

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3152

Appeal PA12-140

Ontario Lottery and Gaming Corporation

January 15, 2013

Summary: The appellant sought access to the minutes of all Ontario Casino Corporation and Ontario Lottery and Gaming Corporation board meetings from 1994 to the date of the request. The appellant also requested that the fee for access be waived on the basis of financial hardship. The Ontario Lottery and Gaming Corporation (OLG) issued a fee estimate for processing the request and denied the appellant's request for a fee waiver. The OLG's fee estimate and decision to deny a fee waiver is upheld and the appeal is dismissed.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, ss. 57(1) and 57(4)(b) and ss. 6, 7, 8, and 9 of regulation 460.

Orders and Investigation Reports Considered: Order MO-2530.

OVERVIEW:

[1] The appellant submitted an access request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ontario Lottery and Gaming Corporation (the OLG) for the minutes of all Ontario Casino Corporation (the OCC) and OLG board meetings from 1994 to the date of the request. She also asked that any fees be waived in full.

[2] In response, the OLG issued a fee estimate, advising that based on a representative sample of the records it is estimated that there are approximately 1,800 pages of records responsive to the appellant's request, 1,200 of which are not currently maintained in electronic format. The OLG also advised that approximately one-third of the records would require severances. The total fee estimate provided to the requester by the OLG was \$630.00 and was detailed as follows:

Description	Time (hours)	Fee
Search – no fees applicable	0	No charge
Preparation of records		
Scanning of records not in electronic format – approximately 1200 pages as 12 years are not available in electronic format	1	30.00
600 pages to be severed, 2 minutes per page @\$30.00 per hour (1200 minutes = 20 hours)	20	600.00
Total Estimated Fee		\$630.00

[3] The OLG also denied the request for a fee waiver.

[4] The appellant appealed the OLG's fee estimate and refusal to grant the fee waiver.

[5] Mediation did not resolve the matter. The file was transferred to the adjudication stage of the appeal process and I was assigned to conduct an inquiry.

[6] Representations were sought and received first by the OLG and subsequently, by the appellant.

[7] For the reasons that follow, I uphold the OLG's fee estimate and decision not to grant a fee waiver, and dismiss the appeal.

ISSUES:

At issue in this appeal are the following:

- A. Should the OLG's fee estimate of \$630.00 be upheld?
- B. Is the appellant entitled to a fee waiver?

DISCUSSION:

A. Should the OLG's fee estimate of \$630.00 be upheld?

[8] An institution must advise the requester of the applicable fee where the fee is \$25 or less.

[9] Where the fee exceeds \$25, an institution must provide the requester with a fee estimate.¹

[10] Where the fee is \$100 or more, the fee estimate may be based on either

- the actual work done by the institution to respond to the request, or
- a review of a representative sample of the records and/or the advice of an individual who is familiar with the type and content of the records.²

[11] The purpose of the fee estimate is to give the requester sufficient information to make an informed decision on whether or not to pay the fee and pursue access.³

[12] The fee estimate also assists requesters to decide whether to narrow the scope of a request in order to reduce the fees.⁴

[13] In all cases, the institution must include a detailed breakdown of the fee, and a detailed statement as to how the fee was calculated.⁵

[14] Generally, this office has accepted that it takes two minutes to sever a page that requires multiple severances.⁶

[15] This office may review an institution's fee and determine whether it complies with the fee provisions in the *Act* and Regulation 460, as set out below.

[16] Section 57(1) requires an institution to charge fees for requests under the *Act*. That section reads:

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

¹ Section 57(3).

² Order MO-1699.

³ Orders P-81, MO-1367, MO-1479, MO-1614 and MO-1699.

⁴ Order MO-1520-I.

⁵ Orders P-81 and MO-1614.

⁶ Orders M-1169, PO-1721, PO-1834 and PO-1990.

- (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.

[17] More specific provisions regarding fees are found in sections 6, 7 and 9 of Regulation 460. Those sections read:

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.
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.

7. (1) If a head gives a person an estimate of an amount payable under the Act and the estimate is \$100 or more, the head may require the

person to pay a deposit equal to 50 per cent of the estimate before the head takes any further steps to respond to the request.

(2) A head shall refund any amount paid under subsection (1) that is subsequently waived.

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

Representations

[18] In addition to its representations, the OLG provided a detailed affidavit sworn by its Senior Manager, Information Access and Privacy Services, outlining the search and preparation time required for the disclosure of the responsive records.

[19] In her affidavit, the Senior Manager explains that she consulted with the Executive Secretary, Board of Directors and her assistant, as the Executive Secretary is responsible for compiling and maintaining the minutes of the Board of Directors meetings. She was advised that they located copies of the minutes of OCC board meetings from 1994 to 2000 and minutes of OLG board meetings from 2000 to 2011. She was further advised that with the exception of one year, 1996, records that covered the years 1994 to the end of 2006 were in paper format and the records containing the minutes from 2007 to 2011 were in electronic format.

[20] The Senior Manager states that she then asked the Executive Secretary for a number of the binders containing the minutes in order to review a representative sample of the number of pages of minutes, including appendices, per year, as well as to determine an approximation of the number of pages that would require severances. She states that she reviewed the hard copy of the minutes and appendices for the years 1994, 1995, 1999, 2004, and 2005. In her affidavit, the Senior Manager provides a chart that details the number of pages of minutes and appendices per year of the sample she reviewed. From the information that she gathered, the Senior Manager established an average number of pages per year for the minutes and appendices responsive to the appellant's request. Based on her review, the Senior Manager established an estimate of 1,800 pages.

[21] To establish the approximate number of pages requiring severances, the Senior Manager submits that she reviewed previous freedom of information requests which contained board minutes. She states that for two of the requests approximately one-third of the minutes contained multiple severances. For the third request, she submits that two-thirds of the minutes contained multiple severances. The Senior Manager submits that she also reviewed 100 pages of minutes from the years 1994 and 1996 and determined that approximately one-third of these pages required multiple

severances. She submits that as based on her review she determined that approximately one-third (or 600) of the 1,800 total pages would require multiple severances. The Senior Manager then calculated the fee for severing based on the accepted standard of two minutes per page.

[22] To establish the time required to scan the paper records for disclosure the Senior Manager requested that a Senior Analyst, Information Access and Privacy Services, to provide her with an estimate. At the time, the Senior Analyst was scanning records for another request and advised that it took approximately five minutes to scan 100 pages. Accordingly, she estimated that it would take approximately one hour to scan 1,200 pages (those without severances). The Senior Manager submits that this time represents actual scanning time and does not include time required to remove the hard copies from binders and to remove staples from minutes and appendices.

[23] In its representations on this issue, the OLG submits that it was able to reduce the fee by providing all requested records to the appellant in an electronic format (CD) as the costs for producing hard copies would have been an additional \$240.00 (1,200 pages @ \$0.20 per photocopy). The OLG submits that the scanning is a necessary component of producing the records in a format that would minimize costs to the appellant. It points to Order MO-2530 where Adjudicator Laurel Cropley found that one hour was a reasonable amount of time to scan 100 pages of records in order to provide information to the appellant on a CD. The OLG submits that in this instance, one hour of time to scan 1,200 pages is reasonable and fair.

[24] In her representations, and attached affidavit, the appellant does not make any submissions on the issue of whether the OLG's fee estimate is reasonable and should be upheld. Her submissions focus primarily on the issue of fee waiver, which I will address below.

Analysis and finding

[25] In determining whether to uphold a fee estimate, my responsibility under section 57(5) is to ensure that the estimated amount is reasonable. The burden of establishing the reasonableness of the fee rests with the OLG. To discharge this burden, the OLG must provide me with detailed information as to how the fee estimate has been calculated in accordance with the provisions of the *Act* and provide sufficient evidence to support its claim.

[26] I note that the appellant was not charged a search fee by the OLG for the time it took to locate the responsive records. The \$630.00 fee estimate relates solely to the time required to prepare the paper records for disclosure, that is, severing the records and scanning them so they can be produced in electronic format.

[27] As noted above, section 57(1)(b) includes time for severing a record and this office has generally accepted that it takes two minutes to sever a page that requires multiple severances. Section 6 of Regulation 460 allows an institution to charge for preparing a record for disclosure, including severing a part of the record, at \$7.50 for each 15 minutes spent, or, put another way, \$30.00 per hour.

[28] In this appeal, the OLG estimates that it will be required to sever approximately 600 pages and charged the appellant in accordance with Section 6 of Regulation 460 for a total of \$600.00. Based on the submissions of the OLG I accept that the estimate of 600 pages requiring severances is reasonable and that the fee charged is accurate. Accordingly, I uphold the OLG's fee estimate of \$600.00 for severing the responsive records.

[29] Section 6(2) of Regulation 460 indicates that the cost for providing records on CD is \$10 for each CD. In Order MO-2530, Adjudicator Cropley stated that although the regulation does not specifically refer to scanning paper records in order to provide the information on CD, given that the activity is a necessary component of producing paper records in an electronic format, scanning can be considered as an activity that falls under section 6(4) of Regulation 460 which provides the fees the OLG is to charge "for preparing a record for disclosure." I agree with this approach and adopt it for the current appeal.

[30] In the circumstances of this appeal, the OLG submits that 1,200 of the 1,800 responsive records are currently in paper form and that it decided that it would minimize costs to the appellant if it scanned them so that they can be produced electronically rather than charge the fee of \$240.00 for photocopies in accordance with section 6(1) of Regulation 460. The appellant does not dispute receiving records in an electronic format.

[31] The OLG provided detailed representations on how it came to estimate the one hour of time required to scan 1,200 pages and I accept that it is reasonable and fair. Accordingly, I find that the OLG is entitled to charge the appellant \$30.00 for one hour of time to scan the records in order for them to be produced electronically in accordance with section 6(4) of Regulation 460.

[32] In conclusion, based on the material before me, I find the OLG has set out a detailed explanation for its fee estimate for the preparation of the responsive records for disclosure (severing and scanning) and the amount is reasonable.

[33] Accordingly, I uphold the OLG's fee estimate of \$630.00

B. Is the appellant entitled to a fee waiver?

[34] 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);
- (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.

[35] 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 requester 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.⁷

⁷ Order PO-2726.

[36] A requester must first ask the institution for a fee waiver, and provide detailed information to support the request, before this office will consider whether a fee waiver should be granted. This office may review the institution's decision to deny a request for a fee waiver, in whole or in part, and may uphold or modify the institution's decision.⁸

[37] The institution or this office may decide that only a portion of the fee should be waived.⁹

Part 1: basis for fee waiver

[38] In support of its decision not to waive the fee the OLG submits the appellant did not provide the necessary information to support a claim on the basis of financial hardship. It submits that the appellant has not provided any information other than two notices of assessment from the Canada Revenue Agency and in order to qualify for a fee waiver, she must provide details of her financial situation including information about income, expenses, assets and liabilities.

[39] In the appellant's representations, provided in response to the notice of inquiry, the appellant submits that her "claim of financial hardship is fully justified by her provision of two notices of assessment from the Canada Revenue Agency" which she states "are entirely true, accurate and complete disclosure of her full income." The appellant also submits that:

- that she lives below the poverty line in Canada; and
- that her expenses, assets and liabilities are only her normal day-to-day living expenses.

[40] The appellant submits that in her view she has provided sufficient information to the OLG to make a fee waiver decision in her favour and that it would be unnecessary, and oppressive to require that she make any other declaration or provide any other information regarding her financial status. She states categorically that it would be a financial hardship for her to pay any fee and she requests a fee waiver in full.

[41] Previous orders addressing the issue of fee waiver on the basis of financial hardship have made the following findings:

- The fact that the fee is large does not necessarily mean that payment of the fee will cause financial hardship.¹⁰

⁸ Orders M-914, P-474, P-1393 and PO-1953-F.

⁹ Order MO-1243.

¹⁰ Order P-1402.

- For section 57(4)(b) to apply, the requester must provide some evidence regarding his or her financial situation, including information about income, expenses, assets and liabilities.¹¹

[42] Based on my review of the material before me, I find that the appellant is not entitled to a fee waiver on the basis of financial hardship. The appellant did not provide sufficiently detailed and convincing evidence of her financial situation including income, expenses, assets and liabilities in order for me to determine whether a financial hardship would result if she were to pay the fee. While I accept that the fee is relatively large for someone of limited means like the appellant, I do not have enough evidence to enable me to conclude that the appellant is entitled to a fee waiver on the basis of financial hardship.

Part 2: fair and equitable

[43] As I have found that the appellant has not provided sufficient evidence to establish a basis for a fee waiver due to financial hardship, it is not necessary for me to consider whether it would be fair and equitable to waive the fee. However, in the circumstances of this appeal, I will go on to do so.

[44] For a fee waiver to be granted under section 57(4), it must be also be "fair and equitable" to do so in the circumstances. Relevant factors in deciding whether or not a fee waiver is "fair and equitable" may include:¹²

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

¹¹ Orders M-914, P-591, P-700, P-1142, P-1365 and P-1393.

¹² Orders M-166, M-408 and PO-1953-F.

[45] The OLG also states that the following factors were considered in denying the appellant's request for a fee waiver:

- the request is for a large volume of records;
- the appellant has made no attempt to work with the OLG to narrow the scope of the request; and
- the appellant has made no attempt to advance a compromise solution which would reduce costs.

[46] Finally, the OLG submits that granting a fee waiver would shift an unreasonable burden of the cost from the appellant to itself.

[47] The appellant submits that it is fair and equitable that a fee waiver be granted in these circumstances because she has provided more than sufficient and credible information to establish that there is a financial hardship for her to pay any amount to the OLG for copies of the responsive records and she should be granted a fee waiver in full.

[48] She also responded that she has previously indicated to the OLG that to narrow the scope of her request or to make any other compromises on the extent of the responsive records that she seeks would be to defeat the purpose of her access request, and is therefore, not feasible. She submits that she should not be negatively judged because she does not wish to collaborate with the OLG as it would preemptively restrict her access to responsive records to which she has a right.

Analysis and finding

[49] In my view, there are a number of factors in this appeal that are relevant to determining whether it would be fair and equitable in the circumstances to grant a fee waiver to the appellant.

[50] On my review of the circumstances surrounding the appellant's request, I am satisfied that the OLG responded appropriately and spent a considerable amount of time preparing a detailed and accurate fee estimate to provide the appellant with sufficient information to make an informed decision on whether or not to pursue access to the requested records. I also am satisfied that the OLG made an effort to minimize the costs to the appellant. Specifically, it did not charge for search time and it calculated that the fee would be significantly reduced if the records were produced electronically rather than paper copies. In my view, these are factors that weigh against the granting of a fee waiver.

[51] Additionally, I note that there are a significant number of pages of responsive records. As a result, a waiver of the fee would shift an unreasonable burden of the cost from the appellant to the OLG. I find that this factor also weighs against the granting of a fee waiver.

[52] Furthermore, although the appellant is of limited means, I have no evidence to suggest that the appellant otherwise worked constructively with the OLG to narrow the scope of the request, or that she advanced a compromise solution which would reduce costs. These factors also weigh against granting a fee waiver.

[53] After considering the factors that are relevant in deciding whether granting a fee waiver would be "fair and equitable," I have concluded that even if the appellant had established financial hardship as a basis for a fee waiver, the factors that weigh against doing so outweigh those in favour. Accordingly, I find that it is not fair and equitable in the circumstances for the OLG to waive the fee.

ORDER:

1. I uphold the OLG's fee estimate of \$630.00
2. I uphold the OLG's decision to deny a fee waiver.
3. I dismiss the appeal.

Catherine Corban
Adjudicator

January 15, 2013