

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3108

Appeal PA12-62

Ontario Lottery and Gaming Corporation

August 30, 2012

Summary: The appellant requested access to records relating to Directions to Exclude from 1994 to the date of the request and asked that the fee for access be waived on the basis of financial hardship. The Ontario Lottery and Gaming Corporation (OLGC) issued an interim fee estimate for processing the request and refused to waive the fee. The OLGC's interim fee estimate and waiver refusal is upheld.

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.

OVERVIEW:

[1] The Ontario Lottery and Gaming Corporation (OLGC) received a multi-part request under the *Freedom of Information and Protection of Privacy Act* (the *Act* or *FIPPA*) for access to a variety of records. The OLGC divided the request into twelve parts. At issue in this appeal is the first of the twelve part request, being a request for access to:

All Direction to Exclude records in the possession of the [OLGC] and OCC (Ontario Casino Corporation) from 1994 to [the date of the request] as well as all supporting documentation relating to each direction to exclude.

[2] The requester asked that the fee for access be waived on the basis of financial hardship. The request was accompanied by the requester's Income Tax Notice of Assessment for the 2009 tax year in support of this contention.

[3] In response, the OLGC issued an interim fee estimate of \$280.00 for access to the requested information, based on a random sampling of records. The estimate reflected 1 hour of search time and 8.33 hours for preparing the records for disclosure. The OLGC denied the fee waiver request and requested payment of one-half of the fee estimate before continuing to process the request.

[4] The requester (now the appellant) appealed the fee estimate and the OLGC's refusal to waive the fee.

[5] Mediation did not resolve the matter and it was moved to the adjudication stage of the appeal process where an adjudicator conducts an inquiry under the *Act*.

[6] I commenced the inquiry by seeking representations from the OLGC on the facts and issues set out in a Notice of Inquiry. The OLGC provided representations in response. I then sent a Notice of Inquiry to the appellant along with the non-confidential representations of the OLGC. The appellant did not provide responding representations.

ISSUES:

[7] At issue in this appeal is the following:

- A. Should the OLGC's fee estimate of \$280.00 be upheld?
- B. Is the appellant entitled to a fee waiver?

DISCUSSION:

A. Should the OLGC's fee estimate of \$280.00 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

¹ Section 57(3).

- 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 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.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,

- (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.

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 MO-1169, PO-1721, PO-1834 and PO-1990.

[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.

[18] The OLGC provided an affidavit from its Senior Information and Privacy Analyst, Information Access and Privacy Services (the Analyst) outlining the estimated search and preparation time for disclosure of the responsive records. He explained that the responsive records could be found in two locations: a file folder of hard copies of

Directions to Exclude (DTE's) kept by an assistant to the Director of Security Services at the OLG and Itrack, the Security Services Database which OLG started using in April 2009. The Analyst explained in detail the process for estimating how much time it would take to search and retrieve information from the 116 responsive DTE files on Itrack. The Analyst further explained that if the request was processed the hard copy DTE's would have to be compared to the DTE's extracted from Itrack to ensure that all responsive records had been located.

[19] The Analyst stated in his affidavit that:

... In order to better understand the time required to retrieve the information from the Itrack system I asked [named individual] to take me through the steps of retrieving information for a number of DTE files. ...

The search for all the necessary information ... took 1.5 to 2 minutes per file, depending on the number of scanned documents to be opened and printed.

Based on a sampling of DTE files, the files contained 6 – 8 pages.

...

The hard copy file of DTE's contained 103 DTE's. Each DTE consisted of approximately three pages. In the event the processing of the request was to proceed, I reviewed a sample of these DTE's to determine, on average, the time required to search for additional information that would not be contained in the records printed from Itrack. This process took an average of 30 seconds per page and would take approximately 2.5 hours.

...

Based on a representative sample of the records, a DTE file contains 6 to 8 pages for a total of 600 to 900 pages for 116 files. The sample record provided to the requester ... contained six pages. Of those six pages, five pages (83% of the total pages) required severances and the sixth page was withheld in its entirety. These pages are representative of the records contained in the other DTE files.

Based on the above calculation, and using the low end estimate of 600 for the number of pages it was determined that 83%, or approximately 500 of the 600 pages would require severances.

[20] The OLGC also provided a chart indicating that although the fee estimate that was sent to the requester was for \$280.00, the estimated allowable charges under the *Act* could have been \$692.50.

[21] The portion of the chart pertaining to estimated allowable charges under the *Act* set out the following:

Search 1.5 minutes per file 116 files x 1.5 minutes = 174 minutes or 2.9 hours	2.9 hours
Preparation of Records Scanning of records into redaction system	.75 hours
Manual Search through hard copy records for responsive records	2.5 hours
Redaction of information 2 minutes per page for 500 pages = 1000 Minutes	16.6 hours
CD Rom	\$10.00
Total	\$692.50

[22] In its representations, the OLGC explained that the following factors were taken into account to reduce the estimated fee to \$280.00:

- Because the design of the Itrack system does not allow for the quick retrieval of information the OLGC determined that the appellant should not have to bear the total search and retrieval cost and reduced the search time from 2.9 hours to 1 hour.
- The accepted standard of two minutes to sever a page that requires multiple severances was not used because a representative sample of the responsive records indicated that within a DTE file some pages required few severances and others required multiple severances. Furthermore, the lowest estimate of the total number of responsive pages (600) was used to calculate the percentage requiring redaction rather than the higher (900) or even mid-point (750) estimate of the total number of pages. The OLGC estimated that approximately 2100 severances would have to be

made to the responsive records. Relying on Order P-741,⁷ the OLGC submitted that just over 8 hours to make approximately 2100 severances is fair and reasonable.

- The Itrack system does not have the capability to produce the requested information in electronic format and to prepare the responsive records for disclosure they would have to be scanned into the redaction system. OLGC determined that in the circumstances, the appellant should only bear the fees relating to the redaction of information.
- Due to the inadequacy of record keeping prior to the implementation of the Itrack system the appellant should not be charged for the time spent by the Analyst to search the hard copy file for additional responsive records.

[23] Based on the material before me, I find the OLGC's reduced fee estimate of \$280.00 for the search and preparation of responsive records to be reasonable. The OLGC has set out a detailed explanation for the fee estimate and why it was reduced in the appellant's favour. The appellant provided no representations to refute the OLGC's estimated fee calculation and the rationale for its reduction.

[24] Accordingly, I uphold the OLGC's fee estimate of \$280.00.

B. Is the appellant entitled to a fee waiver?

[25] 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;

⁷ The OLGC submits that in that Order the Adjudicator accepted that it would take staff at the Ministry of Natural Resources 8 hours to make 261 severances to 1,659 pages of records that were at issue in that appeal.

- (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.

[26] 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.⁸

[27] 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.⁹

[28] The institution or this office may decide that only a portion of the fee should be waived.¹⁰

Part 1: basis for fee waiver

[29] In support of its decision not to waive the fee on the basis of financial hardship the OLGc submitted that the appellant provided copies from Canada Revenue of Income Tax Return information without any other information or explanation to support the request.

⁸ Order PO-2726.

⁹ Orders M-914, P-474, P-1393 and PO-1953-F

¹⁰ Order MO-1243.

[30] In its initial decision letter, the OLGc stated that the income tax information provided by the appellant was not sufficient and more detailed information was required.

[31] Although she provided no representations in response to the Notice of Inquiry, during the course of mediation, the appellant sent an email to the OLGc forwarding Income Tax Notices of Assessment for the 2009 and 2010 tax years. She stated in the email that these provided full disclosure of her annual income and that:

- she lives below the poverty line
- she has no other personal assets other than "bare assets" for daily living
- her expenses are those for daily living

It was her position that the OLGc required no further information to make a fee waiver decision in her favour.

[32] As stated above, the appellant provided no representations containing additional detailed information in support of her request for a fee waiver in response to the Notice of Inquiry.

[33] The fact that the fee is large does not necessarily mean that payment of the fee will cause financial hardship.¹¹

[34] 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.¹²

[35] 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.

¹¹ Order P-1402.

¹² Orders M-914, P-591, P-700, P-1142, P-1365 and P-1393.

Part 2: fair and equitable

[36] Although it is not necessary for me to do so, I will also consider whether if I had found there to be financial hardship, that it would be fair and equitable to waive the fee.

[37] 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:¹³

- 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.

[38] The OLGC submitted that in its decision not to waive the fee it took into account a number of factors, including the following:

- The fees were reduced in the appellant's favour
- The request is for a large volume of records
- The appellant has made no attempt to work with the OLGC to narrow the scope of the request
- The appellant made no attempt to advance a compromise solution which would reduce costs

¹³ Orders M-166, M-408 and PO-1953-F.

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

[40] The appellant did not provide representations in response to the Notice of Inquiry that specifically address whether it would be "fair and equitable" to provide a fee waiver.

[41] 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.

[42] On my review of the circumstances surrounding the appellant's original 12-part request, I am satisfied that the OLGC responded appropriately to the request, by dividing it into 12 separate parts. I am also satisfied that the OLGC worked constructively with the appellant in an attempt to narrow the request by providing an example of a redacted record to her to ensure that it had appropriately identified responsive records. I also note that there may be as many as 900 pages of responsive records. I find that these factors weigh against granting a fee waiver.

[43] Furthermore, although the appellant is of limited means, with the exception of advising the OLGC that certain specific information in the DTE's could be withheld from disclosure, I have no evidence to suggest that the appellant otherwise worked constructively with the OLGC 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.

[44] Lastly, an important factor to consider is if a waiver of the fee would shift an unreasonable burden of the cost from the appellant to the OLGC. After considering all of the circumstances, including those outlined in the appellant's emails to this office as well as the OLGC's voluntary reduction of the fee estimate, I find that this factor weighs against granting a fee waiver.

[45] 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, the factors that weigh against doing so outweigh those in favour. Accordingly, it is not fair and equitable in the circumstances for the OLGC to waive the fee.

ORDER:

1. I uphold the OLGC's estimated fee of \$280.00.
2. I uphold the OLGC's denial of a fee waiver.

Original Signed by: _____
Steven Faughnan
Adjudicator

_____ August 30, 2012