

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3109

Appeal PA11-550-3

Alcohol and Gaming Commission of Ontario

September 14, 2012

Summary: The appellant made a four-part request under the *Freedom of Information and Protection of Privacy Act* to the Alcohol and Gaming Commission of Ontario (AGCO). This order addresses a fee estimate and fee waiver request with respect to part two of the request. The AGCO's fee estimate and refusal to waive the fee are 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.

BACKGROUND:

[1] This appeal follows a number of procedural appeals with respect to the requester's four-part request under the *Freedom of Information and Protection of Privacy Act* (the *Act* or *FIPPA*) for access to a variety of records.¹

[2] At issue in this appeal is the second part of the multi-part request in which the requester sought access to all minutes of the AGCO Board meetings from 2000 to October 24, 2011. The requester asked that any fee for obtaining 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.

¹ Appeals PA11-550 and PA11-550-2.

[3] On November 2, 2011, the Ministry of Attorney General (the ministry), on behalf of the AGCO, sent an e-mail to the requester, confirming receipt of her request, noting that "this request may be quite voluminous" and advising that a search had begun "for responsive records; however, we would like to ask if there is any specific record or issue in order to further narrow/clarify this request."

[4] On November 2, 2011, the requester responded, confirming that with respect to part two of the multi-part request, she was seeking all the minutes of the AGCO board meetings since the year 2000.

[5] In a subsequent email exchange between the ministry and the requester on November 17, 2011, the ministry indicated:

On November 2, 2011, I sent you an email, explaining that the records you are requesting are voluminous. The processing of this request involves many hours of search and preparation time, in addition to photocopying and will entail a rather large fee. I suggested you may wish to narrow the request to a specific issue or record; however, you responded, indicating you wanted all records from 2000 to present date request received.

In our initial search of the records, it appears the processing of this request, in its original form, would significantly interfere with the operations of this office, as dealing with the request as is, involved a large number of records. I would like to propose the following:

- narrowing the request to a specific issue or record; or
- responding to each part of the request separately.

[6] On November 17, 2011, the requester responded by agreeing that the ministry could respond to each part of the request separately. She stated:

Please start with the first two categories of responsive records [parts 1 and 2] . . . These records should be very easy to locate, and clearly identifiable, and as such require the least time and effort to compile.

[7] The requester reiterated that she did not wish to narrow the scope of her request.

[8] On December 16, 2011, the ministry issued a time extension letter to the requester, advising that it was processing part two of the multi-part request and that "an interim fee estimate and/or decision will follow within 30 calendar days, on or before January 15, 2012."

[9] On December 21, 2011, the requester (now the appellant) appealed the ministry's time extension decision to this office. As a result, a time extension appeal (appeal number PA11-550) was opened.

[10] During the mediation of the time extension appeal, on January 12, 2012, the ministry issued a decision letter regarding part two of the multi-part request. The AGCO provided a fee estimate of \$780.00 to process part two of the multi-part request and advised that it would be withholding some information under sections 21(1) (invasion of privacy), 13(1) (advice or recommendations), 17(1) (third party commercial information), 19(a) and (b) (solicitor-client privilege) and 22(a) (information is publicly available) of the *Act*. The appellant's fee waiver request was not addressed in this letter.

[11] The mediator assigned to this appeal by this Office then sent the ministry an email inquiring about the appellant's request for a fee waiver. The ministry replied by advising that it had waived the fee for processing the records responsive to part one of the multi-part request, but that it had decided not to waive the fee for processing part two.

[12] The ministry confirmed its position in a letter to the appellant dated February 1, 2012, advising her that that the information she supplied was not sufficient and that:

... in order to determine a proper assessment of the matter, it is important for the ministry to establish a complete financial profile.

To that end, since you are requesting the ministry waive the complete fee, we require additional documentation including assets and evidence of your total financial income and expenses.

[13] In response, the appellant sent an email to a number of recipients, including the ministry, dated February 8, 2012 enclosing copies of her Revenue Canada Agency Notices of Assessment for the 2009 and 2010 tax years and stating that:

You and the [ministry] have previously accepted from me this same notice of assessment, and entirely on this basis, have accepted this information as full and sufficient demonstration of my financial status, and have granted to me a fee waiver in full on this basis.

In other words, you and the ministry have already established a correct precedent that I should be granted a fee waiver in full, based on my submission of a federal income tax notice of assessment, from the Canada Revenue Agency.

...

I unequivocally state herein that [the Notices of Assessment] is an accurate documentation of my total income, and that on this basis alone as you and the ministry have done in the past, you have sufficient information to grant me a fee waiver in full ...

As you already know, very well, that my income is below the poverty line. I have no other financial or other assets.

...

You have all the required information to make a decision that I should be granted a fee waiver in full, just as you have decided correctly, previously. You do not require any further documentation, other than what I have submitted to you herein, to grant me a fee waiver in full.

[14] The appellant further stated that it would be evidence of bad faith on the part of the AGCO and the ministry if the waiver was refused or if the matter be required to "proceed to an appeal."

[15] In the meantime, Adjudicator Cathy Hamilton issued Order PO-3048, addressing the time extension request in Appeal PA11-550. Adjudicator Hamilton did not uphold the AGCO's time extension. That order did not address the appellant's request for a fee waiver, which, along with the amount of the fee estimate, is the subject of the appeal before me.

[16] I commenced my inquiry in this appeal by seeking representations from the AGCO on the facts and issues set out in a Notice of Inquiry. The AGCO provided representations in response. I then sent a Notice of Inquiry to the appellant, along with a copy of the AGCO's representations. The appellant did not provide responding representations.

ISSUES:

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

- A. Should the AGCO's fee estimate of \$780.00 be upheld?
- B. Is the appellant entitled to a fee waiver?

DISCUSSION:

A. Should the AGCO's fee estimate of \$780.00 be upheld?

[18] Where the fee exceeds \$25, an institution must provide the requester with a fee estimate.²

[19] 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.³

[20] 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.⁴

[21] The fee estimate also assists requesters to decide whether to narrow the scope of a request in order to reduce the fees.⁵

[22] In all cases, the institution must include a detailed breakdown of the fee, and a detailed statement as to how the fee was calculated.⁶

[23] Generally, this office has accepted that it takes two minutes to sever a page that requires multiple severances.⁷

[24] 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.

[25] 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;

² Section 57(3).

³ Order MO-1699.

⁴ Orders P-81, MO-1367, MO-1479, MO-1614 and MO-1699.

⁵ Order MO-1520-I.

⁶ Orders P-81 and MO-1614.

⁷ Orders MO-1169, PO-1721, PO-1834 and PO-1990.

- (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.

[26] 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.

[27] Although the appellant provided no representations with respect to the quantum of the AGCO's fee estimate in response to the Notice of Inquiry in this appeal, she did make extensive representations on the AGCO's fee estimate in response to the Notice of Inquiry in appeal number PA11-550, which resulted in Order PO-3048, discussed above. In Order PO-3048, Adjudicator Hamilton set out the appellant's representations on the appropriateness of the AGCO's fee estimate for records responsive to part two of the multi-part request, as follows:

The appellant submits that part two of her request, which is for all minutes of AGCO Board Meetings since 2000, are carefully filed in a very organized place in the AGCO's records, both as paper copies, and in their electronic, computerized database. In addition, the appellant states that the minutes, which are clearly identifiable by their title⁸ are immediately retrievable during board meetings at the AGCO, and can be "called up" immediately, in a matter of seconds from the board's electronic records, for reference and deliberations.

The appellant states that the AGCO cannot claim that electronic records take a great length of time to identify, retrieve or print out, and if needed, to sever easily identifiable personal information. The appellant states that the time to process part two of the request could be practically indefinite if the AGCO decides to make excuses, rather than admit to the simplicity of the task and simply get on with the task itself.

With respect to records responsive to part two of the request that are in hard copy only, the appellant submits that the AGCO look in the filing cabinet under the letter "B" for "Board" or under the letter "M" for "Minutes" and take out all of the copies of the "Minutes of Board Meetings" from the filing cabinet. The appellant states that these are simple, clearly identifiable records referred to every day at the institution. In the appellant's view, the time required for processing part two of the request should be a maximum of a few days, not a matter of months, as the institution has already needlessly taken.

⁸ Minutes of Board Meetings.

[28] In its representations in the appeal before me the AGCO submitted that:

Part 2 of the request was for records dating back to January 1, 2000, meaning approximately 12 years of responsive records had to be searched for and located. The estimate provided to the requester included time to locate and retrieve paper files located off-site at the Governments Records Centre. In addition, paper files on-site within several departments had to be searched.

Five banker boxes of off-site records were retrieved and had to be reviewed for responsive records. A banker's box has approximately 1,500 pages, which meant approximately 7,500 pages required review. In addition, on-site, two filing drawers, which is approximately 50 linear filing inches, were identified as potentially responsive to the request.

The AGCO estimated 3 hours and 20 minutes of search time to search for records responsive to part 2 of the request. ...

In estimating the number of responsive documents, a person with knowledge of these types of records was consulted. The Board of the AGCO meets approximately once a month. On average, there would be approximately 12 meetings per year. Over nearly 12 years, this would be approximately 144 meetings. For each Board meeting, there would be approximately 10 pages of minutes. This amounts to approximately 1440 pages responsive to this request.

A representative sample of these records was reviewed. The estimate of 1440 pages was further reduced based on the knowledge that there were times during the 12 year period when a monthly meeting did not take place, estimated at 20, and that not all meetings produced 10 pages of minutes. The estimate of responsive pages was therefore reduced to 1000 pages.

... Therefore photocopying was estimated at \$200.00.

The majority of the responsive records require multiple severing. This assumption was based on two factors. Firstly, for much of the 12 year period, legal counsel for the board attended board meetings to provide legal advice. The minutes would therefore contain information protected by solicitor/client privilege. Secondly, the minutes contained a substantial amount of personal information.

... allowing 2 minutes per page for preparation for disclosure for 90% of the records, the AGCO estimated 1800 minutes. This provided an estimate of \$900 for preparing the records for disclosure.

[29] In its representations, the AGCO also advises that on January 11, 2012, it provided the ministry with a fee estimate for part two of the multi-part request and, on January 12, 2012, the ministry issued a fee estimate to the appellant in the amount of \$780.00, which was lower than the amount recommended by the AGCO. AGCO explains that while awaiting additional financial information from the appellant, and in light of the limited income information provided by the appellant, the head granted a reduction in fees for part two of the request.

[30] AGCO submits that notwithstanding the fact that the fee estimate remained at issue, it continued to work on the request. AGCO submits that:

... it is now known that there were in fact some 1089 records responsive to part 2 of the appellant's request. All but 49 of these records were determined to be releasable, whether in whole or in part. Approximately 785 of these records were releasable in part and thus required severing.

[31] As set out above, the appellant provided no representations in response to the Notice of inquiry to refute the AGCO's estimated fee calculation and the rationale for its reduction.

[32] The AGCO advises that 785 pages of the 1089 pages of responsive records required severing. Assuming that two minutes a page would be spent on severing the pages, this yields an estimated severance time of a total of 1570 minutes (785 pages at 2 minutes a page). As set out above, for severing a part of a record a fee of \$7.50 for each 15 minutes spent by any person is permitted. Accordingly, this results in an estimated fee of \$784.99 without any component of search time or photocopying cost.

[33] Based on the material before me, therefore, I find the AGCO's fee estimate of \$780.00 for the preparation of responsive records to be reasonable.

[34] Accordingly, I uphold the AGCO's fee estimate of \$780.00.

B. Is the appellant entitled to a fee waiver?

[35] 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.

[36] 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.⁹

[37] 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.¹⁰ The institution or this office may decide that only a portion of the fee should be waived.¹¹

⁹ Order PO-2726.

¹⁰ Orders M-914, P-474, P-1393 and PO-1953-F.

¹¹ Order MO-1243.

Part 1: basis for fee waiver

[38] In support of its decision not to waive the fee on the basis of financial hardship the AGCO submitted that the appellant provided copies of her Notices of Assessment for the 2009 and 2010 tax years from the Canada Revenue Agency without any other information to support the request. The AGCO submits that it had advised the appellant that this information was not sufficient.

[39] The AGCO submits that:

... the appellant has not discharged the onus on her by simply providing a copy of her Notice of Assessment for the tax years 2009 and 2010. While the appellant has provided some information on income for two years, she has not provided any information as to assets, expenses or liabilities, as required.

[40] Although the appellant provided no representations in response to the Notice of Inquiry, she did provide some information in support of a fee waiver in her submissions in appeal PA11-550, which resulted in Order PO-3048, discussed above.

[41] In her submissions provided in response to the Notice of Inquiry in appeal PA11-550, which resulted in Order PO-3048, she wrote:

I have been granted a fee waiver in full, by this same institution previously, on the basis of the same evidence of my annual income, and therefore, this submitted evidence¹² should be accepted, in the same manner, as before and I should be granted the fee waiver, in full, not only in part, on this same basis, and on this well established precedent, in accordance with all expected and required good faith practices from the institution, and in compliance with the provisions of the *Act*.

This institution, the AGCO, has previous copies of my federal tax assessment, that demonstrate clearly my low-income and further they know that I am physically permanently disabled, medically certified as such and live on a below subsistence annual income. They know full well that payment of any amount by me for any part of the provision of responsive records to me, would be a financial hardship to me, and that I should be eligible, without doubt, for a fee waiver, in full, and not only in part. We have been through this before, with this same institution, and they know all of this very well, from before.

¹² Being the Notices of Assessment for the 2009 and 2010 tax years.

[42] The fact that the fee is large does not necessarily mean that payment of the fee will cause financial hardship.¹³

[43] 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.¹⁴

[44] 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 the AGCO, or this office, with sufficiently detailed and convincing evidence of her financial situation including income, expenses, assets and liabilities to enable me to determine, in this instance, 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 in this instance.

Part 2: fair and equitable

[45] 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.

[46] 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 include¹⁵:

- 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

¹³ Order P-1402.

¹⁴ Orders M-914, P-591, P-700, P-1142, P-1365 and P-1393.

¹⁵ Orders M-166, M-408 and PO-1953-F.

- whether the waiver of the fee would shift an unreasonable burden of the cost from the appellant to the institution.

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

- the request is for a large number of records
- it attempted to work with the appellant to narrow the scope of the request by asking the appellant "if there was any specific record or issue she was interested in in order to further narrow/clarify her request"
- the appellant refused to narrow the scope of her request
- the appellant has indicated that she is not interested in reducing costs

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

[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] I am satisfied that the AGCO attempted to work constructively with the appellant to narrow the scope of the second part of her multi-part request, but to no avail. I also note that there are some 1089 records responsive to part two of the appellant's multi-part request. I find that these factors weigh against granting a fee waiver.

[51] Furthermore, although the appellant is of limited means, I have no evidence to suggest that the appellant worked constructively with the OLGc to narrow the scope of the request, or that, other than agreeing that the AGCO could respond to each part of the multi-part request separately, she advanced a compromise solution which would reduce costs. These factors also weigh against granting a fee waiver.

[52] 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 AGCO. After considering all of the circumstances, including the AGCO's initial voluntary reduction of the fee estimate, I find that this factor weighs 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, the factors that weigh against doing so outweigh those in favour.

[54] Finally, while it is evident that the AGCO did waive the fee for access to records responsive to part one of the multi-part request, in my view, the waiver of a fee on a previous occasion, does not forever bind an institution to waive on all occasions in the absence of sufficient grounds for doing so.

ORDER:

1. I uphold the AGCO's fee estimate of \$780.00.
2. I uphold the AGCO's denial of a fee waiver.

Original signed by: _____
Steven Faughnan
Adjudicator

_____ September 14, 2012