

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3680

Appeal PA13-217-4

Ministry of Community Safety and Correctional Services

December 22, 2016

Summary: This appeal relates to a request for approximately 252,000 pages of records addressed in related appeal PA13-217-3 and Order PO-3506. The ministry issued an interim access and fee estimate decision to the appellant, and denied his request for the fee to be waived. The ministry's fee waiver denial is upheld as the appellant has not established that the fees should be waived under section 57(4) of the *Freedom of Information and Protection of Privacy Act*. The fee estimate decision is partially upheld.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 57(1) and 57(4).

Orders and Investigation Reports Considered: MO-1169, MO-1380, P-4, PO-1834, PO-1943, PO-2574 and PO-3506.

OVERVIEW:

[1] This appeal arises from the interim access and fee estimate decision issued by the Ministry of Community Safety and Correctional Services (the ministry) in compliance with provision 3 of Order PO-3506 issued by the Office of the Information and Privacy Commissioner (IPC) on June 30, 2015. Order PO-3506 addressed related Appeal PA13-217-3, in which the appellant sought access to the following information:

All Authorizations to Carry restricted or prohibited firearms, issued in Ontario, including (a) application forms, (b) supporting documents, (c)

requests for more information, (d) responses to requests in (c), notes, memos, emails, faxes, voice and video recordings pertaining to the issuance or refusals to issue Authorizations to Carry restricted or prohibited firearms since [the date of the] coming into force of [the] *Firearms Act* and to the present.

[2] In Order PO-3506, Adjudicator Steven Faughnan ordered the disclosure of a severed sample of the records that the ministry identified as responsive to the appellant's request. Accordingly, this appeal and the ministry's interim access and fee estimate decision relate only to the remaining responsive records which have not been disclosed to the appellant.

[3] The ministry's interim access and fee estimate decision indicates that it will likely grant the appellant partial access to the 252,000 pages of records that remain at issue. It then provides a breakdown of its fee estimate, in which it identifies search time fees of \$26,820 based on 894 hours of search time at \$30 per hour and photocopying fees of \$50,400 based on 252,000 pages at \$0.20 a page. In addition, the ministry indicates that it will charge preparation time at \$30 per hour according to the time allowable under the *Act*. Based on the ministry's representations, the estimated preparation fee is \$252,000 for the 252,000 pages at issue. Rather than include the preparation fee amount in its fee estimate of \$77,220, the ministry indicates it is "to be determined."

[4] The ministry's interim access and fee estimate decision also advises that parts of the records will likely be exempt from disclosure under the *Act*. The ministry identifies the following potentially applicable discretionary and mandatory exemptions: sections 14(1)(a) (law enforcement matter), 14(1)(e) (endanger life or safety), 14(1)(i) (security), 14(1)(l) (facilitate commission of an unlawful act), 16 (prejudice defence of Canada), 20 (danger to safety or health), and 21(1) (personal privacy). In addition, the ministry's decision letter advises the appellant that its estimated fee would be reduced if the appellant reformulated his request to encompass fewer records.

[5] After receiving the ministry's interim access and fee estimate decision, the appellant requested that the fee be waived on the grounds of financial hardship and because dissemination of the information in the records will benefit public safety. The appellant also asked that the ministry provide him with a summary of the records that remain at issue, including the document types and page counts, in order for him to "establish the new scope."

[6] In response, the ministry issued a decision denying the appellant's fee waiver request. It also confirmed that the sample records it disclosed in compliance with Order PO-3506 gave the appellant an idea of the types of documents that are included in the remainder of the records. In its fee waiver denial letter, the ministry stated that in the interest of helping the appellant to reformulate his request, it was providing him with the following list of Authorization to Carry (ATC) categories with a breakdown of the percentage of ATC approvals and denials contained in each category. The ministry

explained that the information contained in the table below reflects a total sum average over the past four years:

ATC Categories	Percentage of Total ATC
Personal Protection	0.03%
Armoured guards	93%
Statistic guarding	4%
Wilderness, Prospector, Pilot, Forestry Tech, Bear baiter, other	1.49%
Trapper (includes Trapper with nuisance)	1.21%

[7] The ministry noted in its fee waiver denial letter that the percentages provided in the table above do not necessarily reflect the percentage of responsive records contained in each category.

[8] The appellant appealed the ministry's interim access and fee estimate decision and its fee waiver denial to the IPC. Although mediation was attempted, the appeal could not be resolved. As a result, it was transferred to the adjudication stage of the appeal process for a written inquiry under the *Act*.

[9] During my inquiry, I sought and received representations from the ministry and the appellant and shared these with the parties in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction Number 7*.

[10] In this order, I uphold the ministry's fee waiver denial and fee estimate, with the exception of certain costs that are not recoverable under the *Act*.

DISCUSSION:

A. Should the fee estimate be upheld?

The ministry's representations

[11] The ministry notes that the scale of the appellant's request is enormous, covering approximately 252,000 pages of records and spanning 14 years. It also stresses the requirement in section 57(1) of the *Act* for requesters to pay prescribed fees in accordance with the regulations under the *Act*. Considering the vast scope of the request, the ministry submits that its fee estimate is reasonable and reflects the fee schedule in the *Act*. The ministry asserts that the appellant provided no rationale for appealing its fee estimate and no explanation of which aspects of the fee estimate he finds objectionable.

[12] The ministry explains that it calculated the applicable fees based on the sample of records considered in Order PO-3506 and the advice of two experienced employees from the Chief Firearms Office (CFO). The ministry states that the records at issue are kept in different formats; the applications for an ATC are kept in paper format only, while the remaining records are kept in electronic format in a database that is linked to a larger federal database. The ministry continues that it would have to locate the requested records by the unique numeric identifier for each ATC record, and it would then have to print or photocopy the record depending on whether the record is stored electronically or in paper format.

[13] The ministry submits that it would take a minimum of two minutes to sever a page and prepare it for disclosure considering the multiple severances that each page would likely require. It adds that it would need additional time to prepare the records in order to: remove staples from paper records before making photocopies of those records; print records stored in electronic format as each ATC record would have to be accessed and printed separately; refile and restore paper records after these have been photocopied; and assemble the records, which are kept at the CFO in Orillia, and transport them to the ministry in North Bay in order for the ministry to sever the records and prepare them for disclosure. The ministry adds that it would incur considerable additional costs in preparing the records for disclosure since it would have to hire a second individual to work on collecting the records. It also argues that printing or photocopying an estimated 252,000 pages of records will shorten the lifespan of its printing and photocopying equipment at the CFO, resulting in this equipment having to be replaced sooner.

The appellant's representations

[14] In his representations the appellant maintains that the fee estimate is unreasonable and does not take into account available technology that would significantly lower the cost of preparing and disclosing the records. The appellant submits that the responsive records that are stored in electronic format could be disclosed to him electronically rather than being printed on paper. He states that the ministry's representations do not indicate whether the electronic records are stored as scanned images, plain-text documents, or as text fields in a relationship database, which is what the ministry's use of the term "database" suggests. The appellant explains that printing electronic records contained in a database can be performed using an automated report that can be exported in many electronic formats, and can usually be done by extracting the report without breaking individual records down into separate pages, so long as the beginning and end of each record can be visually identified. The appellant states that this is a simple reporting task performed by information technology professionals in all fields of information management on a daily basis.

[15] The appellant also provides representations on the issue of severing the records arguing that the ministry should need less time to sever the records because it should

not withhold as much information as it did in the sample of records at issue in Order PO-3506. The way in which the ministry applied exemptions to and withheld information from the sample of records at issue in Order PO-3506 has already been considered and decided by the adjudicator in that order. Accordingly, I will not consider these issues again in this order.

The ministry's reply representations

[16] I invited the ministry to reply to the appellant's suggestions that it could run automated reports for the electronic records in the database and export/extract such reports for search, preparation and disclosure purposes rather than print the electronic records on paper, and that it could provide all the records at issue to him in electronic format rather than paper copy, thereby significantly reducing the overall fee. I also invited the ministry to address the appellant's representations on the use of technology to reduce the fees and to provide details on how the electronic records are stored and how the ministry proposes to search them and prepare them for disclosure.

[17] The ministry's reply representations explain that the vast majority of the responsive records, which it estimates to be 99%, are ATC application-related records which are all stored in paper format. The ministry submits that converting these paper records to electronic records so that they can be provided to the appellant at a lower fee would be extraordinarily expensive given their number and the ministry's available staff resources. It adds that there is no requirement in the *Act* for it to allocate funds and incur costs in order to convert its records into electronic format.

[18] The ministry continues that only one percent of the records at issue are stored in a Royal Canadian Mounted Police (RCMP) database. For this reason, the ministry submits it cannot retrieve the records in a bulk manner electronically, except with the cooperation of the RCMP. The ministry submits that the RCMP would have to create special codes to allow for bulk electronic retrieval. It concludes by suggesting that the appellant direct his access request for bulk electronic records to the RCMP, which has custody and control of the records for this purpose.

Analysis and findings

[19] In accordance with section 57(3) of the *Act*, the ministry has provided the appellant with a fee estimate for his request. A fee estimate is meant to give requesters sufficient information to make an informed decision on whether or not to pay the fee and pursue access¹ and to assist them in deciding whether to narrow the scope of a request in order to reduce the fees. As required, the ministry has also included a breakdown of the fee, and a statement as to how it calculated the fee, however, the

¹ Orders P-81, MO-1367, MO-1479, MO-1614 and MO-1699.

breakdown and statement are not particularly detailed.² The ministry has also followed the accepted practices of basing its fee estimate on its review of a representative sample of the records and the advice of an individual who is familiar with the type and content of the records.³

[20] In deciding whether the fee is appropriate, I must determine whether it complies with the fee provisions in the *Act* and Regulation 460, as set out below. Section 57(1), which requires the ministry to charge fees for requests under the *Act* reads:

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

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

[21] More specific provisions regarding fees are found in section 6 of Regulation 460, which reads, in part:

6. The following are the fees that shall be charged for the purposes of subsection 57(1) of the *Act* for access to a record:

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.

[22] The only information the ministry has provided to support its estimate of 894

² I appreciate that the number of responsive records at issue and the 14-year span that the records cover add a layer of complexity to the calculation of the fee estimate. However, the ministry could have provided more detailed information on its calculation.

³ Order MO-1699.

hours of search time to locate the records is that the ATCs must be located by the identifier unique to each one. This information is insufficient to justify the hundreds of hours of search time the ministry estimates it requires to process the request. While manual search time is recoverable under section 57(1)(a) of the *Act*, it relates to time spent locating records. In this appeal, the ministry is aware of the locations of the records and identifies these in its representations. As it is aware of the locations of the records, the ministry does not have to search to locate them. I also note that in its fee estimate decision, the ministry describes its search time as hours spent to "locate and assemble document." Time spent assembling information is not recoverable under section 57(1)(a). For these reasons, I do not uphold any search time under section 57(1)(a) in this appeal.

[23] The ministry advises that 99% of the records are in paper format, meaning that of the approximately 252,000 pages of records, 249,480 pages are paper records. Considering this reality, I accept that a significant amount of time and effort is necessary to prepare the records. As part of its fee, the ministry properly includes time for severing the records.⁴ The IPC has accepted that it takes two minutes to sever a page that requires multiple severances.⁵ From my review of the sample records, there appear to be six to nine areas in each ATC that would require severing. Accordingly, I uphold up to two minutes per page of preparation time under section 57(1)(b) of the *Act*, which amounts to 8,400 hours at a fee of \$30 per hour, for a total of \$252,000.

[24] I do not uphold the ministry's additional preparation costs described in its representations, including its time for assembling the records, removing staples from the paper records, and refile and restoring the records. Although I accept the ministry's position that preparation time is not restricted to the time spent severing the records, I do not believe that the additional actions noted by the ministry fall within the ambit of the actions contemplated by the words "prepare a record for disclosure" under section 57(1)(b). Previous IPC orders have declined to allow preparation costs under section 57(1)(b) for removing staples from records, refile and restoring records, and packaging records for shipment, and I agree with and follow their approach.⁶

[25] Under section 57(1)(c), I uphold the ministry's decision to charge the appellant photocopying fees of \$0.20 per page for the 99% of the records that exist in paper format, and for the remaining one percent stored in the RCMP's database. I agree with the ministry's reply submissions that it is not required by the *Act* to convert its paper records into electronic format in order to reduce the fee in this appeal. As for the records that exist in electronic format, if the appellant chooses to pursue them directly from the RCMP, then the ministry should remove these records and their related fees upheld in this order from its calculation of the ultimate fee.

⁴ Order P-4.

⁵ Orders MO-1169 and PO-1834.

⁶ Orders PO-2574 and P-4.

[26] In respect of the ministry's claim of a fee for transporting the records from the CFO in Orillia to its office in North Bay, I do not uphold any time spent arranging for records to be transported⁷ under section 57(1)(b). However, I uphold the ministry's right to charge any transportation costs it incurs under section 57(1)(d), which allows for shipping costs.

[27] Finally, I do not accept the ministry's argument that it should be permitted to charge a fee for hiring an additional staff member to work on collecting the records and for the shortened lifespan of its photocopying equipment as a result of processing the request. While the ministry does not specify which section of the *Act* it relies on to support its argument, it could use section 57(1)(e) which permits the recovery of "other costs." The IPC has interpreted section 57(1)(e) as intending to cover general administrative costs resulting from a request which are similar in nature to those listed in paragraphs (a) through (d), but not specifically mentioned.⁸ Previous IPC orders have held that section 57(1)(e) does not include the time for responding to the requester⁹ and coordinating a search for records,¹⁰ and costs (even if invoiced) that would not have been incurred had the request been processed by the institution's staff.¹¹ Applying this reasoning to this appeal, I find that the work of an additional employee and of the ministry's photocopying equipment in processing the appellant's request, are necessary functions in the ministry's obligation to administer the *Act* and are therefore not recoverable under section 57(1)(e).¹²

[28] In summary, I uphold fees of up to \$252,000 for preparing the records for disclosure under section 57(1)(b), \$50,400 for photocopies under section 57(1)(c), and any transportation costs incurred for shipping the records under section 57(1)(d).

B. Should the fee be waived?

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

57. (4) A head shall waive the payment of all or any part of an amount required to be paid under subsection (1) if, in the head's opinion, it is fair and equitable to do so after considering,

(a) the extent to which the actual cost of processing, collecting and copying the record varies from the amount of the payment required by subsection (1);

⁷ Order P-4.

⁸ Order MO-1380.

⁹ Order MO-1380.

¹⁰ Order PO-1943.

¹¹ Order P-1536.

¹² Orders P-1536 and M-1083.

- (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.

[30] The fee provisions in the *Act* establish a user-pay principle which 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 57(1) and outlined in section 6 of Regulation 460 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 or the *Act* requires the institution to waive the fees.¹³ In reviewing the ministry's decision to deny the appellant's request for a fee waiver, I may uphold or modify the institution's decision.¹⁴

Part 1: Basis for fee waiver

Section 57(4)(b): Financial hardship

[31] The fact that the fee is large does not necessarily mean that payment of the fee will cause financial hardship.¹⁵ For section 57(4)(b) to apply, the appellant must provide some evidence regarding his financial situation, including information about income, expenses, assets and liabilities in order to establish that section 57(4)(b) of the *Act* applies.¹⁶

Section 57(4)(c): Public health or safety

[32] The following factors may be relevant in determining whether dissemination of a

¹³ Order PO-2726.

¹⁴ Orders M-914, P-474, P-1393 and PO-1953-F.

¹⁵ Order P-1402.

¹⁶ Orders M-914, P-591, P-700, P-1142, P-1365 and P-1393.

record will benefit public health or safety under section 57(4)(c):

- whether the subject matter of the record is a matter of public rather than private interest
- whether the subject matter of the record relates directly to a public health or safety issue
- whether the dissemination of the record would yield a public benefit by
 - (a) disclosing a public health or safety concern, or
 - (b) contributing meaningfully to the development of understanding of an important public health or safety issue
- the probability that the requester will disseminate the contents of the record¹⁷

[33] The focus of section 57(4)(c) is “public health or safety”. It is not sufficient that there be only a “public interest” in the records or that the public has a “right to know”. There must be some connection between the public interest and a public health and safety issue.¹⁸

Part 2: Fair and equitable

[34] For a fee waiver to be granted under section 57(4), it must be “fair and equitable” in the circumstances. 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

¹⁷ Orders P-2, P-474, PO-1953-F and PO-1962.

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

- whether the waiver of the fee would shift an unreasonable burden of the cost from the appellant to the institution.¹⁹

The parties' representations

[35] The appellant provides brief representations on this issue. In respect of the public interest in disclosure of the records, he asserts that the ATCs are issued "only under exceptional circumstances where someone's life is in danger and police protection is insufficient." He continues that because no one outside the CFO is able to analyze and review the records, the public has no way of knowing whether public lives are safe, how efficient policing is, what policing failures have occurred and why, which occupations are safe, and which residential communities are safe. He makes additional submissions on this topic that are premised on the idea that the ATC process applies to the most vulnerable members of the public whose lives are in danger and that this has an impact on career planning, and choice of residence and lifestyle for members of the public.

[36] The ministry submits that the appellant has not provided any information or evidence in support of a fee waiver. It asserts that for a fee to be waived on the basis of financial hardship, the appellant must provide some evidence regarding his financial situation, including information about income, expenses, assets and liabilities. The ministry argues that because the appellant has not provided any such information, there are no grounds upon which to grant a fee waiver in respect of financial hardship. The ministry similarly argues that the appellant has not provided evidence to support his position that there is a public interest in having the records disclosed and that disclosure could save lives. It submits that there is no evidence to suggest that any of the responsive records could relate to public health or safety in any way that supports a fee waiver. Due to the lack of evidence to support his argument, the ministry states that it does not accept the appellant's view that a fee waiver is justified under the *Act*.

[37] The ministry adds the following considerations which it argues further support its denial of a fee waiver: the fee is significant and waiving it would shift an unreasonable burden of the cost from the appellant to it; it has offered to work with the appellant to narrow the scope of the request with the intent of reducing the appellant's costs; and it has already provided the appellant with records free of charge, including the list of ATC categories with a breakdown of the percentage of ATCs in each category.

Analysis and finding

[38] I agree with the ministry that the appellant has not established a basis for waiving the fee in whole or in part, or that doing so is fair and equitable in the circumstances. On the issue of financial hardship, the appellant's representations

¹⁹ Orders M-166, M-408 and PO-1953-F.

address the use of technology to reduce fees and not his financial situation. I note that in his letter to the ministry requesting a fee waiver on August 19, 2015, the appellant submits that spending the estimated amount on an appeal would cause him financial ruin. To support his submission, he notes that this amount is well over the average Canadian's annual income and that it could only be raised by selling a home or taking out a mortgage. These general assertions without any evidence of the appellant's actual financial situation do not establish financial hardship in this appeal. Even if I were to accept that the fee would cause the appellant financial hardship, I am not convinced that it would be fair and equitable to waive the fees in this appeal. As appropriately noted by the ministry, the fee is significant because of the tremendous number of records to which the appellant seeks access, and it would be unfair to shift an unreasonable burden of the cost to the ministry, particularly when the appellant has not narrowed the scope of his request.

[39] On the issue of public health or safety, the appellant has not established that the subject matter of the records directly relates to a public health or safety issue. He bases his arguments on unsupported premises and provides no insight into why he believes disclosure of the records directly relates to the public benefits he asserts will flow from it. I see no such connection from my review of the records and find the appellant's arguments unreasonable and unpersuasive.

[40] As the appellant has not provided sufficient evidence in support of his request for a fee waiver that would justify deviating from the user-pay principle set out in the *Act*, I uphold the ministry's decision to deny his fee waiver request.

ORDER:

1. I uphold the ministry's denial of a fee waiver.
2. I partially uphold the ministry's fee estimate as follows:
 - under section 57(1)(b), two minutes per page of preparation time to sever the records
 - under section 57(1)(c), \$0.20 per page for photocopies; and
 - under section 57(1)(d), any shipping costs incurred in respect of the records.
3. I do not uphold any search time under section 57(1)(a), or any of the other costs that I have found are not recoverable under the *Act*.

Original Signed by: _____
Stella Ball
Adjudicator

December 22, 2016 _____

