



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER MO-2140

Appeal MA-060099-2

Toronto Police Services Board



Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Téloc: 416-325-9188
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

The Toronto Police Services Board (the Police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for the following:

Some time ago the Toronto Police Service upgraded their old side arms to new Glock semi automatics. Please supply:

1. The total number of old side arms taken out of service
2. what was done with those side arms
3. the number of those side arms lost, stolen or unaccounted for.

The Police issued a fee estimate under section 45(1) of the *Act* in the amount of \$3,150, and requested a deposit of \$1,575 before proceeding with the request. After payment of the deposit by the appellant, the Police advised the appellant that they would complete the search and provide the appellant with answers to each of the three questions posed in the his request.

The requester, now the appellant, appealed this decision.

During mediation the appellant submitted a request for fee waiver on the grounds that “the dissemination of this information is in the interest of public safety.” The Police subsequently issued a new decision in which they denied the appellant’s request for a fee waiver. At that time, they also provided both the appellant and this office with a sample of each of the two databases that will be needed to be searched by the Toronto Police Service Property and Evidence Management Unit in order to respond to the request.

The appellant asked that his file be moved to the adjudication stage of the appeal process, without the benefit of further mediation. Accordingly, I sent a Notice of Inquiry to the Police setting out the facts and issues and seeking their representations on the appropriateness of the fee sought by them and the fee waiver sought by the appellant. I received the representations of the Police, which were sent to the appellant along with a Notice of Inquiry. The appellant provided representations in response. I then sought and received reply representations from the Police.

DISCUSSION:

FEES

Where the fee exceeds \$25.00, an institution must provide the requester with a fee estimate. The Police have provided the appellant with a \$3,150 search fee estimate.

A fee estimate greater than \$100.00, may be based on either

- the actual work done by the institution to respond to the request, or

- a review of a representative sample of the records and/or the advice of an individual who is familiar with the type and content of the records [Orders P-81, MO-1699].

The purpose of a fee estimate is to give the requester sufficient information to make an informed decision on whether or not to pay the fee and pursue access [Orders P-81, MO-1367, MO-1479, MO-1614, MO-1699].

The fee estimate also assists requesters to decide whether to narrow the scope of a request in order to reduce the fees [Order MO-1520-I].

In all cases, the institution must include a detailed breakdown of the fee, and a detailed statement as to how the fee was calculated [Order P-81, MO-1614].

Section 45(1) requires an institution to charge fees for requests under the *Act*. The Police state that section 45(1)(a) is relevant in their fee estimate. This section reads:

A head shall require the person who makes a request for access to a record to pay fees in the amounts prescribed by the regulations for,

the costs of every hour of manual search required to locate a record;

In calculating their fee, the Police indicate that they have taken into account paragraph 3 of section 6 of Regulation 823. This section reads:

The following are the fees that shall be charged for the purposes of subsection 45(1) of the *Act* for access to a record:

For manually searching a record, \$7.50 for each 15 minutes spent by any person.

The Police have provided the appellant with an estimate of the \$3,150 fee. In accordance with sections 7(1) and of the Regulation 823, the Police have asked the appellant to pay a deposit before releasing the records. These sections state:

7(1). If a head gives a person an estimate of an amount payable under the *Act* and the estimate is \$100.00 or more, the head may require the person to pay a deposit equal to 50 per cent of the estimate before the head takes any further steps to respond to the request.

9. If a person is required to pay a fee for access to a record, the head may require the person to do so before giving the person access to the record.

The Police state in their representations that:

...in order to extract the "total number of old side arms taken out of service"; a two-step validation process would need to occur. Due to the fact that the records generated and supplied to the Royal Canadian Mounted Police (R.C.M.P) during the conversion of Revolvers to Glocks contain the list of all firearms to be destroyed, it would take one Toronto Police Service (TPS) member to manually cross reference these lists with TPS inventory database to establish which firearm was a Revolver i.e. a Smith & Wesson.

It is not possible to electronically extract a total number of listed Revolvers from the two samples provided to the appellant (TPS inventory databases), and therefore, the TPS member will first have to manually review each entry from all records during that time period.

Upon completion of that, a second validation process will consist of cross-referencing the TPS inventory databases with the handwritten lists sent to the R.C.M.P. (destruction process). Therefore, a conservative estimate revealed 15 business days to complete. The formula is as follows:

15 days at 7 hours / day = 105 hours x \$30.00 / hr = \$3,150.

The appellant did not respond to the Police's submissions on the appropriateness of their fee estimate; rather, his submissions focus on the fee waiver issue.

Analysis/Findings

As stated above, the purpose of a fee estimate is to provide the requester with sufficient information to make an informed decision on whether or not to pay the fee and pursue access to the requested records. In the current appeal, the Police's fee estimate was based on the estimated work to be done to respond to the appellant's request. The Police provided the appellant with a search fee based on the advice of the Property and Evidence Management Unit (Property Unit) Supervisor, who is familiar with the type and contents of the responsive records. The Property Unit stores the original hard copy, hand-written lists of all firearms for destruction. The Police provided the appellant with two representative samples of the TPS inventory databases. This information is stored electronically and would need to be searched manually and cross-referenced in order to respond to the appellant's request completely and accurately.

Given that the Police have placed appropriate reliance on the advice of an expert employee in connection with this fee estimate, I am satisfied that it is justified based on the cost estimated to manually search the records to respond to the appellant's request.

FEE WAIVER

Section 45(4) of the *Act* requires an institution to waive fees, in whole or in part, in certain circumstances. Section 8 of Regulation 823 sets out additional matters for a head to consider in deciding whether to waive a fee. Those provisions state:

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.

A requester must first ask the institution for a fee waiver, and provide detailed information to support the request, before this office will consider whether a fee waiver should be granted. This office may review the institution's decision to deny a request for a fee waiver, in whole or in part, and may uphold or modify the institution's decision [Orders M-914, P-474, P-1393, PO-1953-F].

The institution or this office may decide that only a portion of the fee should be waived [Order MO-1243].

Part 1: basis for fee waiver

The appellant relies on the provision in section 45(4)(c), which contemplates a benefit to public health or safety, to justify his request for a waiver of the fee in this case.

This office has found that dissemination of the record will benefit public health or safety under section 45(4)(c) where, for example, the records relate to:

- compliance with air and water discharge standards [Order PO-1909]

- a proposed landfill site [Order M-408]
- a certificate of approval to discharge air emissions into the natural environment at a specified location [Order PO-1688]
- environmental concerns associated with the issue of extending cottage leases in provincial parks [Order PO-1953-I]
- safety of nuclear generating stations [Orders P-1190, PO-1805]
- quality of care and service at group homes [Order PO-1962]

Analysis/Findings

In Order P-474, former Assistant Commissioner Glasberg found that the following factors are relevant in determining whether dissemination of a record will benefit public health or safety under section 57(4)(c) of the provincial *Freedom of Information and Protection of Privacy Act*, which is the equivalent of section 45(4)(c) of the *Act*:

1. Whether the subject matter of the records is a matter of public rather than private interest;
2. Whether the subject matter of the records relates directly to a public health or safety issue;
3. Whether the dissemination of the records would yield a public benefit by a) disclosing a public health or safety concern or b) contributing meaningfully to the development of understanding of an important public health or safety issue; and
4. The probability that the requester will disseminate the contents of the records.

Requirement 1 - public interest

The appellant's request includes accessing information as to what was done with handguns taken out of commission and the number of those handguns lost, stolen or unaccounted for. He submits in his representations that the location of more than 2000 handguns is most definitely in the public interest. The Police do not dispute this statement. I agree with the appellant. In my view, this factor weighs in favour of the appellant's argument that the disclosure of the records would benefit public health or safety.

Requirement 2 - relates directly to public health or safety

The appellant states that the public has a right to know how many of the handguns are unaccounted for and possibly in the hands of criminals. The Police reply that the appellant has failed to demonstrate that there is an immediate public health or safety risk as the conversion

took place 16 years ago. I find that the appellant's request does directly relate to public safety. I find that there is no requirement in the *Act* that there be an "immediate" public health or safety risk. The *Act* requires only that dissemination of the record will benefit public health or safety. The appellant has asked in his request for information concerning what was done with the side arms taken out of circulation and the number of those side arms lost, stolen or unaccounted for. This factor also weighs in favour of the appellant's arguments favouring a finding that disclosure would benefit public health or safety.

Requirement 3 - dissemination would yield a public benefit

The appellant states that:

With all the talk of centralizing storage for firearms by the Ontario government and City of Toronto the public have a right to know just how safe central storage is.

The Police did not respond to this submission by the appellant. I find that the dissemination of the records would yield a public benefit as it would address a public safety concern relating to the number of the side arms lost, stolen or unaccounted for by the Police. On this basis, I find that this requirement is satisfied.

Requirement 4 - probability of dissemination

The appellant indicates that he will definitely disseminate the records, as he did with the records disclosed to him as a result of a prior request under the *Act*, which he states enjoyed a great deal of media attention. The Police reply that:

Accommodating the appellant in continuing his dissemination of these types of records for the enjoyment of the media does not equate to public health and safety regardless of the samples provided under Section 45(4)(c).

I find that the appellant has undertaken to disseminate the contents of the records. In my view, he will, in fact, do so in the present appeal as well, thereby meeting Requirement 4.

In conclusion, as all four requirements of the test under section 45(4)(c) has been met, I find that the disclosure of the records will benefit public health or safety within the meaning of that section.

Part 2: fair and equitable

For a fee waiver to be granted under section 45(4), a finding must be made that it is "fair and equitable" in the circumstances to do so. I found above that the consideration in section 45(4)(c) applies, namely that the dissemination of the records will benefit public health or safety. I must now determine whether it is fair and equitable to waive the payment of all or any part of the fee required to be paid by the appellant under section 45(1).

Relevant factors in deciding whether or not a fee waiver is “fair and equitable” may include:

- the manner in which the institution responded to the request;
- whether the institution worked constructively with the requester to narrow and/or clarify the request;
- whether the institution provided any records to the requester free of charge;
- whether the requester worked constructively with the institution to narrow the scope of the request;
- whether the request involves a large number of records;
- whether the requester has advanced a compromise solution which would reduce costs; and
- whether the waiver of the fee would shift an unreasonable burden of the cost from the appellant to the institution.

[Orders M-166, M-408, PO-1953-F]

In making a finding as to whether waiver of the fee is fair and equitable, I have considered my findings under section 45(4)(c), the representations of the parties and the factors listed above.

In particular, I note the following with respect to the manner in which the Police responded to the appellant’s request:

- In his appeal letter, the appellant states that it took approximately two months for a decision to be rendered on his request, contrary to the statutory requirement of 30 days in section 19 of the *Act*.
- The fee estimate enclosed in the Police's decision letter did not provide details as to the reasons the Police expected that locating records responsive to the appellant’s request would take 15 days of manual search time.
- The appellant received the Police’s decision letter on a Friday. This letter required a response as to whether the appellant was requesting a fee waiver by the following Monday.
- The appellant’s fee waiver request was received by the Police on May 8, 2006. On June 27, 2006, they replied to the appellant, denying the application for a fee waiver on the basis that his request lacked detail as to the basis of his claim that dissemination of the records would benefit public safety. The Police confirmed

that they had made an error as to the correct date for response for seeking a fee waiver, which date had already passed. The Police in this letter, or in the interim, did not provide the appellant with a revised time period to provide a detailed response as to the basis for his request for a fee waiver.

- The Police have not provided, either in their representations to this office or in their letters to the appellant, information as to the existence of records responsive to parts two and three of the appellant's request concerning the disposition of the old side arms. The only direct reference to these two parts of the appellants' request is in the original decision letter where the Police state that upon completion of the search, answers will be supplied to each of the three questions posed by the appellant in his request.

Section 45(4)(a) of the *Act* requires that the Police consider the extent to which the actual cost of processing, collecting and copying the record varies from the amount of the payment required. The Police state that in order to comply with the request, the Property Unit will assign a Class 5 Clerk at \$25.30 per hour to conduct the necessary search. The estimated time has been set at 15 days, or 105 hours. Therefore, based solely on the extraction and manual search through the records, the total actual cost to the Police is less than the fee estimate originally provided to the appellant. Specifically, the Police calculate the actual cost to reply to the appellant's request will be 105 hours x \$25.30 = \$2,656.50. This results in a difference of \$493.50 from the amount of the original fee estimate.

Conclusion

Having considered the factors outlined above, I am satisfied that it would be fair and equitable to grant a partial fee waiver in this case. As the firearm conversion took place approximately 16 years ago, the response to part one of the appellant's request may be only marginally relevant to the public safety consideration. I do, however, find that parts two and three of his request are directly relevant to the safety issue, namely the disposition and the number of handguns lost, stolen or unaccounted for. In my view, it would not be fair and equitable in the circumstances to waive all fees associated with this request. Waiver of the entire fee would shift an unreasonable burden of the cost from the appellant to the Police.

The actual cost of the search has been estimated by the Police to be \$2,656.50, and in my view it would be fair and equitable for the appellant to share the cost of the actual search equally with the Police. Therefore, I will uphold the Police decision to charge one half of the actual estimated cost of \$2,656.50, namely the amount of \$1,328.25. Accordingly, I will order the Police to waive the amount of \$1,821.75 from its fee estimate of \$3,150.

ORDER:

1. I uphold the Police's search fee estimate of \$3,150.

2. I order the Police to waive the amount of \$1,821.75 from its fee estimate of \$3,150, leaving a balance of \$1,328.25 to be paid by the appellant.
3. Upon receipt of a deposit of one half of the amount of \$1,328.25 from the appellant, I order the Police to provide the appellant with a final decision on access without recourse to any fees over and above those permitted in provision 2 of this Order.

Original signed by: _____
Diane Smith

December 22, 2006 _____