I find that the police are entitled to charge for the creation of the query at the rate of $7.50 for 15 minutes under paragraph 3 of section 6 of Regulation 823. As the amount that it appears the police charged for drafting the query is less than this amount, I will uphold this portion of the fee estimate.

[68] The police note, in their decision letter and in their representations, that they will likely claim exemptions for some of the emails identified as responsive to the reformulated request. Paragraph 4 of section 6 of Regulation 823 permits an institution to charge for preparing a record for disclosure, including severing a record, at a rate of $7.50 for each 15 minutes spent. In this case, the police have neither provided an estimate of the percentage of the responsive emails (once non-responsive and duplicate emails are removed) that might require severance, nor have they provided an estimate of the fees for them to undertake such severances. In the absence of more detailed information about the fees that might be charged for severing the responsive emails, I will not allow the police to charge for the task of severing them. As indicated above, the purpose of a fee estimate is to give a requester enough information to make an informed decision on whether or not to pay the fee and pursue access[30] or decide whether to narrow the scope of a request to reduce the fee.[31] Without an estimate of what the fee might be for severing 1177 emails, I do not accept that the appellant is in a position to make an informed decision regarding how to proceed with respect to his request. Accordingly, I will not allow the police to charge fees for preparing the records for disclosure, including severing information subject to an exemption.

[69] Accordingly, I uphold the police's fee estimate of $592.50 for locating responsive records. I will next consider whether any portion of the fee should be waived. I will order the police to continue to process the appellant's request for records responsive to his reformulated request and issue a final access decision within 30 days of the date of this order, without charging any additional fees for preparing a record for disclosure, such as severing information subject to a claimed exemption.

Issue D: Should the fee be waived?

[70] The fee provisions in the *Act* establish a "user-pay" principle. The fees referred

[30] Orders P-81, MO-1367, MO-1479, MO-1614 and MO-1699.
[31] Order MO-1520-I.

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.[32]

[71] 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.

[72] 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.[33]

[73] 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 support his claim, the appellant provided the police with financial information, including information about his finances and assets.

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

[74] The police submit that the actual cost of processing, collecting and copying the record is more than the amount that was charged, that the appellant has failed to demonstrate financial hardship and that dissemination of the records will not benefit public health or safety.

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

[75] 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.[34]

[76] The police state that the actual cost of processing, collecting and copying the records is more than the amount that was charged. They submit that the fee estimate only reflects the costs that are known. The appellant did not address this issue.

[77] In the circumstances, I find that the actual cost in comparison to the fee is not a relevant factor weighing either for or against a fee waiver. The police have not explained the magnitude of the difference or pointed to any particulars to support why this factor should be taken into account.

Section 45(4)(b): financial hardship

[78] For section 45(4)(b) to apply, a requester must provide evidence regarding their financial situation, including information about income, expenses, assets and liabilities.[35] If financial hardship is established, this is a factor that weighs in favour of a fee waiver.

Representations

[79] The police submit that the appellant has not established that payment of the fee would cause the appellant financial hardship. They submit that although the appellant provided a limited picture of his financial situation, they determined that financial hardship as not established.

[80] The appellant submits that he provided the police with ample documentation attesting to his financial situation and assets to support his position that payment of the fee of $592.50 would cause him financial hardship.

Analysis and findings

[81] I have considered the information that appellant provided to the police about his financial status. Also, I have considered that, in the circumstances and considering the number of responsive records, the fee is not particularly large. However, I am satisfied, based on the evidence before me, that payment of the $592.50 would cause the

[34] Order PO-3755. See also Order PO-2514.
[35] Orders M-914, P-591, P-700, P-1142, P-1365 and P-1393.

appellant some limited degree of financial hardship.

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

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

[83] 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.[36] If present, this factor weighs in favour of a fee waiver.

[84] 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.[37]

Representations

[85] The appellant submits that dissemination of the records that are responsive to his reformulated request is in the public interest. He submits that:

> In early 2020 the TPSB [Toronto Police Services Board] 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 TPSB reversed course and did admit to their [members'] using Clearview AI's software. The admission on the part of the TPSB that its members did use such

[36] Orders MO-1336, MO-2071, PO-2592 and PO-2726.
[37] Orders P-2, P-474, PO-1953-F and PO-1962.

software only came once a leaked customer list from Clearview AI did, in fact, confirm that the TPSB used such software.[38]

[86] The appellant cites the following statement issued by the police:

> At today's Toronto Police Services board meeting, [the Chair] read the following statement with respect to the use of Clearview AI technology: The use of Clearview AI's face recognition service by some Toronto Police Service Members has raised serious questions regarding the use of this technology. Members of the community have a legitimate interest in this topic. The Board appreciates the dialogue that has been generated, and understands the importance of closely examining and then discussing the various issues it raises, including the internal process for reviewing and approving new technology that the Service wishes to use. As has been reported, the Chief directed the use of Clearview to be stopped immediately upon learning of its unauthorized use, and subsequently, the Chief advise the Board about this matter. There are many questions that the use of this technology has generated, and it is important that these questions be carefully considered and explored. This Service is currently in the information-gathering state as it relates to Clearview AI. As the Chief conducts this review, the Board will remain in constant contact with the Chief with respect to this issue. Once we have further information, and before any decision is made with respect to the use of this technology, the public will be informed about the Service's findings….

[87] The appellant argues that there is a public interest in the dissemination of the records that are responsive to his reformulated request in order to "more clearly

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[38] The appellant cites a number of media articles that addressed TPSB's use of such software:

- 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).

- "Feb. 13, 2020 update: Toronto police had previously said it uses facial recognition, but not through Clearview AI. However, spokesperson Meaghan Gray confirmed Thursday some of their officers were, in fact, using Clearview AI software and that those officers have been directed to stop using the technology." https://www.cbc.ca/radio/thecurrent/the-current-for-jan-21-2020-1.5434328/the-end-of-anonymity-facial-recognition-app-used-by-police-raisesserious-concerns-say-privacy-advocates-1.5435278

- "Toronto police admit using secretive facial recognition technology Clearview AI," https://www.cbc.ca/news/canada/toronto/toronto-police-clearview-ai-1.5462785

- "144 Toronto police officers signed up to use Clearview AI 'mass surveillance' tech" https://www.thestar.com/news/gta/2022/02/28/144-toronto-police-officers-signed-up-to-useclearview-ai-mass-surveillance-tech.html

ascertain the events surrounding the TPSB's use of Clearview AI's software and the TPSB admission that it had, in fact, used such software…." He submits that he is gathering information of the type responsive to this request for the purpose of a study on Canadian law enforcement's use of images, the results of which will be published. He notes that he is currently under contact with a publisher.

[88] The police submit that the records do not affect public health and/or safety.

Analysis and findings

[89] For the following reasons, I find that the dissemination of the records that are responsive to the appellant's reformulated request will benefit public health and safety. I will address in turn each of the four factors listed in paragraph 85 above.

[90] The use of Clearview AI facial recognition technology and whether the dissemination of records related to its use in the policing context would benefit public health or safety has been considered before by the IPC in the context of a fee waiver request. In Order MO-4286, as in this appeal, the subject matter of the records for which the appellant was seeking a fee waiver, related to the police's use, or prior use, of Clearview AI's facial recognition technology.[39] Many of the considerations weighed by the adjudicator in Order MO-4286 are applicable to the present appeal. I repeat those that are relevant, here.

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

[91] In my view, the use or potential use of Clearview AI 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. This is consistent with the reasoning set out in Order MO-4286, where the Senior Adjudicator noted:

> The use of [facial recognition 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 people's faces for law

[39] Order MO-4286 involved a request by the appellant, similar in wording to his reformulated request in this appeal, made under the *Act* to a different police services board in Ontario.

> enforcement purposes has significant privacy implications for all Ontarians."[40]

[92] In Order MO-4286, the Senior Adjudicator found that the disclosure of the records related to the police service's use of the technology is a public or safety issue because the "records relate to the potential use of police powers that directly affect individuals' privacy rights in the name of public health or safety." She stated:

> 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 new practice, and one that has given rise to questions and other scrutiny that it rises to the level of being a matter of public health or safety.

[93] I agree with the reasoning set out by the Senior Adjudicator in Order MO-4286 and, given the similarity between the requests and the types of records that would be identified as responsive, the subject matter of the records being considered in this appeal is a matter of public rather than private interest, and 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

[94] For the following reasons, I also find that distribution of the records responsive to the appellant's reformulated request would yield a public benefit by contributing meaningfully to the development of understanding of an important public health or safety issue.

[95] Recent Orders PO-4244 and MO-4286, discussed above, both considered whether distribution of the records, once disclosed, would yield a public benefit by contributing meaningfully to the development of understanding of an important public health or safety issue. I find the adjudicators' reasoning in both orders are relevant to the present appeal and I agree with it.

[96] Order PO-4244 considered 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.

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[40] 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/

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."[41] She 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.

[97] Similarly, in Order MO-4286, the adjudicator stated that 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. She referenced a recent joint statement on police use of facial recognition technology, in which 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. The Senior Adjudicator noted that in this statement, the Commissioners noted potential advantages of facial recognition technology and cautioned against its pitfalls. That joint statement reads, in part:

> 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

[41] Order PO-4244, para 67.

> 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.[42]

[98] In Order MO-4286, the Senior Adjudicator notes that the commissioners' joint statement highlights the live debate around the issue, as do the news articles submitted by the appellant. She states that 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,[43] racial bias[44] and mass surveillance.[45]

[99] The Senior Adjudicator also considers the scrutiny that has been placed on and the enforcement action that has been taken against the use of facial recognition technology and, in particular that developed by Clearview AI.[46] She states that this enforcement and scrutiny, from both within Canada, as well as globally, "is illustrative of the live debate around this highly controversial technology and its use." She states

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[42] "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/.

[43] 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).

[44] BuzzFeed, *ibid*.

[45] BuzzFeed, *ibid*.

[46] She references a joint investigation by the Privacy Commissioner of Canada (OPC) and three provincial privacy commissioners (Quebec, British Columbia and Alberta), into Clearview's practices which found that its collection, use and disclosure of personal information by means of its facial recognition tool ran afoul of federal and provincial privacy laws applicable to the private sector: "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.

She references a related investigation into the RCMP's use of Clearview's technology by the OPC where it was found that the RCMP contravened the Privacy Act R.S.C., 1985, c. P-21 in collecting personal information from Clearview:

- "Police use of Facial Recognition Technology in Canada and the way forward", *Office of the Privacy Commissioner of Canada,* June 10, 2021.

She references enforcement taken by the data protection authorities in the United Kingdom and Australia:

- 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.

that Clearview is challenging many of these enforcement orders in court[47] does not detract from her finding that the police's use or potential use of its technology is a matter of public health or safety and disclosure of records relating to it would help to inform the debate about the issue. The Senior Adjudicator summarizes her view stating:

> 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.

[100] In Order MO-4286, despite acknowledging that she had not seen the records, the Senior Adjudicator stated:

> [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.

[101] The records that would be responsive to the request in this appeal are very similar to those in the appeal that lead to Order MO-4286. I agree with the comments and reasoning applied by the Senior Adjudicator and find that the considerations addressed in that order are equally relevant in this appeal. For the same reasons as the Senior Adjudicator explained in Order MO-4286, in the context of the appeal that is before me, I find that distribution of the records sought by the appellant from the police, once disclosed, would yield a public benefit by contributing meaningfully to the development of understanding of an important public health or safety issue, namely, the police's use of facial recognition technology and, in particular, the technology of Clearview AI.

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

[102] Lastly, I find it likely the appellant will disseminate the content of the records, or communicate their substance. 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, to be published in a book. He has named the publisher. In my view, he has provided sufficient information to establish that he will disseminate the information in the records to which he is provided access.

[103] As a result, I find that distribution of the records will benefit public health or

[47] The Senior Adjudicator in order MO-4286 noted that the OPC does not have order-making powers, but Clearview is challenging the orders issued by other jurisdictions. She referenced the following article, as an example: "U.S. 'mass surveillance' company challenges B.C. privacy watchdog order", Victoria Times Colonist, January 24, 2022.

safety, within the meaning section 45(4)(b). This finding supports the granting of a fee waiver.

Regulation 823, section 8: whether access is granted

[104] When assessing whether to waive the fee, I must also consider whether the appellant will be given access to the records as set out in section 8 of Regulation 823.

[105] The police explained in their fee estimate that they will provide partial access to the responsive records.

[106] I find that this factor neither weighs in favour of granting a fee waiver, nor against it.

Other relevant factors

[107] 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.[48]

[108] In my view, there are a number of additional factors relevant to my consideration of whether a fee waiver is fair and equitable in the circumstances.

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

[109] I note that during mediation, the requester's original request was clarified and the police conducted an additional search for records responsive to the request. It was

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

as a result of the search for records responsive to the appellant's reformulated request that 1177 additional responsive records were identified.

[110] The appellant notes the police have not provided a sufficiently detailed breakdown of the fees and despite repeated attempts on his part to gain additional information about the records for the purposes of reducing the fee, the police were not particularly responsive.

[111] The police do not specifically address this factor.

[112] Given that there is evidence before me to suggest that, to some degree, the police worked with the appellant at mediation to clarify the request, and ultimately located a significant number of additional responsive records, I accept that this factor weighs against granting a fee waiver.

The request involves a large number of records

[113] I note that the request for records is broad in scope. The appellant seeks access to wide variety of types of records and spans a timeline of over three years. As a result, the request generated a significant number of responsive records.

[114] In my view, this is a factor that weighs against granting a fee waiver.

Detailed index of records

[115] The appellant further submits that the police have not provided a detailed index of the records that they have identified as responsive to his request, reformulated at mediation. 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, especially since he has made repeated attempts through the mediator to gain clarity on the fee.

[116] The police did not address this factor.

[117] In my view, the police have provided the appellant with sufficient information to help him decide whether to pay the fee and pursue access. They told him that 1177 records were identified as a result of the email search query and what exemptions would likely be applied. Although the police have noted that not all of the 1177 emails will be responsive to the request, in my view, the level of detail that they provided is sufficient in the circumstances to enable the appellant to decide whether to pursue access. The absence of a detailed index of records is therefore not a factor weighing in favour of a fee waiver in this case.

The police provided a record to the requester free of charge

[118] The police have indicated that they have already disclosed to the appellant, in part, a report entitled "TPS Clearview AI: Usage, Review & Analysis, internal emails and

routine orders.

[119] The appellant does not address this issue.

[120] In my view, when considering that there are 1177 emails that remain potentially responsive to the appellant's reformulated request, the fact that the police have disclosed limited information to the appellant, in part, is not, in my view, a relevant factor weighing against a fee waiver in this case.

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

[121] 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.

[122] When considering the relevant factors weighing against the granting of a fee waiver, 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.[49] Additionally, in the context of this appeal, I have noted that the request is broad in scope and generated a significant number of records. I also noted that the police worked constructively with the appellant, during mediation, to clarify the records to which he seeks access. These factors weigh against the granting of a fee waiver.

[123] In terms of the relevant factors weighing in favour of granting a fee waiver, I found above that the payment of the fee would cause the appellant a small degree of financial hardship, a finding that weighs slightly for granting a fee waiver. I also concluded that dissemination of the records will benefit public health or safety. Given the current level of public interest and scrutiny around the use of facial recognition technology and, in particular, the use of Clearview's AI technology, I place significant weight on this factor.

[124] Taking into account all the relevant factors, I find that it would be fair and equitable to grant a partial fee waiver or a reduction of the fee by 50 percent. Although, the user- pay principle articulated above (particularly in the context of the number of records and the police's cooperation in attempting to clarify the request), is a factor weighing against the disclosure of a fee waiver, in my view, dissemination of the records will contribute greatly to meaningful debate on a subject with significant public

[49] Order PO-2726.

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 percent of the police's fee estimate, or a waiver of 50 percent of the final fee, should it differ from the fee estimate.

ORDER:

1. I order the police to disclose the procedure document to the appellant by August 14, 2023.

2. I uphold the police's fee estimate for the processing of the appellant's request as reformulated at mediation, set out in paragraph 6, above.

3. I order the police to grant the appellant a fee waiver of 50 percent of the fee estimate or of the final fee, should it differ from the fee estimate.

4. The police are not to charge fees under section 45(1), for preparing records for disclosure, including severing information that is claimed to be exempt.

5. I order the police to issue a final access decision on the appellant's reformulated request treating the date of this order as the date of the request for administrative purposes only.

Original Signed by: July 13, 2023

Catherine Corban
Adjudicator