

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-3466**

Appeal PA11-560-2

Ontario Lottery and Gaming Corporation

February 24, 2015

**Summary:** The appellant made a request for records of telephone contacts between the Ontario Lottery and Gaming Corporation (the OLG) and himself from December 2003 to 2011. The OLG granted partial access to responsive records, and denied that it had custody or control over detailed billing information for that period. Order PO-3254 addressed the severance of the records that were partially withheld, and also determined that detailed billing records are under the OLG's control. Order provision 3 of Order PO-3254 required the OLG to request a search for responsive records by its telephone service provider and to issue an access decision. In response, the OLG issued a fee estimate in the amount of \$15,000.00 and requested a deposit of \$7,500.00. The appellant asked the OLG to waive this fee and the OLG decided not to do so. The issues in this order are whether the fee estimate is reasonable, whether the fee waiver should be granted, and whether the OLG has conducted a reasonable search for records. This order upholds the fee estimate as reasonable, upholds the OLG's decision to deny a fee waiver, and finds that the issue of reasonable search is premature since there has not been a search for detailed billing records, which would only occur after the deposit is paid.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 17, 57(1) and 57(4); Regulation 460 sections 6 and 6.1

**Orders and Investigation Reports Considered:** Orders PO-3254, MO-2764, MO-2595, and MO-2154.

## **OVERVIEW:**

[1] The appellant submitted a request to the Ontario Lottery and Gaming Corporation (the OLG) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to call logs and recordings between the appellant and the OLG from 2003 to 2011.

[2] The OLG granted partial access to the responsive records. The information disclosed included call recordings made by the OLG, who had begun the practice of recording telephone calls in September 2007. An OLG incident report was also disclosed in part.

[3] The appellant appealed the OLG's decision and Appeal PA11-560 was opened. During the processing of appeal PA11-560, the appellant clarified that he seeks access to detailed telephone billing records for the period 2003 to 2011. The OLG explained that it was unable to produce these records as the information was not within its custody or control.

[4] Appeal PA11-560 proceeded to adjudication and resulted in Order PO-3254, which found that the detailed billing records were under the control of the OLG pursuant to section 10 of the *Act*. The OLG was ordered to request a search for responsive records in the possession of its telephone service provider and to issue an access decision if additional records were located. The telephone service provider treated this as a request to search for detailed telephone billing records for the period 2003 to 2011. It provided a letter to the OLG indicating an estimated cost of \$15,000.00 and outlining the steps it would take to carry out the search. It estimated that it would take three weeks to complete the search. It also stated the following:

- telephone billing records from 2003 no longer exist as the telephone service provider only retains backup and archived data for 7 years;
- data from 2003 have been overwritten;
- call detail records are kept online for 13 months and then on archive/back-up (to tape) for 24 months, so details of this nature could be produced back to January 2011 and possibly a little further; and
- information archived over the longer term is likely to be in summary billing format and would not contain any call detail records.

[5] The OLG then issued a fee estimate of \$15,000.00 to the appellant, and enclosed the telephone service provider's letter. The OLG stated that it would require a deposit of \$7,500.00.

[6] The appellant then commenced an appeal of the OLG's fee estimate and Appeal PA11-560-2 was opened. In correspondence sent to this office, the appellant states

that he is seeking information about telephone calls from the end of December 2003 "most of all."

[7] After receiving the fee estimate, the appellant also submitted a request for a fee waiver to the OLG. The OLG advised the appellant that it required additional information in order to make an informed decision. The appellant then submitted documentation to the OLG in support of his fee waiver request. The OLG denied the appellant's request for a fee waiver and reiterated that its service provider is unable to produce records dating back to 2003.

[8] Mediation did not resolve the appeal, and the appellant advised the mediator that he would like to proceed to adjudication. The appellant indicated that he wishes the appeal to include the issues of the fee estimate, fee waiver and reasonable search. He maintains that the OLG should be able to retrieve detailed phone records dating back to 2003.

[9] The appeal then proceeded to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry under the *Act*. This office sent a Notice of Inquiry to the OLG inviting it to provide representations on the issues of fee estimate and fee waiver only. The OLG responded with representations. This office then sent a Notice of Inquiry to the appellant, enclosing the initial representations of the OLG in their entirety, and inviting the appellant to provide representations on the issues of fee estimate and fee waiver, and the reasonableness of the OLG's search for records. The appellant responded with representations, which were provided to the OLG for reply. The OLG then filed reply representations.

[10] This file was subsequently re-assigned to me in order to complete the adjudication. In preparing this order, I have reviewed the entire adjudication file including all representations received from the parties.

## **RECORDS:**

[11] The records in this appeal consist of telephone billing records from the OLG's telephone service provider from 2003 to 2011. No search for these records has been conducted as of the present time.

## **ISSUES:**

**Issue A: Should the fee or fee estimate be upheld?**

**Issue B: Should the fee be waived?**

**Issue C: Did the institution conduct a reasonable search for records?**

## **DISCUSSION:**

### **Issue A: Should the fee or fee estimate be upheld?**

[12] In this case, the OLG provided the appellant with a fee estimate prepared in connection with the search the OLG was ordered to request from its telephone service provider under provision 3 of Order PO-3254. The fee estimate is in the amount of \$15,000.00. As already mentioned, the OLG's letter to the appellant setting out the fee estimate contains a letter provided by the OLG's telephone service provider. The telephone service provider would be required to conduct the actual search. The enclosure outlines the steps that would have to be taken in order to do so, and the associated costs.

[13] 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,

- (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.

[14] More specific provisions regarding fees are found in sections 6 and 6.1 of Regulation 460. Section 6 deals with requests for access to general records, and section 6.1 with requests for one's own personal information. Those sections read, in part:

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

...

- 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.

6.1 The following are the fees that shall be charged for the purposes of subsection 57(1) of the Act for access to personal information about the individual making the request for access:

...

4. 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.

[15] The purpose of a fee estimate is to give the requester sufficient information to make an informed decision on whether or not to pay the fee and pursue access.<sup>1</sup> The fee estimate also assists requesters to decide whether to narrow the scope of a request in order to reduce the fees.<sup>2</sup> In all cases, the institution must include a detailed breakdown of the fee, and a detailed statement as to how the fee was calculated.<sup>3</sup>

[16] In its initial representations, the OLG notes that section 57(1)(e) of the *Act* requires it to recover "any other costs incurred in responding to a request for access to the record." It also refers to section 6.6 of Regulation 460, made under the *Act*. This appears to be a reference to section 6, paragraph 6 (quoted above).

[17] The OLG argues that this section "specifies that the OLG shall charge '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.'" I note that section 6.1 of Regulation 460, dealing with requests for one's own personal information, contains an identical provision at paragraph 4 (quoted above). Given the nature of the request, it may be that section 6.1, paragraph 4 applies under the circumstances.

[18] In its initial representations, the OLG explains that it must obtain records from its telephone service provider, who estimates that it will cost \$15,000.00 in service fees to search for the records. The OLG also notes that the service provider is "not in the business of data retrieval."

[19] As mentioned above, the OLG enclosed a copy of the letter from its telephone service provider with the fee estimate that it sent to the appellant. The letter outlines the fee and the steps that need to be taken to search for responsive records, and

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<sup>1</sup> Orders P-81, MO-1367, MO-1479, MO-1614 and MO-1699.

<sup>2</sup> Order MO-1520-I.

<sup>3</sup> Orders P-81 and MO-1614.

explains that the telephone service provider keeps archived billing information for only seven years. With respect to more detailed billing records, the telephone service provider keeps its call detail records online for 13 months and then on archival tape for a further 24 months, so this information can be produced back to January 2011 and possibly a little further. Information archived over the longer term is likely to be in summary format and would not contain any call detail records.

[20] The letter from the telephone service provider also indicates that, in order to retrieve all available call detail information, the following steps would be taken:

- retrieve all available off-site backup tapes and try to restore as many annual backups as are available and then extract the call level details;
- write all necessary scripts to do a custom restore of the data, including any re-scripting required by different versions found in the tapes; and
- extract the data and produce a report with adequate detail (i.e. originating caller, date and time of call, duration of call, etc.).

[21] The letter further advises the OLG that although the work would be done on a time and materials basis, the costs to proceed are estimated at \$15,000.00, reflecting a project of three weeks' duration.

[22] The OLG's initial representations indicate that it had further correspondence with the telephone service provider to obtain more information about the estimated costs. In the course of this correspondence, the telephone service provider gave further details, in which it referred to the following list of activities required to search for the records, and provided a further breakdown of the projected costs:

- finalize scope details (define the specific requirements as detailed through a customer engagement – what data is OLG looking for and what can be excluded) - \$2,000.00
- write project mandate (define the objective and the output requested by OLG as a result of customer meetings, resulting in a Statement of Work/deliverables as well as the detailed set of activities that are required to perform the work) - \$2,000.00
- determine which years are available in offsite backup (do the research to determine what data may be at the offsite storage – there would be thousands of backup tapes for the period in question) - \$500.00
- request oldest backup first; determine which software version was in place when backup was taken; restore directly if the software used was compatible with the current version; if not - create temporary database and run conversion utility (this step includes retrieval of both compatible and non-compatible data, and also checking for completeness and overlaps, and ensuring that non-OLG data is removed) - \$4,500.00
- repeat the previous step for every annual backup - \$3,000.00

- write query to merge each restored table along with current data, ensuring no duplicates due to overlapping months in consecutive backups - \$2,000.00
- export merged results to CSV file - \$500.00
- send file (including final validation and auditing, and obtaining approval from management of the telephone service provider) - \$500.00.

[23] I note that this cost breakdown adds up to \$15,000.00, consistent with the original fee estimate. The appellant received this detailed breakdown as part of the OLG's representations, which were sent to him when he was invited to provide his own representations.

[24] As noted in the OLG's initial representations, its Director of Technical Services (Infrastructure Delivery Services) summarized the impact of the further details provided by the telephone service provider, as just outlined, for the OLG's Freedom of Information and Privacy Co-ordinator:

This kind of a request from a customer ... involves specific work from their IT department and potentially lots of data that there is no assurance of finding the detail required. . . .

From my experience, I think the estimate is likely low depending on what you are looking for. . . . I suspect reviewing just a bit of data will lead to further questions and the need for more data, driving up the effort (and potential cost) significantly. Remember, [the telephone service provider] is only mandated to keep summary billing data which may be insufficient to meet the request.

Also, just a point to note, [the telephone service provider]'s cheapest rate to the OLG is \$1,350 per person per day (plus tax), fulfilling [a Statement of Work] like this would likely involve at least some additional time from higher priced resources.

[25] In addition, the OLG notes that "[p]rojects that involve recovery of data from backup tapes are notoriously expensive. . . ." The OLG also provides examples of this office upholding significant fees in similar cases.<sup>4</sup>

[26] The OLG's initial representations also address the fact that its fee estimate is based on a quote rather than an "invoice," citing Orders MO-2764 and MO-2595 as authority for the proposition that "a quote for services is acceptable to meet the 'specified in an invoice' criterion" in section 6 of the Regulation.

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<sup>4</sup> Order MO-2764 and MO-2154

[27] The appellant's representations, which include a tape-recorded conversation with two representatives of the OLG's telephone service provider, focus on "proof the OLG can get a complete itemized billing list for 2003." In my view, this does not relate to whether the fee estimate should be upheld; rather, it is relevant to the issue of whether a fee waiver should be granted, and to the issue of reasonable search.

[28] I note, however, that in his appeal letter, the appellant claims that his request was made in a "timely fashion," and in other correspondence he states that the proposed fees arise because the OLG did not request the information from its telephone service provider in a timely fashion. I do not agree with the appellant in that regard. The appellant's request was submitted in October 2011. While it is true that the OLG did not request the archival billing information from its telephone service provider until Order PO-3254 (which found that the billing records are under OLG's control) was issued in 2013, this delay had no demonstrable effect on the cost of searching for detailed billing records back to 2003, as sought by the appellant.

[29] I agree with the OLG that Orders MO-2764 and MO-2595 provide authority for the view that a quote, as opposed to an actual invoice, can satisfy the "specified in an invoice" requirement in section 6, paragraph 6, and the same conclusion applies if the request is treated as a request for the appellant's own personal information, in which case section 6.1, paragraph 4 is the relevant section. Given that the texts of these two provisions are identical, it is not necessary to decide whether the records contain the appellant's personal information in order to determine the extent to which sections 6 and 6.1, respectively, might apply. The costs chargeable would be the same under both sections.<sup>5</sup> In either case, it is clear that the \$15,000.00 fee is "specified in an invoice that the institution has received."

[30] Nevertheless, an invoice should provide some detail about the nature of the work to be performed. The fee estimate in this case is difficult to assess because, without beginning to do the work required to retrieve the information, it is difficult to know precisely how much work would be required or how long it would take. This difficulty is made clear by the OLG's Director, Technical Services when he says (as quoted above): "I suspect reviewing just a bit of data will lead to further questions and the need for more data, driving up the effort (and potential cost) significantly."

[31] In assessing the reasonableness of this fee estimate, I note that while the initial letter from the OLG's telephone service provider (which the OLG used as the basis of the estimate) did not provide very much detail to substantiate the \$15,000.00 fee, the OLG has, during the course of this appeal, devoted considerable effort to obtaining further information about the required scope of work. In my view, this additional detailed information, which is set out above, is sufficient to justify the fee estimate.

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<sup>5</sup> Order MO-2154



[32] In addition, I have taken into account that the OLG's Director, Technical Services cites a rate of \$1,350 per person per day as the "cheapest rate" to be paid by OLG to its telephone service provider for these services, as well as his comment that the fee estimate is "likely low."

[33] Accordingly, in the somewhat unusual circumstances of this case, I find that the fee estimate is reasonable, and that sufficient detail has been provided to back it up.

**Issue B: Should the fee be waived?**

*Introduction*

[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, in part:

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 a fee waiver is available under section 57(4).

[36] For a fee waiver to be granted under section 57(4), it must be "fair and equitable" in the circumstances. The wording of this section makes it clear that the "fair and equitable" requirement is a necessary condition to the granting of a fee waiver in all cases, even if a factor identified in section 57(4)(a) though (d), including financial hardship,<sup>6</sup> has been established.

[37] Relevant factors in deciding whether or not a fee waiver is "fair and equitable" may include:

- the manner in which the institution responded to the request;
- whether the institution worked constructively with the requester to narrow and/or clarify the request;
- whether the institution provided any records to the requester free of charge;
- whether the requester worked constructively with the institution to narrow the scope of the request;
- whether the request involves a large number of records;
- whether the requester has advanced a compromise solution which would reduce costs; and
- whether the waiver of the fee would shift an unreasonable burden of the cost from the appellant to the institution.<sup>7</sup>

[38] In this case, the appellant wrote to the OLG and requested a waiver of the \$15,000.00 fee "because the fee is beyond my means." The OLG asked the appellant for additional information to substantiate this request. In response, the appellant provided his 2012 tax assessment, and stated that the fee is too great for him to afford because his wife and two sons are also supported on his income.

[39] The OLG then issued a decision denying the appellant's fee waiver request. In its decision, the OLG stated:

At this point in time we would reiterate that as indicated in our letter of October 11, 2013 [the OLG's access decision] and during several other telephone conversations, [the telephone service provider] no longer has the 2003 information you are seeking.

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<sup>6</sup> Section 57(4)(b).

<sup>7</sup> Orders M-166, M-408 and PO-1953-F.

As you are aware OLG began call recording in September 2007 and the call details and recordings from this time were sent to you on November 17, 2011 and once again on April 22, 2014. As indicated previously, although [the telephone service provider] may have summary billings from 2007, this information may not provide the detailed call information you are seeking and what we have already provided to you. As OLG would be required to incur substantial costs to have [the telephone service provider] conduct searches for seven years of information, details for most of which you already have, we are unable to grant your request for a fee waiver. Doing so would shift an unreasonable burden of the cost to OLG. In addition, we do not believe sufficient evidence has been provided to show that payment will cause financial hardship.

### *Representations*

[40] In its initial representations in this appeal, the OLG acknowledges that the appellant's income is modest, but states that the information he provided about his resources is "not sufficient to reliably establish that paying \$15,000 would cause a financial hardship; it gives too limited a picture of the [appellant]'s personal finances."

[41] The OLG submits further that:

Regardless of the [appellant]'s personal finances, however, fairness and equity do not favour a waiver of a \$15,000 fee. Most notably, the request seems pointless in light of the requester's stated interest in confirming that he made a call to OLG in 2003. In short, OLG should not bear the cost of a search that is not likely to be fruitful and, in these circumstances, it is especially important that the user pay principle govern.

OLG has provided the requester its call recordings and call records in response to this request without any charge. It has spent numerous hours with [the telephone service provider] to produce the \$15,000 estimate and information about how the estimate was generated. It should not be required to bear further costs to proceed with an onerous search that will not likely produce what the requester desires.

[42] As already noted, the OLG's submissions were provided to the appellant when he was invited to submit representations.

[43] He did not respond to the OLG's comments about his financial situation or whether the information he provided in that regard is sufficient to establish that the fee would present a financial hardship.

[44] Rather, he provided an audio recording of a telephone conversation with two employees of the telephone service provider on July 9, 2014. He submits that this recording is "proof the OLG can get a complete itemized billing list for 2003."

[45] In my view, this submission must be considered in assessing the OLG's position that it would not be fair and equitable for it to bear the cost of a search that is unlikely to be fruitful.

[46] In its reply representations, the OLG points out that the individual who responded to the inquiry in the recording is an unidentified employee of the telephone service provider, who spoke with another unidentified employee to obtain the information that he then passed on to the caller.

[47] The OLG then makes reference to the documentary materials provided with its decision letter and its initial representations, which indicate that the telephone service provider's archived billing materials only extend seven years into the past, and would not include billing materials from 2003. These documentary materials were provided to the appellant with the copy of the OLG's initial representations that was given to the appellant when he was invited to provide his own representations.

[48] The OLG submits that this documentation, which includes input from a director in its IT department, is more reliable than the information in the recorded telephone conversation provided by the appellant.

[49] I have listened to the recorded telephone conversation of July 9, 2014 provided by the appellant, in which the caller, who does not identify himself in the recording, speaks with two representatives of the OLG's telephone service provider. The caller states that he has previously been informed that he can get itemized billing back to 2003 for a 1-800 number. The first representative says that he deals with residential accounts, and the call is then transferred to a second representative.

[50] The second representative does not identify himself. The caller repeats that he has been told he can get itemized billing information for a business back to 2003, and wants to know how long it will take to obtain it. The representative attempts to clarify the question, and asks for the telephone number. The caller responds that it is a 1-800 number but does not mention that the call was made to the OLG. He does mention another business entity. After some further discussion, the second representative places the call on hold for several minutes and then returns. It appears that he is speaking with someone else about this matter while the call is on hold, but the recording does not identify that person or their credentials. When the second representative returns, he affirms that itemized billing from 2003 would be available and directs the caller to the dedicated sales customer service representative for the named business entity in order to find out what the cost would be and what needs to be done.

*Analysis and Decision*

[51] As I have already stated, even if the appellant establishes that paying the fee would cause him financial hardship, section 57(4) only authorizes granting a fee waiver in circumstances where it would be fair and equitable to do so.

[52] In my view, several of the factors listed above are relevant in making that determination in this appeal. Those factors are:

- whether the waiver of the fee would shift an unreasonable burden of the cost from the appellant to the institution 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; and
- whether the requester has advanced a compromise solution which would reduce costs.<sup>8</sup>

[53] I will begin by considering whether, as the OLG suggests, the waiver of the fee would shift an unreasonable burden of the cost from the appellant to the institution. The primary consideration in making that determination is whether there is any significant prospect that this very costly search is likely to produce the information sought by the appellant.

[54] The recorded telephone call produced by the appellant provides evidence that an unidentified representative of the OLG's telephone service provider has stated that itemized billing back to 2003 for a 1-800 number would be available. This information was evidently provided by another employee (or employees) of the OLG's telephone service provider, whose name(s), job title(s) and credentials are unknown.

[55] This response is strikingly different than the information contained in the telephone service provider's letter to the OLG setting out the fee estimate. That letter, which was sent to the appellant with the fee estimate, is dated October 7, 2013. The author of the letter is a Senior Sales Consultant with the OLG's telephone service provider. In the letter, she states:

It was communicated in a previous letter that *any data from 2003 has been written over* as we are only obligated to archive business information for seven years. Furthermore; the format in which we archive over the

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<sup>8</sup> Orders M-166, M-408 and PO-1953-F.

longer term is likely to be in summary billing format and *would not contain any call detail records.*

I have confirmed that we keep our call detail records online for 13 months and then archive/back-up (to tape) for 21 months. So we can produce these details back to January 2011 and possibly a little further.

I have had our IT team assess the tasks and effort to retrieve all available call detail information. . . . [Emphases added].

[56] This letter reaffirms the contents of an earlier email dated May 2, 2012 sent by the Senior Sales Consultant to the OLG, in which the Senior Sales Consultant states:

I had a call with one of the directors of our IT department and unfortunately, our back up / archived data is stored only for 7 years. . . . I have confirmed that any data from 2003 has been written over.

[57] The email of May 2, 2012 goes on to outline the telephone service provider's backup methodology in considerable detail.

[58] As noted earlier in this order, after receiving the telephone service provider's October 7, 2013 letter, the OLG asked the telephone service provider for further information about the \$15,000 fee estimate, and received the detailed responses that are outlined above under my analysis of the fee estimate issue. From this, it is evident that both the telephone service provider and the OLG have put considerable effort into determining what information might be available to satisfy the appellant's request and what methodology would be required to retrieve whatever might be available.

[59] Given the complete contradiction between the information provided to the appellant in the recorded telephone conversation of July 9, 2014 and the information provided to the OLG by the Senior Sales Consultant, it is necessary to decide which evidence is more credible.

[60] In my opinion, the information provided by the Senior Sales Consultant is much more credible, given that it clearly emanates from the telephone service provider's IT staff. Moreover, as evidenced in the May 2, 2012 email, the IT staff member who affirmed that backup data are only retained for seven years, and that 2003 records have been overwritten, was "one of the directors of our IT department." It is also evident that this view has been maintained over a significant period of time, during which repeated queries were made and analyses conducted in relation to the preparation of the fee estimate.

[61] By contrast, the evidence provided by the appellant is weakened by the fact that the sources of the information, and their credentials, are not identified. Moreover, the appellant introduced his conversations with both representatives of the telephone service provider by indicating that he had been told that the 2003 data is accessible, and he only needed to know how long it would take to obtain it. He did not provide information about the telephone number to which the 2003 call had been made, nor did he identify that the call was to the OLG.

[62] In my view, therefore, the more compelling evidence in this case confirms that the 2003 information that is of particular interest to the appellant is very unlikely to exist. Based on the telephone service provider's backup methodology, it is also unlikely that any detailed billing records older than 2011 still exist, and the request covers the period 2003-2011. Accordingly, I agree with the submission of the OLG that it "should not bear the cost of a search that is not likely to be fruitful and, in these circumstances, it is especially important that the user pay principle govern."

[63] Other relevant factors also weigh against granting a fee waiver. As the OLG notes, it has already provided the requester with its call recordings and call records without any charge, and has spent numerous hours with its telephone service provider to obtain information about the search process and produce the \$15,000 fee estimate. In addition, the OLG clearly spent significant additional time obtaining further detailed information about the telephone service provider's backup methodology and the basis for its fee estimate. I am satisfied that the OLG has attempted to take a constructive approach to this request. On the other hand, the appellant has stated that he is most interested in information about calls from December 2003, but he has taken no steps to limit the scope of the request to that time period in order to reduce the cost of the search, nor has he put forward any other compromise solution aimed at reducing the cost of the search.

[64] For all these reasons, I find that it would not be fair and equitable to grant a fee waiver. In these circumstances, it is not necessary for me to determine whether payment of the fee will cause financial hardship. As already noted, even if financial hardship is established, a fee waiver cannot be granted unless it is "fair and equitable" to do so. In the circumstances of this case, it is not, and I therefore find that section 57(4) does not authorize a fee waiver.

**Issue C: Did the institution conduct a reasonable search for records?**

[65] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17.<sup>9</sup>

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<sup>9</sup> Orders P-85, P-221 and PO-1954-I

[66] In this case, the appellant's concerns about the OLG's search for responsive records relate to the detailed telephone billing records from 2003 to 2011. The other responsive records, namely the OLG's call recordings since September 2007 and the relevant incident report have already been disclosed, except to the extent that Order PO-3254 upheld the exemption claimed by the OLG.

[67] As already noted, Order PO-3254 found the detailed billing records to be within the OLG's custody or control, and order provision 3 required the OLG to "request a search for responsive records in the possession of its telephone service provider." The OLG responded to Order PO-3254 by requesting that its telephone service provider conduct such a search. The result of that request was the fee estimate that is under review in this appeal.

[68] As of the present time, the search for detailed billing records has not been conducted. If I had found that the appellant is entitled to a fee waiver in this order, the search would have proceeded. Although I did not make that finding, the appellant still has the option of paying the requested deposit, and if he does so, the search will proceed.

[69] Without a fee waiver and/or payment of the deposit, it is clear that the OLG and its telephone service provider were not required to proceed with an actual search.<sup>10</sup> Given that the appellant's concerns relate to a search that could not proceed until the fee estimate and fee waiver issues were resolved, I find that it would be premature for me to assess the reasonableness of that search. If the appellant pays the requested deposit and the search proceeds, he will be able to file an appeal if he believes that the search was not reasonable.

I therefore dismiss this aspect of the appeal.

**ORDER:**

1. I uphold the OLG's fee estimate in the amount of \$15,000.00.
2. I uphold the OLG's decision to deny a fee waiver.
3. The appeal on this issue of reasonable search is dismissed.

Original Signed By: \_\_\_\_\_ February 24, 2015  
John Higgins  
Adjudicator

<sup>10</sup> See Regulation 460, Section 7