

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER PO-4244

Appeal PA21-00454

Ministry of the Solicitor General

March 16, 2022

**Summary:** The Ministry of the Solicitor General (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* from a member of the media for records regarding a proposed, but then retracted and never enforced, amendment to a COVID-19-related provincial Emergency Stay-at-Home order. The proposed amendment granted police officers the power to stop and question individuals about their reasons for leaving their homes.

The ministry issued an interim access decision and fee estimate. The requester sought a fee waiver, which the ministry denied. The requester appealed the ministry's fee estimate and fee waiver decision to the IPC. In this order, the adjudicator reduces the fee estimate and orders the ministry to waive 50 percent of this reduced fee.

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

### OVERVIEW:

[1] The appellant, a member of the media, has appealed the \$720 fee estimate and the ministry's denial of his request that this fee be waived. The fee estimate was for the processing of his access request for records regarding an amendment to a provincial Emergency Stay-at-Home order,<sup>1</sup> which would provide more power to police officers to legally stop individuals on the street and in vehicles and question their reasons for leaving their homes. The decision to implement this amendment was reversed prior to its implementation.

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<sup>1</sup> O. Reg. 8/21 Enforcement of COVID-19 Measures.

[2] Specifically, the Ministry of the Solicitor General (the ministry) received the following request<sup>2</sup> from the appellant under the *Freedom of Information and Protection of Privacy Act* (*FIPPA* or the *Act*):

In mid-April [2021] the Ontario government announced that it would be enforcing COVID-19 measures [the Stay-at-Home order] by empowering police to stop people and compel them [to state] where they live. The power was immediately walked back by the Solicitor General within days. Under [the *Act*], please release:

- Briefing notes, background papers, PowerPoint decks and like materials sent or received by the deputy minister
- Correspondence between the deputy minister and his assistants with such groups as the OACP [Ontario Association of Chiefs of Police], OPP [Ontario Provincial Police], Toronto Police, Peel Police, Police Association of Ontario, and municipal police forces and police unions
- Exchanges between the [Ministry of the Solicitor General] and OPP Commissioner [named individual] on said powers
- Exchanges with the Office of the Premier about said powers.

The time frame for the request is 2021/03/20 to 2021/04/20.

[3] The ministry issued a fee estimate in response to this access request totaling \$720. The ministry broke down the fee estimate as representing 19 hours of search time and five hours of preparation time under sections 57(1)(a) and 57(1)(b) of the *Act*, respectively.

[4] The appellant submitted a detailed fee waiver request to the ministry, seeking a fee waiver on the basis that dissemination of the records would benefit public health or safety. The ministry denied the fee waiver request.

[5] The appellant filed an appeal to the Information and Privacy Commissioner of Ontario (the IPC) and a mediator was assigned to attempt resolution of this appeal.

[6] A mediated resolution could not be reached and the file was moved to the adjudication stage of the appeal process where an adjudicator may conduct an inquiry.

[7] I decided to conduct an inquiry and sent a Notice of Inquiry to the ministry. The ministry provided representations, which I shared with the appellant, along with a Notice of Inquiry. The appellant provided representations in response. I then provided the ministry with a copy of the appellant's representations and sought its reply

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<sup>2</sup> The request reproduced in this order represents the appellant's clarified request after his initial request and subsequent discussions with the ministry.

representations. The ministry declined to provide reply representations.

[8] In this order, I reduce the fee estimate by \$75 to \$645 and I find that a 50 percent waiver of the fee would be fair and equitable. Accordingly, I reduce the ministry's fee estimate to \$322.50.

## **ISSUES:**

- A. Should the IPC uphold the ministry's fee estimate of \$720?
- B. Should the ministry waive all or part of its fee?

## **DISCUSSION:**

### **Issue A: Should the IPC uphold the ministry's fee estimate of \$720?**

[9] Institutions are required to charge fees for requests for information under the *Act*. Section 57 governs fees charged by institutions to process requests.

[10] Under section 57(3), an institution must provide a fee estimate where the fee is more than \$25. The purpose of the fee estimate is to give the requester enough information to make an informed decision on whether or not to pay the fee and pursue access.<sup>3</sup> The fee estimate also helps requesters decide whether to narrow the scope of a request to reduce the fee.<sup>4</sup>

[11] The institution can require the requester to pay the fee before giving them access to the record.<sup>5</sup> If the estimate is \$100 or more, the institution may require the person to pay a deposit of 50 percent of the estimate before it takes steps to process the request.<sup>6</sup>

[12] Where the fee is \$100 or more (as is the case here), 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.<sup>7</sup>

[13] In all cases, the institution must include:

- a detailed breakdown of the fee, and

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<sup>3</sup> Orders P-81, MO-1367, MO-1479, MO-1614 and MO-1699.

<sup>4</sup> Order MO-1520-I.

<sup>5</sup> Regulation 460, section 9.

<sup>6</sup> Regulation 460, section 7(1).

<sup>7</sup> Order MO-1699.

- a detailed statement as to how the fee was calculated.<sup>8</sup>

[14] The IPC can review an institution's fee or fee estimate and can decide whether they comply with the *Act* and regulations.

[15] Section 57(1) sets out the items for which an institution is required to charge a fee:

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.

[16] In the circumstances of this appeal, the ministry is only charging the appellant search and preparation fees in its fee estimate under sections 57(1)(a) and (b). It did not charge for items under sections 57(1)(c) to (e).

[17] More specific fee provisions are found in section 6 of Regulation 460 (the regulation), which applies to access requests for general records:<sup>9</sup>

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.

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<sup>8</sup> Orders P-81 and MO-1614.

<sup>9</sup> As opposed to requests for access to one's own personal information, which are governed by section 6.1 of the regulation.

5. For developing a computer program or other method of producing a record from machine readable record, \$15 for each 15 minutes spent by any person.

6. The costs, including computer costs, that the institution incurs in locating, retrieving, processing and copying the record if those costs are specified in an invoice that the institution has received.

### ***Representations***

[18] The ministry states that the appellant submitted a broadly worded four-part request for records sent or received by specified ministry officials in respect of proposed COVID-related enforcement measures, which the Province of Ontario in the end decided not to proceed with.

[19] The ministry provided a fee estimate of \$720, based on:

- the amount of \$570 for 19 hours of search time (at \$30 per hour), reflecting the allowable charge for searching records under item 3 of section 6 of Regulation 460, and
- the amount of \$150 for five hours of preparation time (at \$30 an hour) reflecting the allowable charge for preparing records for disclosure under item 4 of section 6 of Regulation 460.

[20] The ministry submits it provided the appellant with a fair and reasonable fee estimate based on the fee schedule in *FIPPA*, which contains sufficient information for the appellant to make an informed decision on whether or not pay the fee and pursue access.

[21] The ministry states that it has not prepared the actual records to respond to the request and submits that due to the circumstances of the request, and the expected large volume of responsive records, it is demonstrably not practical to prepare the actual records up front.

[22] The ministry states that, instead, its Freedom of Information (FOI) office calculated the fee estimate by consulting with relevant staff in the Minister and Deputy Minister's office who are most familiar with the responsive records, along with their record keeping systems. The ministry submits that the fee estimate is, therefore, based on the direct knowledge and advice of knowledgeable staff.

[23] The ministry states that the appellant's broadly worded four-part access request is expected to yield numerous responsive records, which could include briefing notes, background papers, slide decks, correspondence, emails and other written communication exchanges between senior ministry officials such as the Deputy Minister and other officials, as well as stakeholder groups.

[24] The ministry further states that the records would be expected to be stored in

different places, including in relevant staff members' email systems and shared drives, and that multiple staff in multiple offices (the Deputy Minister, the Minister and the OPP Commissioner) would have to conduct searches of their own file holdings, as well as shared file holdings, in order to retrieve responsive records. It states that, given the nature of the request, it would expect some responsive records to contain duplicative information, which would then have to be severed. The ministry also explains that:

The time frame for the search is from March 20, 2021 to April 20, 2021. During this time, the Province declared a provincial emergency, and issued a Stay-at-Home order (among others), in response to the third wave of COVID-19. We would expect that staff would have to spend time considering whether in fact records were responsive to the appellant's request, or instead to other emergency actions, including the issuance of orders, that occurred during the responsive time frame.

We expect that most, if not all the records will be subject to being severed. We submit that the records will likely contain advice and recommendations, and therefore may be subject to being exempted under section 13. Other records may be subject to Cabinet privilege pursuant to section 12. Finally, other applicable exemptions may apply. We believe it will take 5 hours to prepare all the records that need to be severed, which is based on the IPC's accepted position that it usually takes two minutes to sever each page that is subject to multiple exemptions.

[25] The appellant provided extensive representations on the fee waiver issue, as summarized under Issue B below. Concerning the separate issue of the fee estimate of \$720, the appellant disputes that his request is a "broadly worded" request of "broad scope" that would generate a host of duplicative records that would be an onerous chore to sort through. He bases this claim on the fact that the request at issue in this appeal is a clarified and narrowed request from his original request, and is for a time frame that encapsulates only a one-month window.

### ***Analysis/Findings***

[26] The ministry based its fee estimate, not on the actual work done to respond to the request, but on the advice of individuals who are familiar with the type and contents of the requested records. This approach to establishing a fee estimate has been upheld in many IPC orders<sup>10</sup> and is most useful as the basis of a fee estimate when it is accompanied by review of a "representative sample" of the records from which the quantity and nature of responsive records can be extrapolated.

### ***Search time***

[27] The ministry has estimated a search fee of \$570 representing 19 hours of search time at the allowed rate under *FIPPA* and Regulation 460 of \$30 per hour of search

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<sup>10</sup> See Order MO-1699.

time.<sup>11</sup>

[28] I agree with the ministry that the appellant's request is a broadly worded request that, even though it only encompasses a one-month period, seeks a wide range of records about enforcing COVID-19 measures by empowering police to stop people and compel them to state where they live and their reasons for leaving their home. The numerous records sought were:

- Briefing notes, background papers, PowerPoint decks and like materials sent or received by the deputy minister,
- Correspondence between the deputy minister and his assistants with such groups as the OACP, OPP, Toronto Police, Peel Police, Police Association of Ontario, and municipal police forces and police unions,
- Exchanges between the [Ministry of the Solicitor General] and OPP Commissioner [named individual] on said powers, and
- Exchanges with the Office of the Premier about said powers.

[29] I accept as reasonable the ministry's explanation that these records are stored in different places, including email systems and in shared drives of multiple staff in multiple offices, including that of the Deputy Minister, the Minister, and the OPP Commissioner's office.

[30] I find that the ministry's estimated search time of 19 hours is reasonable in the circumstances of this appeal, taking into account the many different types of records sought and the numerous locations where these records may be located. Therefore, I am upholding the ministry's search fee estimate of 19 hours of search time.

### *Preparation Time*

[31] Under section 57(1)(b) and the regulation, time spent preparing a record for disclosure can be charged for general requests, such as the one at issue here.<sup>12</sup>

[32] An institution, such as the ministry, can charge for time spent:

- severing (redacting) a record, including records in audio or visual format,<sup>13</sup> and
- running reports from a computer system.<sup>14</sup>

[33] The IPC has generally accepted that it takes two minutes to sever a page that

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<sup>11</sup> I.e., \$7.50 for each 15 minutes.

<sup>12</sup> This is in contrast to requests for the requester's own personal information: see Regulation 460, sections 6 and 6.1.

<sup>13</sup> Order P-4.

<sup>14</sup> Order M-1083.

requires multiple severances.<sup>15</sup>

[34] An institution cannot charge for time spent on:

- deciding whether or not to claim an exemption,<sup>16</sup>
- identifying records requiring severing,<sup>17</sup>
- identifying and preparing records requiring third party notice,<sup>18</sup>
- removing paper clips, tape and staples and packaging records for shipment,<sup>19</sup>
- transporting records to the mailroom or arranging for courier service,<sup>20</sup>
- assembling information and proofing data,<sup>21</sup>
- photocopying,<sup>22</sup>
- preparing an index of records or a decision letter,<sup>23</sup> or
- re-filing and restoring records to their original state after they have been reviewed and copied.<sup>24</sup>

[35] The ministry has estimated a preparation time of five hours for a preparation fee of \$150, which it states is based on the IPC's accepting in past orders that it usually takes two minutes to sever each page that is subject to multiple exemptions.

[36] The ministry has stated that it expects that most, if not all the records will be subject to severing information under various exemptions; however, it has not provided an estimate of the number of overall pages of responsive records with multiple severances it anticipates severing.

[37] According to the ministry, this preparation time also includes time for severing duplicative information. The ministry has not indicated how much of the estimated five hours of preparation time is for severing duplicative information and how much time is estimated for severing records on the basis of the application of any exemptions or exclusions under *FIPPA*.

[38] The appellant has not removed duplicate information from the scope of his

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<sup>15</sup> Orders MO-1169, PO-1721, PO-1834 and PO-1990.

<sup>16</sup> Orders P-4, M-376 and P-1536.

<sup>17</sup> Order MO-1380.

<sup>18</sup> Order MO-1380.

<sup>19</sup> Order PO-2574.

<sup>20</sup> Order P-4.

<sup>21</sup> Order M-1083.

<sup>22</sup> Orders P-184 and P-890.

<sup>23</sup> Orders P-741 and P-1536.

<sup>24</sup> Order PO-2574.



request. Therefore, I find that severing duplicate information is not allowable as part of the ministry's preparation fee under section 57(1)(b).

[39] Accordingly, I find that the ministry has not provided sufficient evidence for me to uphold its preparation fee of \$150, as the ministry has not provided:

- an estimate of the total number of pages to be disclosed,
- an estimate of what proportion of these pages will require multiple severances, or
- an estimate of the proportion of the records that it estimates are non-responsive or duplicative (for which it cannot claim severing fees).

[40] Therefore, I find that I do not have sufficient evidence to uphold the entirety of the ministry's preparation fee estimate of \$150. In the circumstances, I will allow a preparation fee estimate of \$75 as reasonable in the circumstances. This reduction reflects the fact that the ministry has not provided sufficient information to substantiate the number of pages that will require severance, and the fact that I have found that the ministry cannot charge a preparation fee for severing duplicate information.

### *Conclusion*

[41] I am upholding the ministry's search fee estimate of \$570 representing 19 hours of search time and a preparation fee of \$75 representing 2.5 hours of preparation time for a total fee estimate of \$645.

[42] I will now determine whether the ministry's fee should be waived, in whole or in part.

### **Issue B: Should the ministry waive all or part of its fee?**

[43] As I stated above, the ministry denied the appellant's request for a fee waiver.

[44] The fee provisions in the *Act* establish a "user-pay" principle. The fees referred to in section 57(1) and outlined in sections 6 and 6.1 of Regulation 460 are mandatory unless the requester can show that they should be waived.<sup>25</sup>

[45] The *Act* requires an institution to waive fees, in whole or in part, if it is fair and equitable to do so. Section 57(4) of the *Act* and section 8 of Regulation 460 set out matters the institution must 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,

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<sup>25</sup> Order PO-2726.

(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.

[46] 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.<sup>26</sup>

### ***Representations***

[47] In the appellant's fee waiver request to the ministry, the appellant relied, in particular, on the health or safety factor in section 57(4)(c).

[48] In its representations, the ministry states that there is no reason it can determine as to why dissemination of the record would benefit public health or safety, within the meaning of section 57(4)(c). It notes that the request is for records relating to an enforcement initiative that never happened, and that had no impact on public health or safety.

[49] In response, the appellant states that although the request is for records relating to a contemplated enforcement initiative, "the government held consultations, put pen to paper on emergency orders, and took a swing and a miss on an attempt to give itself a sweeping police power, which was to be marshalled specifically in the name of preserving public health, retreating on this only amid an outcry." He states:

Prior to that point, various top officials spoke of this as an "immediate and decisive action" by a government "doing whatever it takes" to "reduce

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<sup>26</sup> Section 57(5), Orders M-914, MO-1243, P-474, P-1393 and PO-1953-F.

mobility” of some 15 million Ontarians so as to “help interrupt transmission of this virus.”

[50] The appellant states that within a week the Premier completely walked back the police powers in the proposed amendment to the Stay-at-Home order.<sup>27</sup>

[51] The appellant submits that the public health benefit of the proposed government initiative was explicitly promised to the entire province by the Premier, his solicitor general and their independent chief medical officer of health, working in lockstep with each other.<sup>28</sup>

[52] The appellant states the records are of enormous potential benefit to the public as the public has a keen interest in knowing what the government is doing, or contemplating doing, to enhance police powers to enforce stay-at-home pandemic orders affecting millions of Ontarians.

[53] The appellant submits that the records could contribute to meaningful public understanding about a health or safety issue. He states:

Records relating to police powers to enforce Stay-at-Home pandemic orders affecting millions of Ontarians would seem to be precisely why a clause like [section] 57(4)(c) was legislated into law.

Because the trajectory of my query is veering right at this legislated bullseye, I submit that the potential benefit surrounding the fee waiver must also be construed accordingly broadly. We are talking about power that was being invoked in the name of better protecting 15 million Ontarians from [a] pandemic. We are talking about a power that any future government might put back on the table during future crises.

So the public discourse might well benefit from an improved understanding of the cost-benefit analyses of the police powers that surely should have taken place within government.

[54] The appellant contends that several past IPC orders<sup>29</sup> favour the application of section 57(4)(c). He states:

The matters at hand are by nature life and death. By some of the latest counts, Ontario has seen more than one million COVID-19 cases and 10,000 deaths. The crisis is forcing all governments to gravitate towards

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<sup>27</sup> The appellant refers to the Premier’s televised statement reported at: <https://www.cp24.com/news/we-got-it-wrong-ford-says-about-covid-19-police-powers-to-arbitrarily-stop-people-1.5397651?cache=zlgprbffuv%3FclipId%3D89578>

<sup>28</sup> The appellant refers to the news release “Ontario Strengthens Enforcement of Stay-at-Home Order” found at <https://news.ontario.ca/en/release/61192/ontario-strengthens-enforcement-of-stay-at-home-order>

<sup>29</sup> The appellant refers specifically to Orders 2, MO-3834, and PO-1953-F.

sweeping emergency powers and decrees. Consider how Quebec has recently announced controversial plans to tax the unvaccinated.<sup>30</sup> The Canadian Civil Liberties Association is also fighting the government of Newfoundland over a bill that would give the police the right to conduct warrantless searches.

Suffice it to say that the scales of individual freedoms and collective responsibilities have entered an era of difficult balancing. Governments are rapid-fire whipsawing from one measure to the next.

Public health, we know now, has no greater ally during a pandemic than an informed public. We must all debate what policy measures work for Canadians and which ones do not, and which ones will not. We must base those discussions on facts, including the documentary records of governments who have been seen to overreach.

[55] As noted above, the ministry did not provide reply representations, although I provided it with a copy of the appellant's representations for this purpose.

### ***Analysis/Findings***

[56] As set out above, I have reduced the ministry's fee estimate of \$720 to \$645. I must now decide whether the fee should be waived, in whole or in part.

[57] A fee must be waived, in whole or in part, if it would be "fair and equitable" to do so in the circumstances.<sup>31</sup> The factors an institution must consider are set out in section 57(4) of the *Act* and, as set out above, are:

- actual cost in comparison to the fee - section 57(4)(a);
- financial hardship - section 57(4)(b);
- public health or safety - section 57(4)(c); and,
- the requester given access to the record or the fee is \$5 or less - section 57(4)(d) and section 8 of Regulation 460

[58] Of the factors listed in section 57(4), only the factor in section 57(4)(c) is relevant in this appeal. The parties did not provide representations that would engage the application of sections 57(4)(a), (b) or (d) of the *Act* and in my view, they are mostly not applicable here, except that I accept that the ministry's costs may be somewhat higher than its fee estimate [noting that it did not charge for items under sections 57(1)(c) to (e)].

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<sup>30</sup> Quebec's plan to levy a tax on residents who did not receive the COVID-19 vaccine was cancelled after it was announced and before it was implemented.

<sup>31</sup> See *Mann v. Ontario (Ministry of Environment)*, 2017 ONSC 1056.

[59] The appellant relies on the factor in section 57(4)(c), which is one factor that must be considered in deciding whether it would be fair and equitable to waive the fee. Under section 57(4)(c), the question is whether dissemination of the records will benefit public health or safety.<sup>32</sup>

[60] The focus of section 57(4)(c) is “public health or safety.” 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.<sup>33</sup>

[61] 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.<sup>34</sup>

[62] With respect to the first factor, I note that the records are about the Ontario government’s announcement that it was going to issue an amendment to the Emergency Stay-at-Home order in response to the third wave of COVID-19. This order would provide more power to police officers to legally stop individuals on the street and in vehicles and question their reasons for leaving their homes. I find that the subject matter of the records, a proposed amendment to a province-wide Emergency Stay-at-Home order containing sweeping police powers to stop and question individuals, is a matter of public rather than private interest.

[63] As well, I find that the subject matter of the records relates directly to a public health or safety issue, being the potential use by the Ontario government of emergency police powers to mandate Ontarians to confine themselves to their homes during a health crisis. The enforcement of such orders could have directly affected Ontarians, by

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<sup>32</sup> The appellant does not rely on the other factors in section 57(4), and I find that these other factors, found in sections 57(4)(a), (b) and (d) do not apply in this appeal. The actual cost of processing the request has not been determined, as the fee is only an estimate in this appeal. The appellant specifically does not rely on financial hardship. Also the appellant has not been given access to the record and the fee estimated is more than \$5.

<sup>33</sup> Orders MO-1336, MO-2071, PO-2592 and PO-2726.

<sup>34</sup> Orders P-2, P-474, PO-1953-F and PO-1962.

curtailing their mobility and other rights by use of, as the appellant states, "...a sweeping police power, which was to be marshalled specifically in the name of preserving public health."

[64] I also find, for the following reasons, that distribution of the records would yield a public benefit by contributing meaningfully to the development of understanding of an important public health or safety issue. The subject matter of the records provides for sweeping police powers to enforce stay-at-home pandemic orders affecting millions of Ontarians. The Ontario government described this order as providing that:

...police officers and other provincial offences officers [would] have the authority to require any individual to provide their home address and purpose for not being at their residence. In addition, police officers, special constables and First Nation Constables [would] have the authority to stop vehicles to inquire about an individual's reasons for leaving their home. This additional enforcement tool [would] only be in effect during the Stay-at-Home order and exclusively to enforce the Stay-at-Home order.<sup>35</sup>

[65] Within a week of announcing the decision to implement the proposed amendment to the Stay-at-Home order, the Premier of Ontario reversed this decision prior to its implementation, stating:

We moved too fast. And I know that some of those measures especially around enforcement we went too far. Simply put, we got it wrong. We made a mistake. These decisions left a lot of people very concerned. In fact they left a lot of people angry and upset. I know we got it wrong. I know we made a mistake. And for that I'm sorry and I sincerely apologize.<sup>36</sup>

[66] It was shortly after these events that the appellant filed the access request before me. He seeks records relating to the government's proposal to grant police officers and other provincial offences officers enhanced authority to support the enforcement of Ontario's Stay-at-Home order. The appellant's request sought a month's worth of materials held by the ministry about why this measure was enacted by amendment to an emergency order (O.Reg 8/21 Enforcement of COVID-19 Measures) and then retracted and not enforced.<sup>37</sup>

[67] I find that distribution of the records, if disclosed, would yield a public benefit by

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<sup>35</sup> See <https://news.ontario.ca/en/release/61192/ontario-strengthens-enforcement-of-stay-at-home-order> link cited and referred to in the appellant's representations.

<sup>36</sup> The appellant refers in his representations to the Premier's televised statement reported at: <https://www.cp24.com/news/we-got-it-wrong-ford-says-about-covid-19-police-powers-to-arbitrarily-stop-people-1.5397651?cache=zlgprbffuv%3FclipId%3D89578>

<sup>37</sup> <https://news.ontario.ca/en/release/61192/ontario-strengthens-enforcement-of-stay-at-home-order> and <https://www.cp24.com/news/we-got-it-wrong-ford-says-about-covid-19-police-powers-to-arbitrarily-stop-people-1.5397651?cache=zlgprbffuv%3FclipId%3D89578>

contributing 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. I agree with the appellant and find that the responsive records would also contribute meaningfully to a discussion of the power of the Ontario government to put this measure back on the table during future crises.

[68] Finally, I find that the appellant, as a reporter with a national newspaper, will share the contents of the records with others.

[69] I find, therefore, that the factor at section 57(4)(c) applies here and supports a waiver of the ministry's fee.

[70] I must also 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.<sup>38</sup>

[71] Considering these relevant factors, I find that the following factors weigh against the granting of a fee waiver:

- As suggested by the ministry's representations, the request may involve locating a large number of records, and
- The ministry will expend significant resources in undertaking an estimated 19 hours to search for responsive records.

[72] I find that the following factor weighs neither in favour nor against the granting of a fee waiver, as follows:

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<sup>38</sup> Orders M-166, M-408 and PO-1953-F.

- The appellant's request is a clarified request; therefore, the ministry and the appellant worked constructively with each other to narrow the scope of the request and/or clarify the request.

[73] In sum, I find that section 57(4)(c) weighs in favour of a fee waiver. Section 57(4)(a) weighs against a fee waiver, given that the fee estimate at issue, \$645, is not a large fee considering the scope of the request and the potentially large number of records, and given that the ministry did not include in its fee any charges for items under sections under sections 57(1)(c) to (e).

[74] Weighing the factors for and against a fee waiver, I find that it would be fair and equitable to grant a partial fee waiver of the fee estimate in the circumstances of this appeal. In my view, section 57(4)(c) weighs strongly in favour of a waiver, but considering the user-pay principle in the *Act*, I find that waiving the entire allowable fee estimate of \$645 would shift an unacceptably high burden onto the ministry, and by extension, Ontario taxpayers, in order to process the appellant's request. As a result, I am allowing a partial fee waiver. I am reducing the \$645 fee estimate by 50 percent to \$322.50 because I am satisfied that this amount would be fair and equitable in the circumstances of this appeal.

[75] To the extent that the ministry's final fee may differ slightly from its estimate,<sup>39</sup> I also order it to waive 50% of its final fee.

**ORDER:**

1. I order a reduction in the ministry's fee estimate from \$720 to \$645.
2. I order the ministry to grant a waiver of 50% of the \$645 fee estimate and of its final fee.

Original Signed by: \_\_\_\_\_

Diane Smith  
Adjudicator

March 16, 2022 \_\_\_\_\_

<sup>39</sup> See Orders MO-1699, MO-3568, and PO-3936, which found that adjustments to the estimated fees in the final fee should be limited in nature.