ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2021-14

April 23, 2021

CALGARY POLICE SERVICE

Case File Number 006971

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Summary: The Applicant made an access request to the Calgary Police Service (the Public Body) for records related to disposition letters issued by the Public Body from complaints where the Chief determined the allegations in the complaint were not serious in nature. The Applicant also requested a fee waiver, on the grounds that the records relate to a matter of public interest (section 93(4)(b)). The Applicant argued that it intended to use the information "to inform the public and make representations to the government for amendments to the *Police Act* and the *Police Service Regulation*."

The Public Body located responsive records but did not grant a fee waiver. The Applicant paid the fee assessed by the Public Body and received the responsive records (with exceptions applied to some information).

The Applicant requested a review of the Public Body's decision regarding the fee waiver, and subsequently an inquiry.

The Adjudicator found that the responsive record would contribute to the public understanding of a matter of concern to the public, and would contribute to open, transparent and accountable government. However, the records had not been shared or made known to the broader public such that the public would benefit from the Applicant's access request. The Adjudicator concluded that in the circumstances it was appropriate to waive 50% of the fees for the request, and ordered the Public Body to refund the Applicant that amount.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 72, 93, *Police Act*, R.S.A. 2000, c.P-17, ss. 45

Authorities Cited: AB: Orders 96-002, F2006-032, F2007-023, F2011-015, F2016-39, F2020-18

Cases Cited: *Alberta Energy Regulator v. Information and Privacy Commissioner and Jennie Russell,* Alberta Court of Queen's Bench oral decision, February 21, 2018 (Court File Number 1601 15874)

I. BACKGROUND

[para 1] The Criminal Trial Lawyers' Association (the Applicant or CTLA) made an access request dated April 25, 2016 to the Calgary Police Service (the Public Body) for

> [...] copies of all disposition letters issued by the Calgary Police Service on *Police Act* complaints from January 1, 2012 until the present where the Chief has determined that the allegations in the complaint are not serious in nature and where there has been a penalty issued under section 19(1) of the *PSR* and also where there has been a determination that the allegations are not serious in nature and then the Chief has gone on to determine that there is insufficient evidence to provide officer misconduct or similar language used to determine that there was no reasonable prospect proving misconduct and then the Chief dismissed the complaint.

[para 2] In its request, the Applicant states: "The CTLA Policing Committee intends to use this material to inform the public and to make representations to the government for amendments to the *Police Act* and the [Police Service Regulation]".

[para 3] On June 23, 2016, the Public Body informed the Applicant that the fee estimate for processing the access request would be approximately $2,376.00. The Public Body estimated that there would be approximately 1600 pages of records and that searching for them would likely cost $945.00. It estimated that the cost of preparing and handling would be approximately $1,431.00.

[para 4] The Applicant requested a fee waiver on the basis of public interest and also paid a deposit of $1,188.00 for the fees.

[para 5] The Public Body denied the request for a fee waiver. It refunded the Applicant $229.90 for the fees paid, as it calculated the actual cost to process the records as $958.10: $310.50 for 11.5 hours to search, locate and retrieve records; $642.60 to prepare and handle 714 pages of records; $5.00 for the disk.

[para 6] The Applicant requested a review of the Public Body's decision to deny the fee waiver request; on March 15, 2018, the Applicant requested an inquiry.

II. RECORDS AT ISSUE

[para 7] As the issue relates to a fee waiver, there are no records at issue. However, as part of its submissions, the Applicant attached a copy of the responsive records.

III. ISSUES

[para 8] The issues in this inquiry, as set out in the Notice of Inquiry, dated November 20, 2020, are:

1. Should the Applicant be excused from paying all or part of a fee, as provided by section 93(4) of the Act (fees)?

2. Did the Public Body properly estimate the amount of fees in accordance with sections 93(1) and 93(6) of the Act, and the Regulation?

   This issue is added to enable the Commissioner to confirm fees under section 72(3)(c) of the Act should she decide that fees should not be waived.

IV. DISCUSSION OF ISSUES

1. Should the Applicant be excused from paying all or part of a fee, as provided by section 93(4) of the Act?

[para 9] Section 93 of the Act states in part:

> *93(1) The head of a public body may require an applicant to pay to the public body fees for services as provided for in the regulations.*
>
> *…*
>
> *(3.1) An applicant may, in writing, request that the head of a public body excuse the applicant from paying all or part of a fee for services under subsection (1).*
>
> *(4) The head of a public body may excuse the applicant from paying all or part of a fee if, in the opinion of the head,*
>
> > *(a) the applicant cannot afford the payment or for any other reason it is fair to excuse payment, or*
> >
> > *(b) the record relates to a matter of public interest, including the environment or public health or safety.*
>
> *…*

[para 10] The Commissioner's jurisdiction to review decisions regarding fee waivers was described in Order F2007-023 (at paras. 23-25):

> When deciding whether a public body has properly refused to grant a fee waiver, the decision-maker must look at all of the circumstances, information and evidence that exists at the time when the Public Body denied the fee waiver and also at the time of the

inquiry (Order 2001-042 (para 19)). A decision-maker may consider all information and evidence at the inquiry, even if that information and evidence was not available to the public body at the time it made its fee waiver decision.

Section 72 of FOIP does not merely authorize the decision-maker to confirm a public body's decision or to require a public body to reconsider its own decision. Section 72(3)(c) of FOIP gives decision-makers the authority to render their own decision about whether to waive all or part of the fee or to order a refund. Under section 72(3)(c), the decision-maker has the authority to hear the case "de novo" as a new proceeding and to make a "fresh decision" (Order F2007-020 (para 30), OIPC External Adjudication Order #2 (May 24, 2002) Justice McMahon (para 45), Order 2001-023 (para 32)).

I must review a public body's decision on a case-by-case basis, and consider all of the information before me. Therefore, if I reach a different conclusion than a public body and find that a fee should be reduced or completely waived, I may make a "fresh decision" and substitute my own decision for the public body's decision. However, if I reach the conclusion that a public body properly applied section 93(4) when denying a fee waiver, I may confirm that decision.

[para 11] In Order F2006-032 the Adjudicator set out a non-exhaustive list of criteria for determining whether to grant a fee waiver in the public interest (these criteria are a revised version of thirteen criteria set out in Order 96-002):

1. Will the records contribute to the public understanding of, or to debate on or resolution of, a matter or issue that is of concern to the public or a sector of the public, or that would be, if the public knew about it? The following may be relevant:
   - Have others besides the applicant sought or expressed an interest in the records?
   - Are there other indicators that the public has or would have an interest in the records?
2. Is the applicant motivated by commercial or other private interests or purposes, or by a concern on behalf of the public, or a sector of the public? The following may be relevant:
   - Do the records relate to a conflict between the applicant and government?
   - What is the likelihood the applicant will disseminate the contents of the records?
3. If the records are about the process or functioning of government, will they contribute to open, transparent and accountable government? The following may be relevant:
   - Do the records contain information that will show how the Government of Alberta or a public body reached or will reach a decision?
   - Are the records desirable for the purpose of subjecting the activities of the Government of Alberta or a public body to scrutiny?
   - Will the records shed light on an activity of the Government of Alberta or a public body that have been called into question? (At para. 43)

[para 12] In Order F2009-034 the adjudicator summarized the "public interest" issue as follows (at para. 73):

As noted by the Public Body, the requested records should be of significant importance in order for the cost of processing the access request to be passed on to taxpayers (Order 2000-011 at para. 52). Fee waivers on the basis of public interest are to be granted only when there is something about the

records that clearly makes it important to bring them to the public's attention or into the public realm (Order F2006-032 at para. 39). It is not sufficient for there to be some marginal benefit or interest in the record; there should be a compelling case for a finding of public interest (Order F2007-024 at para. 47).

Will the records contribute to the public understanding of, or to debate on or resolution of, a matter or issue that is of concern to the public or a sector of the public, or that would be, if the public knew about it?

[para 13] The factors listed in Order F2006-032 as relevant are:

- Have others besides the applicant sought or expressed an interest in the records?
- Are there other indicators that the public has or would have an interest in the records?

[para 14] In its response to the Applicant's fee waiver request, the Public Body states (letter dated August 10, 2017):

> Aside from your request, the public body is not aware of any public debate or discussion on the issue or of a lack of public understanding of the issue. To the contrary, the CPS understands that recent jurisprudence from our Court of Appeal has confirmed that the Chief of Police's jurisdiction to classify matters as not of a serious nature is well settled and had been the subject of thorough debate in the legislature back in 2010. The same authority also sets out the means by which anyone who is affected by a decision of the Chief of Police and disputes his authority or basis to make that decision. The following excerpts from *Sizer v. Calgary (Police Service)*, 2017 ABCA 257 are relevant to the consideration of whether your request will contribute to an existing public interest:
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> > [16] ... I agree with Wakeling JA's observations in *Boychuk v. Edmonton (Police Service)*, 2014 ABCA 163 at para 24, 575 AR 103:
> >
> > > There is no right of appeal if the chief of police disposes of a complaint by concluding that the "alleged contravention of the regulations ... is not of a serious nature" (Police Act, s. 45(4.l)). The chief of police may, in effect, summarily dismiss a complaint he concludes is "not of a serious nature" (Police Act, s. 45(4)). The legislature obviously has sufficient confidence in the chief of police to grant him the authority to make nonreviewable decisions.
> >
> > …
> >
> > [18] The legislative record also weighs heavily against the applicants. Limiting the LERB's ability to review the Chief's decisions under s 45(4) was one of the apparent goals of the 2010 amendments to the Police Act. As the Solicitor General explained, amending the Act to make the Chief's disposition "final" would "prevent the use of extensive resources at an administrative tribunal [I.e. the LERB] for minor complaints": Alberta Legislative Assembly, Hansard, 27th Legislature, 3rd session, Issue 39 (4 Nov 2010) at p 1134. The Legislature specifically debated the wisdom of preventing the LERB from reviewing the Chief's disposition under s 45(4): Alberta Legislative

> Assembly, *Hansard*, 27th Legislature, 3rd session, Issue 49e (29 Nov 2010) at pp 1672-1673.
>
> …
>
> [20] The appropriate means to challenge the Chief's decision to dispose of a complaint under s. 45(4) is an application for judicial review. The applicants acknowledge that judicial review is available (indeed, some have launched concurrent applications for judicial review alongside their applications for leave to appeal), but argue that this avenue of redress is cumbersome, expensive, lengthy, and complicated for many potential applicants.
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> [21] That may well be true. Indeed, the Legislature often provides for appeals to an administrative tribunal as an expedient and accessible alternative to judicial review. However, as expressed by Wakeling JA in *Boychuk*, in this particular situation the legislative scheme is so clear there is no reasonable prospect that the applicants will succeed on appeal.

> The CPS is not aware of any public debate or discourse on the issue since the 2010 debates in the legislature. To the extent it was a matter of public interest at that time, the debate is now well settled. It may well be that there are individuals who dispute the findings of the Chief on any given matter, but such private disputes, even when they involve a public body, do not equate to a larger public interest. As pointed out by the Court of Appeal, there is an avenue for any individual affected by a decision of the Chief of Police to declare a matter not of a serious nature and that avenue is a judicial review. The public interest in scrutinizing decisions of the Chief of Police where such a decision is disputed may be satisfied through that open and transparent process.

[para 15] The Applicant argues that the Criminal Defence Lawyers' Association (the Applicant's Calgary counterpart) and the Law Enforcement Review Board (LERB) and the Director of Law Enforcement are interested in the issue.

[para 16] In Order F2016-39, the adjudicator concluded (at para. 45):

> In concluding that the records at issue would inform a matter that is or would be of interest or concern to the public, I do not need to decide that the Public Body's practice on which the records would shed light is necessarily one that all members of the public would regard as problematic in some way or as worthy of debate. It is enough that in a situation such as the present, which involves the practices of a public body, that there be a reasonable likelihood that some significant sector of the public would wish to know about the matter or debate the merits of the practices. I believe on the basis of the facts outlined, that there is such a likelihood in the present case.

[para 17] I take the Public Body's point that there are mechanisms by which a complainant may request a review of a police chief's decision to apply section 45(4) of the *Police Act* to dismiss a complaint; that mechanism being judicial review. I also understand the Public Body's point that the authority of a police chief to use section 45(4) has been settled.

[para 18] That said, the Applicant has not argued that the Public Body's interpretation of section 45(4) is problematic; nor has it pointed to any specific case as being problematic. The Applicant's argument seems to be focused on the *pattern* of decisions relying on section 45(4) of

the Police Act. The responsive records, being a collection of such decisions, could indicate a particular pattern.

[para 19] The records relate to the Public Body's response to complaints about its members' conduct. The Applicant is alleging that the Chief is categorizing the relevant conduct in a particular way, in order to dismiss the complaints in a manner that precludes an appeal to the LERB. It argues that the pattern may suggest impropriety.

[para 20] Whether or not the records show any impropriety, it seems to me that the general issue – the Chief's response to citizen complaints about police conduct – is an issue in the public eye today. I do not require any particular evidence from either party to know that police conduct, specifically when dealing with vulnerable and marginalized groups, is a live issue. It follows that whether the Chief is taking such complaints seriously and/or dealing with them in an appropriate manner, would also be of interest to the public.

[para 21] Possibly, this issue was not front and centre in 2017, when the Public Body communicated its decision regarding the fee waiver to the Applicant. However, as I am deciding this matter *de novo* and making a 'fresh decision' as discussed in Order F2007-023 (reproduced above), it makes sense for me to consider the current circumstances, rather than the circumstances four years ago.

[para 22] In my view, the above factors are sufficient to show that the public would have an interest in this topic.

Is the applicant motivated by commercial or other private interests or purposes, or by a concern on behalf of the public, or a sector of the public?

[para 23] The factors listed in Order F2006-032 as relevant are:

- Do the records relate to a conflict between the applicant and government?
- What is the likelihood the applicant will disseminate the contents of the records?

[para 24] Regarding the first bullet point, the Public Body argues that the Applicant is a "special interest group that represents criminal defense lawyers (rebuttal submission, at para. 2). It states (at para. 5):

> The Public Body is aware of the Applicant's long history of raising issues with respect to police oversight. They do so to advance their own interests and those of their members. The Applicant has not provided any information that is indicative of a public interest beyond its own desire to investigate these matters. Of course, there is nothing wrong with the Applicant wanting to examine elements of the Public Body's operations; however, there is a cost associated with that and it is only fair that the cost is borne by the interested party rather than by taxpayers at large.

[para 25] The Applicant responds (rebuttal submission, at para. 11):

> The Calgary Police Service knows full well that the CTLA is not representing the individual or group interests of criminal defence lawyers; the CTLA is representing the public interest and the interests of their clients who have complaints about police misconduct and the police oversight process. This is a notorious fact.

[para 26] I have found that there is a public interest in the general topic of police conduct and by extension, the Public Body's response to complaints about that conduct. That the Applicant is a group that represents criminal defense lawyers does not indicate that this matter relates to a conflict between the Public Body and the Applicant. The Applicant's request is broader than any particular matter. This factor is not applicable here.

[para 27] Regarding the second factor, the Applicant states in its access request, that "the CTLA Policing Committee intends to use this material to inform the public and to make representations to the government for amendments to the *Police Act* and the *Police Service Regulation*."

[para 28] From the information before me, it appears that the Public Body provided the Applicant with the responsive records on August 10, 2017. By letter dated February 1, 2021, I noted that it had been several years since the Applicant received the responsive records, and asked how the Applicant has made the information available to the public.

[para 29] The Applicant responded as follows (February 22, 2021 submission):

> In order to make the information available to the public, the CTLA does not publish the entirety of materials obtained by FOIPPA. Instead, the CTLA uses this information to inform itself in making submissions to public bodies about reform of the Police Act and frequently does this in a public way. It would serve no useful purpose to publish the materials, and it would be unlikely that any media outlet would publish the materials or even review the records.
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> In making submissions to police oversight bodies and the Solicitor General, the CTLA makes it known that it has proof that the Calgary Police Service abuses the process in this way. So far as can be recalled, those to whom those representations have been made have not asked to see that proof.

[para 30] The Applicant explained that it participated in the 2018 *Police Act* review undertaken by Alberta Justice and Solicitor General (JSG). It was to this review that the Applicant made submissions. It provided a copy of an email that shows its submissions were provided to all of the review participants. It further states that "[t]he stakeholder list for the engagement process numbered 224. Informing those stakeholders is one of the ways the CTLA communicated this information to the public."

[para 31] I understand from the Applicant's submissions that it used the records at issue to make submissions to the body reviewing the *Police Act*. It states that it has made it known that it has 'proof' for whatever it has said in its submissions; presumably the 'proof' is the disposition letters it received from the Public Body. It states that this 'proof' has not been requested. So I conclude that it has not provided these disposition letters to anyone outside its organization, but has used the records itself to write submissions for the *Police Act* review, which were provided to the review body and as well as the other participants/stakeholders.

[para 32] The Applicant provided a copy of its submission to the *Police Act* review. Regarding decisions made under sections 45(4) and (4.1) of the *Police Act*, the submission states:

> **"Not of a Serious Nature" - s. 45(4)(4.1)**
>
> 36. This provision has been criticized by the LERB in *Laquizee v. Edmonton (Police Service),* 2014 ABLERB 21 at paras. 55-57.
> 37. This should be eliminated as prosecutorial discretion by the Complaint Prosecutor will take care of such cases. If it is retained, then both the complainant and the subject officer should have available appeal to the LERB.

[para 33] In its rebuttal submission, the Applicant states that this is merely a summary of this issue, which had been raised in the engagement process. Possibly the Applicant means that it has provided more information about the use of sections 45(4) and (4.1) of the *Police Act* in the *Police Act* review process; if so, it has not provided any additional information on that point.

[para 34] The Applicant has written several letters to police commissions as well as the LERB regarding the use of section 45(4) and (4.1); if they refer to any particular decisions, these letters refer only to *Fermaniuk v. Edmonton (Police Service),* 2015 ABLERB 011 and *Laquizee v. Edmonton (Police Service),* 2014 ABLERB 021.

[para 35] In the submissions provided by the Applicant, I cannot locate any instance of the Applicant specifically referring to disposition letters or information from the disposition letters in the responsive records.

[para 36] The Applicant's apparent argument – that it would provide the records or information from the records to anyone that asked for it, but no one has asked for it – is not particularly supportive of its argument that there is a public interest in the records.

[para 37] Further, while the Applicant may be willing to provide the records to parties who ask for it, there is no indication that the Applicant has made this known outside of a select group: those involved in the *Police Act* review.

[para 38] In Order F2016-29, the adjudicator noted that an applicant needn't have published information from the responsive records before making a fee waiver request. She said (at para. 50):

> In my view, the Applicant has established that her purpose for obtaining the records is to contribute to public debate regarding a matter that is of public interest. I do not consider the fact that the Applicant has not yet published the article to detract from her stated purpose in obtaining the records. I accept that researching an article of this nature takes time and may require obtaining information from more than one source.

[para 38] This decision was upheld on judicial review (*Alberta Energy Regulator v. Information and Privacy Commissioner and Jennie Russell,* Alberta Court of Queen's Bench oral decision, February 21, 2018 (Court File Number 1601 15874)).

[para 39] In Order F2020-18, I said (at para. 34):

> Waiving fees in the public interest means transferring the cost to the public because the disclosure of the records is in the public interest (as opposed to transferring the cost on the basis of the applicant's inability to pay the cost). To ask the public to bear the burden of the cost on the basis of public interest in the records, the public should receive some benefit to the records being disclosed to the Applicant. This benefit is primarily from the distribution of the information in the records to the public by the applicant, in some fashion.

[para 40] I agreed with the reasoning in Order F2016-39, finding (at para. 40):

> There is no clear timeline past which this factor weighs against finding the applicant ought to receive a fee waiver in the public interest. However, I disagree that a consideration of the amount of time that has passed since the Applicant received the records is arbitrary or unfair. My decision must include the evidence before me at this time. At this point, the Applicant has had the records for over five years and the public has not received a benefit from the Applicant's access request in that time.

[para 41] In this case, the Applicant has had the records for over three years and there is no indication that they will be shared with the public. I find that this factor does not weigh in favour of a fee waiver.

If the records are about the process or functioning of government, will they contribute to open, transparent and accountable government?

[para 42] The factors listed in Order F2006-032 as relevant are:

- Do the records contain information that will show how the Government of Alberta or a public body reached or will reach a decision?
- Are the records desirable for the purpose of subjecting the activities of the Government of Alberta or a public body to scrutiny?
- Will the records shed light on an activity of the Government of Alberta or a public body that have been called into question?

[para 43] The answer to the first bullet above is clearly 'yes'; insofar as the records at issue are of decisions made by the Chief of the CPS.

[para 44] The remaining factors are whether the responsive records are desirable for the purpose of subjecting the activities of the Public Body to scrutiny, or whether they will shed light on an activity of the Public Body that has been called into question.

[para 45] The Applicant pointed to the Arkinstall Inquiry Report, issued by the Alberta LERB in October 2018[1]. The Minister of Justice and Solicitor General had requested the LERB to

[1] https://open.alberta.ca/dataset/2e1202d3-a6cd-4b81-945e-d906440a8794/resource/f25140cc-30a7-497f-aac4-2fcb2a898d9e/download/arkinstall-report-october-1-2018-revised-2.pdf

inquire into a particular matter that had occurred in 2008, and to make findings and recommendations relating to specific or general matters arising from the inquiry. The LERB Report discusses the interplay between sections 45(3) and (4) of the Police Act, stating (at page 75):

> This leads to the perception, rightly or wrongly, that the provision is being used inappropriately by some police services to avoid the appeal process before the Board. It suffices to say that the Act should be amended to clarify how these two provisions interact, to give clear guidance on which issues are to be decided first, and how they are to be decided. Short of this, a province-wide policy should be established to guide police services in a consistent interpretation and application of section 45(4).

[para 46] The Report further states (at page 76):

> The next issue is section 45(4.1) of the Act, which a number of observers have said should be repealed. Section 45(4.1) is a recent feature of Alberta's oversight scheme. It bars any appeal from a police chief's decision under section 45(4) of the Act that the misconduct is "not of a serious nature". In such cases, a chief can dispose of the complaint summarily while imposing minor discipline on the officer. 113 Section 45(4.1) came into force in 2011, having been touted as an efficiency improvement. Its impact has been to force complainants–and in some cases, police officers–to seek judicial review in the Court of Queen's Bench. They are denied the less-costly and timelier recourse of an appeal to the Board, an expert tribunal. Many see this as an access to justice issue, but it is also an oversight issue, since the ban on appeal to the Board means police services are much less likely to have to justify their decisions when section 45(4) is invoked.

[para 47] By letter dated February 1, 2021, I asked the Applicant for additional arguments to support its fee waiver request. I said:

> I do not have a copy of the records you received in response to your request, nor do I have a description of what they contain. I understand that the request was for "disposition letters" but that gives me little indication of what actual information is contained in the records and how that information meets the criteria used to determine whether a fee should be waived in the public interest. Please provide additional detail.

[para 48] In its February 22, 2021 response, the Applicant provided me with the records it received from the Public Body. It states:

> The CTLA position has been that the Calgary Police Service has perverted the application of section 45(4) Police Act and section 19(1.1) of the Police Service Regulation to wrongly characterize complaints as not of a serious nature and to wrongly find that the evidence did not meet the Police Act charging threshold, thereby wrongly depriving complainants of an avenue of appeal to the Law Enforcement Review Board. To illustrate this I will refer to a short selection of disposition letters by page number in the FOIPPA disclosure…

[para 49] The Applicant then provided page numbers for ten particular disposition letters in the records. The Applicant did not explain why these ten letters were of significance, though presumably they represent decisions in which in its view complaints ought not to have been characterized as "not of a serious nature."

[para 50] I understand the Applicant's argument is that the decisions of the Chief under section 45(4) of the *Police Act* are not always appropriate. The responsive records are dispositions letters relating to these decisions of the Chief, for a four-year period, which could arguable show a pattern of behaviour, if one existed.

[para 51] It is not within my area of expertise to assess all of the disposition letters – or the ten highlighted by the Applicant as being significant – and determine whether they indicate a pattern of inappropriate decision-making on behalf of the Chief.

[para 52] However, a finding of wrongdoing on behalf of a public body is not necessary for this factor to apply. It is sufficient that the records would serve to increase public awareness of the decisions of the Chief and enable the public to determine whether the actions of the Chief are appropriate.

[para 53] In saying this I understand that there is already a formal oversight role of the courts in deciding whether each decision of the Chief was appropriate. The difference here is that the number of decisions responsive to the request can show a pattern or propensity that individual decisions, taken separately, would not reveal.

[para 54] The Applicant has provided evidence that section 45(4.1) in the *Police Act* has been raised as a concern by bodies other than the Applicant. Specifically, the concern raised by the LERB is that it could result in a lack (or reduction) of oversight where the chief of a police service relies on section 45(4) of the *Police Act* to dismiss a complaint. The records show how the Chief of the Public Body has relied on section 45(4) over a four-year period; therefore, the records can indicate whether or not there is any concern about the type of complaints it has been applied to.

[para 55] I am satisfied that the records would contribute to open, transparent and accountable government.

Conclusion regarding the fee waiver in the public interest

[para 56] I have found that the responsive record would contribute to the public understanding of a matter of concern to the public, and would contribute to open, transparent and accountable government.

[para 57] However, having had these records for over three years, the Applicant has not shared these records with the public in any manner. I understand that the Applicant is willing to do so, but so far it has shared the information only with a select group. It is not clear how the broader public could learn of the records, or the information in the records. As such, the public has not (yet) benefitted from the Applicant's access request.

[para 58] The finding of a public interest in the records means that a waiver of the fees is appropriate. However, the inability of the public as-yet to benefit from the Applicant's obtaining the records reduces the amount that is appropriate.

[para 59] I will order a waiver of 50% of the fees associated with the request. As the Applicant has already paid the fees, this will amount to a refund of that portion of the fees paid.

2. Did the Public Body properly estimate the amount of fees in accordance with sections 93(1) and 93(6) of the Act, and the Regulation?

[para 60] I have found that the Applicant should be excused from paying 50% of the fee based on public interest. The percentage the Applicant should be refunded depends on whether the fees assessed by the Public Body were appropriate.

[para 61] The Public Body states (initial submission at paras. 24-27):

> In order to prepare the fee estimate, a consultation occurred with the Inspector in the Professional Standards Section ("PSS"), where the records resided. PSS was asked about the nature and volume of records to be searched to locate the responsive records based on the Applicant's request so that an estimate could be prepared. PSS advised that it would take between 30 and 40 hours to search for, locate and retrieve the records in question. They based an anticipated page count for the records on the basis that the average disposition letter that would have to be reviewed would be 8 pages (some of course [are] shorter and some are much longer but 8 pages was a reasonable average to assume for the purpose of estimating) and that there would be approximately 200 files containing potentially responsive records over the relevant years to review.
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> Given the range of 30 to 40 hours to search for, locate and retrieve the records, the midpoint of 35 hours was utilized. The Regulation permits up to $6.75 per ¼ hour ($27.00 per hour) so the estimate for searching for locating and retrieving the records was set at $945.00. The actual hourly rates of the individuals searching for, locating and retrieving the records ranged from $45.00 per hour to $54.00 per hour. The estimated fee was significantly less than the actual cost to the Public Body.
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> The second part of the fee estimate related to preparing and handling a record for disclosure. The OIPC has determined that two minutes per page is a reasonable estimate for the time involved in preparing records for disclosure (see Order 99-011 at para 86). Based upon the estimate of 1600 pages the estimate worked out to 53 1/3 hours which was rounded down to 53 hours for the purpose of the estimate provided to the Applicant. Again, based on the rates prescribed in the Regulation, the amount of the estimate came to $1,431.00. The actual cost to the Public Body would be significantly higher as the pay grade band for disclosure analysts at the time of this request was $35.43 - $47.40 per hour.
>
> It is submitted that the estimate that was provided to the Applicant was based on the best information that the Public Body had at the time the fee estimate was completed (i.e. before all the records were search, located, retrieved and reviewed). The estimates were based on the allowable fees set out in the Regulation and never exceeded the expected actual cost to the Public Body.

[para 62] In its February 10, 2021 submission, the Public Body further states:

> While we acknowledge that 2 minutes per page can, in many circumstances, result in an overestimation of the time to prepare records (as it did in fact in this case), the decision to use that as a benchmark was based on the nature of the records at issue. The records at issue relate to disciplinary matters involving multiple officers and private complainants. Executing the redactions is time consuming. Most of the pages have multiple redactions scattered throughout. Many of the pages had 15 to 20 redactions. It is not an insignificant task to redact records when there are that many redactions per page. Given the large amount of third-party personal information in the records, the 2 minutes per page estimate (and it is only an estimate) was reasonable.

[para 63] The Applicant has not raised concerns about the fee estimate or fees actually charged, aside from the fee waiver request.

[para 64] The actual fees charged to the Applicant were $958.10. This amounts to approximately 40% of the fees estimated by the Public Body. The Applicant paid a deposit of $1,188.00, part of which was refunded once the final fees were known.

[para 65] A fee estimate is, by its nature, only ever a 'best guess'. However, as stated in Order F2011-015, where the actual costs turn out to be significantly lower than the estimate, the discrepancy could have the effect of dissuading an applicant from proceeding with a request based on the estimate, when they would have proceeded based on the actual cost. It is therefore important that a public body take reasonable steps to ensure its fee estimate is as close as possible to what the actual fees will be.

[para 66] In this case, the primary reason the fee estimate was significantly higher than the actual fees is the overestimate of the number of files that may be relevant to the request. The Public Body states that it asked the Professional Standards Section (PSS), the area responsible for these records, to advise on the nature and volume of the records that were likely to be responsive. PSS that estimated that there may be 200 relevant files.

[para 67] From a brief review of the responsive records, I estimate about 100 disposition letters were located. The actual fees charged by the Public Body were correspondingly approximately half of what it had estimated them to be.

[para 68] It is unclear why the PSS estimated there to be about 200 relevant files, when half as many disposition letters were located. Nevertheless, the Public Body took reasonable steps in calculating an estimate by seeking advice from the area responsible for the responsive records.

[para 69] Regarding the time estimated to prepare the records for disclosure, the Public Body's initial submission cites past Orders of this Office that found two minutes per page to be a reasonable estimate of time for preparing and handling records. However, that approach changed with Order F2011-015. Since that Order, this Office has consistently held that a proper estimate will take into account the amount of information the public body anticipates having to sever, and how long it would take to actually redact that information, by whatever method the public body uses.

[para 70] In a subsequent submission, the Public Body acknowledged that two minutes per page would often be an overestimate, but states that it decided that this benchmark was appropriate in this particular case due to the nature of the information in the records and the amount of severing that would be required.

[para 71] More importantly, the Public Body clarified that for the fees actually charged to the Applicant, it charged for the time that was spent severing the records once that figure was known. Other than the hourly rates and time actually spent searching for records, and preparing records, the Public Body charged $5.00 for the disk used to provide the records to the Applicant.

[para 72] I accept that the Public Body took reasonable steps to properly estimate the fees, as well as its explanation for the final fees. I find that the Public Body met its obligation under section 93 of the Act.

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[para 73] The total fee paid by the Applicant is $958.10. Per my decision regarding the fee waiver, I will order the Public Body to refund the Applicant $479.05.

V. ORDER

[para 74] I make this Order under section 72 of the Act.

[para 75] I find that the Applicant should be excused from paying 50% of the fee based on public interest. I order the Public Body to refund $479.05.

[para 76] I find that the Public Body properly estimated the fees under section 93.

[para 77] I further order the Public Body to notify me in writing, within 50 days of being given a copy of this Order, that it has complied with the Order.

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Amanda Swanek
Adjudicator