

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4514

Appeal PA23-00042

Liquor Control Board of Ontario

April 30, 2024

Summary: The appellant made a request under the *Act* for the email records of seven Liquor Control Board of Ontario (LCBO) employees. The LCBO issued a fee estimate of \$15,557.50. The appellant requested a waiver of this fee based on financial hardship. The LCBO denied the appellant's fee waiver request.

In this order, the adjudicator upholds the LCBO's denial of a fee waiver, as she finds that a fee waiver is not fair and equitable in the circumstances of this appeal.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, sections 57(4)(b) and 57(4)(c); R.R.O. 1990, Regulation 460, sections 6 to 8.

OVERVIEW:

[1] This appeal considers whether it is fair and equitable for the Liquor Control Board of Ontario (LCBO) to waive a fee estimated at \$15,557.50 for email records of seven LCBO employees.

[2] Specifically, the LCBO received an access request in October 2022 under the *Freedom of Information and Protection of Privacy Act* (the *Act*) from a requester for all email correspondence for September 2022 for the following LCBO employees:

- President & Chief Executive Officer;

- Chief of Staff & Vice President, Corporate Affairs, Strategy & Sustainability;
- Senior Director, Communications & Corporate Digital Content;
- Director, Resource Protection;
- Communications Specialist;
- Senior Freedom of Information [FOI] & Privacy Advisor; and,
- FOI Administrative Assistant.

[3] In the request, the requester explained that he was seeking information "...in an effort to further understand the health and safety factors within the LCBO post COVID-19 and that of increased alcohol consumption."

[4] Also in the request, the requester noted that he was acting on behalf of a registered charity and asked for a fee waiver under section 57(4) of the *Act* based on financial hardship to the charity.

[5] Before processing the request, the LCBO asked the requester to confirm whether the search terms "health and safety," "Covid-19," and "alcohol consumption" were acceptable. It also asked the requester if there were other keywords that he would like them to use when searching for and identifying responsive records.

[6] The requester did not directly reply to the LCBO's question, stating only that he was "... just seeking all emails for the month (for the one-month period) to be able to review and make additional searches as may be needed."

[7] The LCBO then issued an interim access and fee estimate decision letter that included a \$15,557.50 fee estimate.¹ The LCBO provided a breakdown of the fee as follows:

• 4.25 hours search time	\$30 per hour	\$127.50
• 514 hours preparation for disclosure	\$30 per hour	\$15,420.00
• 1 USB Key	\$10/USB Key	\$10.00
Estimated Total		\$15,557.50

¹ In accordance with section 7(1) of Regulation 460, the LCBO requested a deposit of \$7,778.75, which is 50% of the estimated fee.

[8] The LCBO also advised the appellant:

Our office would be pleased to work with you to find ways to reduce costs associated with processing your request. For example, by helping you to narrow the scope of the request the volume of responsive records subject to processing could be reduced.

[9] With regards to the request for a fee waiver, the LCBO requested that the appellant provide it with the following:

- A written request indicating whether the requester was requesting a full or partial fee waiver;
- the basis for the request; and
- any supporting documentation.

[10] The requester provided a written response requesting a full fee waiver based on financial hardship. He indicated that the charity had no current assets nor income for the last six months and had liabilities of \$2,734.23.

[11] The LCBO responded to the requester's fee waiver request advising that he had not met the requirements to qualify for a fee waiver on the basis of financial hardship. It also noted that the requester did not seek a fee waiver on the basis of public health and safety.

[12] The requester, now the appellant, appealed the LCBO's denial of fee waiver decision to the Information and Privacy Commissioner (the IPC) and a mediator was assigned to attempt a resolution of this appeal.

[13] As mediation did not resolve the fee waiver issue, the file was transferred to the adjudication stage of the appeals process, where an adjudicator may conduct an inquiry. I decided to conduct an inquiry and I sought and received the parties' representations.

[14] In this order, I uphold the LCBO's denial of a fee waiver, as I find that it has not been established that a fee waiver is fair and equitable in the circumstances of this appeal.

DISCUSSION:

[15] The sole issue in this appeal is whether the LCBO should waive its fee estimate of \$15,557.50, in full or in part.

[16] The fee provisions in the *Act* establish a "user-pay" principle. The fees referred to in section 57(1) and outlined in sections 6 and 6.1 of Regulation 460 are mandatory

unless the requester can show that they should be waived.²

[17] The *Act* requires an institution to waive fees, in whole or in part, if it is fair and equitable to do so. Section 57(4) of the *Act* and section 8 of Regulation 460 set out matters the institution must consider in deciding whether to waive a fee. Those provisions state:

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

(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.

[18] A requester must first ask the institution for a fee waiver and provide detailed information to support the request. If the institution either denies this request or chooses to waive only a portion of the fee, the IPC may review the institution's decision, and can uphold or modify the institution's decision.³

[19] A fee must be waived, in whole or in part, if it would be "fair and equitable" to do so in the circumstances.⁴ Factors that must be considered in deciding whether it would be fair and equitable to waive the fee are:

² Order PO-2726.

³ Section 57(5), Orders M-914, MO-1243, P-474, P-1393 and PO-1953-F.

⁴ See *Mann v. Ontario (Ministry of Environment)*, 2017 ONSC 1056.

- Actual cost in comparison to the fee: section 57(4)(a)
- Financial hardship: section 57(4)(b)
- Public health or safety: section 57(4)(c)
- Any other matter prescribed in the regulations: section 57(4)(d) and section 8 of Regulation 460
- Other relevant factors

Representations

The LCBO's representations⁵

[20] The LCBO states that the appellant's request specified that he sought the records of the seven LCBO employees to understand "the handling of health and safety at an executive level of COVID-19, [and] increased alcohol consumption rates post COVID- 19." It states that, despite being asked, the appellant declined to allow it to conduct a search that focused on its stated purpose and did not raise the issue of whether dissemination of the records would benefit public health or safety. As such, the LCBO submits that it determined that the request was not related to public health or safety.

[21] In response to the fee estimate,⁶ the LCBO states that the appellant requested a full fee waiver based on financial hardship to the charity only. It submits that the appellant did not provide any other factors or supporting documentation with respect to the charity's present assets or liabilities.

[22] The LCBO states that it attempted to work constructively with the appellant to clarify and narrow the request and to determine whether it related specifically to the issues of COVID-19 or alcohol consumption, however, the appellant declined to narrow the request or provide this clarifying information.

[23] The LCBO submits that the appellant did not provide any evidence of financial hardship or benefit to public health or safety to support that it would be fair and equitable to grant a fee waiver. It also submits that a fee waiver would shift an unreasonable burden of the cost of processing the request from the charity to the LCBO and, by extension, the Ontario government and its taxpayers.

[24] The LCBO also submits that the appellant failed to describe how his request for all

⁵ The LCBO provided both confidential and non-confidential representations. In this order, I will be referring to the LCBO's non-confidential representations, but I considered these representations in their entirety in arriving at my decision.

⁶ In its fee estimate, the LCBO estimated that it would require 4.25 hours to search for the records and 514 hours to prepare the estimated 19,000 pages of records for disclosure. It provided the appellant with a fee estimate of \$15,557.50 for this work, pursuant to section 57(1) of the Act.

emails from seven LCBO employees, whose titles are set out above, could relate to the stated purpose of “the handling of health and safety at an executive level of COVID- 19, increased alcohol consumption rates post COVID-19.”

[25] The LCBO states that it considers the estimated 19,000 pages of responsive records that would be located as a result of its search to be an extremely large request that will take approximately 520 hours to complete. It submits that the appellant has not advanced a compromise solution that would reduce costs.

[26] Regarding financial hardship (section 57(4)(b)), the LCBO states that the appellant failed to provide sufficient evidence with respect to the charity’s financial situation and evidence that the payment of the fee would result in financial hardship. It states that the appellant did not provide any information with respect to the charity’s current income or expenses or how the fee would cause it financial hardship.

[27] Regarding public health or safety (section 57(4)(c)), the LCBO states that although the appellant stated in the request that he sought the records for a health and safety purposes related to COVID-19 and alcohol consumption, he failed to respond to the LCBO’s requests to clarify how the request related to these topics. It submits that there is no link or nexus between the records requested and any public health or safety issue.

[28] The LCBO further submits that the subject matter of the records is of a private not public interest. The records are emails sent to and from seven LCBO employees during a one-month period. It states that the titles of the employees in question do not suggest that they are responsible for defining or implementing public health and safety policies.

[29] Finally, the LCBO submits that the appellant requested the records for himself personally and is using the charity, whose mandate is unrelated to public health or safety or even to any other relevant purpose, as a facade to attempt to hide his assets and obtain the records at no cost.

[30] The LCBO also submits that it believes that the intended purpose of the appellant’s request was to cause disruption to the LCBO’s FOI system by engaging it in a lengthy and expensive search to create a burden on its FOI resources. In support of this submission, the LCBO states that the appellant has not provided any information as to how he intends to disseminate the information in the records to the public, or whether he has the means available to do so.

The appellant’s representations

[31] The appellant states that the charity operates under stringent financial constraints and that denying the fee waiver would effectively bar the public from accessing critical health-related information, undermining the very essence of transparency and accountability. He states that the charity, on behalf of whom he made the request, presently does not have the financial means, with no assets, no current income, and liabilities of \$2,734.23.

[32] The appellant provided credit card statements for another entity that he claims was the charity's former name. These statements are addressed to him and are dated months after he made the request. They show an unpaid and overdue credit card expense for commercial insurance.

[33] To further demonstrate the charity's lack of assets, the appellant provided a bank statement for a bank account in the charity's name, for the period of October 2022 to March 2023. This statement shows credits of over \$15,000 and debits from this bank account to various unnamed and other entities depleting the money in this bank account.

[34] The appellant submits that, by limiting his request to a one-month period and identifying three key phrases about the type of information he seeks, that he has demonstrated a willingness to collaborate and minimize costs.

[35] The appellant also submits that the IPC has not provided a definition for "large number of records." He submits that there may be numerous duplicate records among those identified by the LCBO thereby reducing the actual number of responsive records. He also states that the LCBO has not provided him with any responsive records free of charge.

Would it be fair and equitable to waive the fee of \$15,557.50?

[36] For a fee waiver to be granted under section 57(4), the test is whether any waiver would be "fair and equitable" in the circumstances.⁷ Factors that must be considered in deciding whether it would be fair and equitable to waive the fees are set out in section 57(4)(a) to 57(4)(d). The factors at sections 57(4)(a) and 57(4)(d) are not relevant to the circumstances of the present appeal.⁸

Section 57(4)(b): financial hardship

[37] The fact that the fee is large does not necessarily mean that payment of the fee will cause financial hardship.⁹

[38] To support his fee waiver request on the basis of financial hardship, the appellant was asked in the Notice of Inquiry to provide financial information including information

⁷ See *Mann v. Ontario (Ministry of Environment)*, 2017 ONSC 1056.

⁸ Under section 57(4)(a), A head shall waive the payment of all or any part of an amount required to be paid under section 57(1) if, in the head's opinion, it is fair and equitable to do so after considering, the extent to which the actual cost of processing, collecting and copying the record varies from the amount of the payment required by section 57(1);

Under section 57(4)(d) and section 8 of Regulation 460, 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.

⁹ Order P-1402.

about income, expenses, assets, and liabilities.¹⁰ Although, the appellant has indicated that the fees would cause the charity financial hardship as it has no assets, I find that he has not provided sufficient evidence to establish a fee waiver should be granted based on section 57(4)(b).

[39] In making this finding, I rely on the following evidence provided by the appellant:

- A link to a Canada Revenue Agency (CRA) filing that states the charity mandate is to "...funds donations to other qualified donees, various charitable initiatives helping marginalized communities."
- Credit card statements in another entity's name, which according to the appellant are for the charity, showing only overdue charges for a commercial insurance expense.
- A bank statement for the charity showing debits from this bank account to various unnamed and other entities depleting the money in this bank account, including payments to what appears to be a disc jockey, a garbage company, a numbered company, and to a credit card.
- The charity's CRA filing for 2021, the year prior to when the appellant made the request, showing revenue of over \$51,000 and expenses exceeding that amount, with over 77% of these expenses being "management and administrative" expenses.

[40] Based on my review of the evidence provided by the appellant regarding the charity's financial position, I find that I have not been provided with sufficient evidence to demonstrate financial hardship on the part of the charity to warrant a fee waiver in these circumstances.

[41] In making this finding, I have considered that the charity had substantial income in the year prior to the request being made, and its corresponding expenses depleting this income are not sufficiently detailed to demonstrate how they are related to the charity's charitable mandate or to valid charitable purposes.

[42] Therefore, I find that I do not have sufficient evidence to conclude that payment of the fee of \$15,557.50 would cause financial hardship to the charity. Accordingly, this factor does not apply and does not weigh in favour of a fee waiver.

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

[43] The following factors may be relevant in determining whether dissemination of a record will benefit public health or safety under section 57(4)(c):

¹⁰ Orders M-914, P-591, P-700, P-1142, P-1365 and P-1393.

- whether the subject matter of the record is a matter of public rather than private interest,
- whether the subject matter of the record relates directly to a public health or safety issue,
 - a. whether distribution of the record once disclosed would yield a public benefit:
 - b. by disclosing a public health or safety concern, or
- by contributing meaningfully to the development of understanding of an important public health or safety issue, and
- the probability that the requester will share the contents of the record with others.¹¹

[44] The focus of section 57(4)(c) is “public health or safety”. It is not sufficient that there be only a “public interest” in the records or that the public has a “right to know”. There must be some connection between the public interest and a public health and safety issue.¹²

[45] In the request, the appellant indicated that he is making the request on behalf of the charity to understand the health and safety factors within the LCBO post COVID- 19. However, at no point has the appellant identified how the information that he has requested relates to any specific public health or safety issue. In his representations, the appellant only mentions health or safety in a very general way in the following three sentences:

- Given the sweeping closures of over 1,000 [LCBO] stores during the pandemic, public scrutiny of its health-related policies is not just warranted but essential.
- Denying the fee waiver would effectively bar the public from accessing critical health-related information, undermining the very essence of transparency and accountability.
- This is why the financial hardship criteria exist for equal access, particularly when seeking information relating to health and safety which is in the public interest and should be accessible.

[46] The request is for a very large number of email records for seven employees, whose titles do not immediately reveal any direct connection to public health or safety responsibilities. The request appears to relate to a private interest on the part of the

¹¹ Orders P-2, P-474, PO-1953-F and PO-1962.

¹² Orders MO-1336, MO-2071, PO-2592 and PO-2726.

appellant, as there is no evidence before me to suggest that there is a public interest in the records. It is also not evident that the records involve a subject matter that relates to a public health or safety issue.

[47] As well, I have no evidence from the appellant that dissemination of the records that he seeks access to would yield a public benefit by:

- disclosing a public health or safety concern, or
- contributing meaningfully to the development of understanding of an important public health or safety issue; and,

[48] Accordingly, as I do not have sufficient evidence to conclude that dissemination of the records would benefit public health or safety, this factor does not apply or weigh in favour of a fee waiver.

Other relevant factors

[49] Any other relevant factors must also be considered when deciding whether or not a fee waiver is “fair and equitable”. Relevant factors may include:

- the manner in which the institution responded to the request,
- whether the institution worked constructively with the requester to narrow and/or clarify the request,
- whether the requester worked constructively with the institution to narrow the scope of the request,
- whether the request involves a large number of records,
- whether the requester has offered a compromise that would reduce costs,
- whether the institution provided any records to the requester free of charge, and
- whether the waiver of the fee would shift an unreasonable burden of the cost from the requester to the institution.¹³

[50] I note that the request is for the email correspondence of seven LCBO employees over a one-month period. I have considered whether any other factors, including those listed above, are relevant in this appeal. Those that I have found to be relevant are as follows:

¹³ Orders M-166, M-408 and PO-1953-F.

- The request involves a large number of records and a large fee. An estimated 19,000 pages, with a corresponding fee of \$15,557.50.
- The LCBO responded to the request in a timely manner and sought to clarify and narrow the request on numerous occasions. It offered to narrow its search to three key phrases which would reduce the number of responsive records and the correlative fee. In response, the appellant did not work with the LCBO to narrow or clarify the request, and in particular, did not agree to narrow the search terms to three key phrases.
- The waiver of the fee would shift an unreasonable burden of the cost to process the request onto the LCBO.

[51] I find that all of these factors are relevant and weigh against the granting of a fee waiver.

Conclusion

[52] In conclusion, I have found that there are no factors that weigh in favour of a finding that it is fair and equitable for the LCBO to waive the fee, as the appellant has not established that a fee waiver for the charity is warranted based on financial hardship, on public health or safety, or on other relevant factors that weigh in favour of a fee waiver.

[53] I have also found that in the circumstances of this appeal, a fee waiver would shift an unreasonable burden of the cost from the charity to the LCBO.

[54] For these reasons, I uphold the LCBO's decision to deny the fee waiver as I find that a fee waiver is not fair and equitable in the circumstances of this appeal.

ORDER:

I uphold the LCBO's decision not to waive the fee and dismiss the appeal.

Original signed by: _____
Diane Smith
Adjudicator

_____ April 30, 2024