

**REPORT WITH RESPECT TO THE APPLICATION
FOR REVIEW OF [REDACTED] IN RELATION TO FEES LEVIED
FOR INFORMATION REQUESTED FROM SASKATCHEWAN LIQUOR AND GAMING
AUTHORITY**

[1] [REDACTED] (the “Applicant”) forwarded an Access to Information Request form to Saskatchewan Liquor and Gaming Authority (the “Respondent”) on April 10, 2003 in which she requested the following:

“Please provide all information prepared [sic] by or for the government of Saskatchewan, and the Saskatchewan Liquor and Gaming Authority, with regard to linked bingo.

Please include all documents related to the ‘mega bingo project; including research done before the launch, approval for the project, any business plans or other due diligence, and any minutes of meetings throughout the process.

As well, please include all documents related to the requests for proposals, or tendering work – including any specifications laid out by Saskatchewan Liquor and Gaming to Western Canada Lottery Corporation for reviewing the proposals.

Please also include any documents on the decision to begin the project and who made it, as well as the decision to end the project.

Please ensure the records I receive are comprehensive and, where applicable, include: documents, files, notes, reports, memorandums, letters, e-mails, briefing notes, transcripts of meetings, agendas of meetings, sticky notes – and any other material that makes reference to “linked” or “mega” bingo.”

[2] By a letter dated May 9, 2003, the Respondent replied by providing an estimated cost to perform a search and review of its records to determine which records would be released. The letter stated, in part:

“With respect to your request, the records to be compiled and reviewed are extensive. SLGA estimates 562 hours to compile and prepare the information requested. The cost of this review is estimated at \$16,940. Photocopying is estimated at up to a further \$1,250.00, for a total of \$18,190.

Section 9(4) of the *Act* provides that “where an estimate is provided the head may require the applicant to pay a deposit of an amount that does not exceed one-half of the estimated amount before a search is commenced for the records for which access is sought.”

If you wish SLGA to proceed further with your request, please forward, to the attention of Fiona Cribb, Manager of the Policy and Legislation Branch, a cheque or money order payable to the *Saskatchewan Liquor and Gaming Authority* in the amount of \$8,470 as a deposit against the full cost of the search. When payment is received we will proceed with your request. . . .”

[3] On May 14, 2003, the Applicant filed a Request for Review with my office requesting that I review the fees requested by the Respondent. The Applicant also submitted a letter which reads as follows:

“This is a request for review of a decision by the Saskatchewan Liquor and Gaming Authority to charge \$16,940 to compile and review records pursuant to my request for information.

I am enclosing the following:

1. A completed “request for review” form
2. A copy of my original request
3. A copy of the department’s response

According to the Minister, the ‘mega-bingo’ project was recently reviewed in order to provide him with a total cost for the scheme. I can not understand how those materials are now so difficult to find, that it would take 562 hours to do so.

Also, it appears from the photocopying estimate, that SLGA believes there are nearly 5,000 pages of material regarding mega-bingo. I would be happy to review those documents to which you feel I’m entitled than have them all photocopied. That should save both time and money.

Finally, it appears that the authority is seeking to charge me for time related to its deliberations on release.

Please feel free to call me if you have any questions, or if you'd like to set up any kind of mediation to help me work through this with officials from the Liquor and Gaming authority."

[4] On May 20, 2003, I wrote to the Respondent as follows:

"I am in receipt of a Request for Review from the above named and enclose herewith the yellow copy of same.

I am also enclosing a copy of the applicants letter dated May 14, 2003 which was enclosed with her request for review.

I am satisfied from reading various reports by my predecessors that, by virtue of Section 7(2)(a), the commissioner has authority under The Freedom of Information and Protection of Privacy Act to review the matter of the estimated costs incurred in providing the information requested.

In your letter to the applicant of May 9, 2003 you set out the estimated costs for compiling and preparing the information requested. The estimate is very substantial. I would ask that you forward me a breakdown as to how you calculated your estimation of 562 hours "to compile and prepare the information requested". Please provide details of the calculation of the estimate of hours involved including the personnel involved and their function. Please also advise what is involved in "preparing the information requested".

I realize the applicant's request is very broad, but my concern is that wherever possible, the spirit of The Freedom of Information and Privacy Act should be honoured and requests for information should not be discouraged by establishing prohibitive costs.

When replying, I would also ask you to address the issues raised in the applicants letter of May 14th. It appeared to address some valid concerns..."

[5] The Respondent replied by letter dated June 6, 2003. In that letter, there was a detailed calculation of the estimate for the search and review of the requested documents. The Respondent estimated that there would be approximately 5,500 pages of documents from several different departments that would have to be found, reviewed and prepared for disclosure. The letter also stated, in part:

“... An issue raised by [REDACTED] in her application for review is that the Minister recently reviewed the “mega bingo” project, to determine project costs, so the materials should not take 562 hours to locate. The review that the Minister requested was a review of financial records to determine total cost and as a result that review was considerably narrow in scope compared to the applicant’s request for “all information”. Further, this review did not require SLGA to prepare documents for release external to the organization. With the exception of the electronic records, SLGA does not expect that the location of records will be significantly time-consuming. However the review and preparation of the records for release will require substantial time. You will note for the estimate above that we used 5 minutes per page as a proxy for the time it will take to review each page, determine release issues connected with the information, and to conduct any severing required. Five minutes per page may actually be a significant under-estimation of the time that would be involved.

[REDACTED] express concern that SLGA “is seeking to charge” her “For the time related to its deliberations on release”. SLGA has always interpreted section 6(2) of the Regulations as providing for a fee to be charged for time spent “preparing a record for disclosure” as including the time an agency must spend considering the releasability of any particular record and whether or not the severing of certain aspects of the record will allow the release of the remainder of the documents. The estimate provided to [REDACTED] was made on that basis.

[REDACTED] suggests that time and money could be saved if she were to review the documents directly. However, as you are aware, SLGA must identify, collect, review, evaluate the information and sever protected information, prior to release of any records. SLGA has a responsibility to sever information that is either prohibited from release by mandatory provisions in the Act, or to deny access to information the head of SLGA deems necessary, by the discretion provided to her in the Act. ...”

[6] On June 11, 2003, I sent the following letter to the Applicant:

“I have now received a response to my letter to Saskatchewan Liquor and Gaming Authority dated May 20, 2003, and enclose herewith a copy of their letter dated June 6, 2003.

Before I proceed to review and report on the matter of the proposed charges, I would appreciate receiving any representations or comment you would like to address to me with respect to this matter, including any responses you might have with respect to the positions taken by SLGA.

It might well be that a lot of these costs could be avoided if the scope of your request was narrowed, and if you feel that this is possible, or that a meeting with myself, yourself and the respondent would be beneficial, then I would proceed to arrange same."

[7] The Applicant eventually decided to amend her request to:

"All documents related to the requests for proposals or tendering work – including any specifications laid out by Saskatchewan Liquor and Gaming to Western Canada Lottery Corporation for reviewing the proposals."

By letter dated August 11, 2003, the Respondent replied with an amended estimate of fees. The letter states:

"Thank you for your July 22, 2003 letter stating [REDACTED] request and asking for our estimated costs for "all documents related to the requests for proposals, or tendering work – including any specifications laid out by Saskatchewan Liquor and Gaming to Western Canada Lottery Corporation for reviewing the proposals."

Our cost assessment for the request is calculated as follows:

- to review, assess and sever known records in the Charitable Gaming Branch for disclosure –
 - 1 person x 19 hours (5 min./page for approximately 250 pages)
@\$15/half-hour = \$570 (minus 2 free hrs @ \$30) = \$510 \$ 510
- to review, assess and sever records from other Divisions/Branches-
 - 1 person x 4 hrs @ \$15/half-hour 120
- to identify and make hardcopies of e-mail records –
 - 1 person x 8 hrs program time @ \$25/hr 200
 - 1 person x 4 hrs run time @ \$75/hr 300
- to review, assess and sever e-mail records for disclosure –
 - 1 person x 8 hrs @\$15/half-hour 120
- Executive Management review and assessment –

| | |
|--|---------|
| 2 persons x 2 hrs @ \$15/half-hour | 120 |
| • Copying costs – 200 pages @ \$.25 | 50 |
| Total | \$1,540 |

As stated in our previous letter, we normally have two persons review, assess and sever records to ensure accuracy and compliance with the Act prior to review and assessment by Executive Management. However, in order to minimize [REDACTED] costs for this review, SLGA will provide the additional reviewer without additional cost.

Section 9(4) of *The Freedom of Information and Protection of Privacy Act* states that “where an estimate is provided the head may require the applicant to pay a deposit of an amount that does not exceed one-half of the estimated amount before a search is commenced for the records for which access is sought.”

If [REDACTED] wishes to proceed with the request, SLGA is requesting \$770.00 as a deposit equal to one-half of the estimated processing cost. . . .”

[8] I forwarded this letter to the Applicant and on August 18, 2003, I received the following reply from her:

“Further to your most recent correspondence regarding file [REDACTED], I’m writing to confirm that I would like a review of the costs detailed by the Saskatchewan Liquor and Gaming Authority to charge \$1,540 to compile and review records pursuant to my request for information.

Below are some of my questions about this charge.

1. Where in the regulations does it outline the cost to “review (and) assess records? Is SLGA now broadening the definition of “preparing for disclosure” to include ‘thinking time’?
2. Why does the estimate charge for an Executive Management review? Is it reasonable to charge for reviewing a review?
3. Why is it necessary to make hard copies of electronic mail? Is it not possible to provide me with an electronic copy?

Here are some thoughts on the above:

On the matter of “preparing a record for disclosure”, while it may be argued that agencies have in the past charged some fees for reviewing documents, this practice is now clearly out-of-hand and a more definitive decision by the commissioner is needed.

Earlier “precedents” may have been set when parties were more willing to follow the spirit of the act. That, obviously, has fallen by the wayside.

It is open to the current commissioner to make whatever recommendations are appropriate in current circumstances. If the current situation shows a marked departure from previous, then the commissioner ought not to recount previous “precedents”. They should illuminate, and not dictate.

Therefore, the commissioner should determine that “preparing a record” for disclose [sic] does NOT entail any assessment or review.

It should be noted that the words “assess”; “review”; and other words of that type do NOT appear in the regulations covering fees. It was never contemplated that government should recover from applicants monies for time spent considering a disclosure.

Finally, as is now evident, there is no way to police the matter.

Given the above concerns about the arbitrary nature of ‘reviewing’ that SLGA seems to want to do, I am further discouraged that SLGA now wants to charge for a second review; a “review” of the “review” by Executive Management. It seems unreasonable to me that SLGA would charge for a ‘review’ that is so inadequate, it must be further reviewed before disclosure can occur.

That, in addition to the charge for photocopying electronic records, has led me to believe that SLGA is essentially refusing my request once again.

You will note that in previous correspondence, I have offered again and again to find a compromise to receive information about a government program that lost almost \$8 million dollars.

I have amended my original request, and am now asking for a very specific portion of the records regarding tendering and specifications for the Western Canada Lottery Corporation.

I have offered to have the Commissioner review the records to determine what is available to me, and for me to come and review those documents – in

an effort to save photocopying charges. Clearly, SLGA is not open to any such compromise as it is now asking to charge for making hard copies of e-mail.

I think it is clear that SLGA is not following the spirit of the Freedom of Information and Privacy Act [sic].

These are my submission [sic] on the matter. I look forward to your report.”

[9] I forwarded the Applicant’s letter to the Respondent who replied by letter, dated September 3, 2003 as follows:

“. . . With respect to [REDACTED] first question regarding the cost to “review and assess” records, our position is that reviewing and assessing a record is an activity that must be undertaken “in preparing it for disclosure” (subsection 6(2) of *The Freedom of Information and Protection of Privacy Regulations*) after “searching for a record requested by an applicant”. Our view is that review and assessment involves determining that the specific information requested is included in the text of a record or body of information and deciding whether the information is accessible pursuant to *The Freedom of Information and Protection of Privacy Act*. It also includes determination of what information is protected and must be severed from an accessible record due to mandatory provisions of the Act.

We believe that we are consistent with other government agencies in trying to provide a reasonable and objective measure of the time incurred to adequately protect the privacy rights of individuals, the commercial interests of third parties, and then related cost to taxpayers of preparing records for disclosure or protecting information. We believe that it is reasonable that, in addition to search time and copying time, a public servant would take, on average, 5 minutes per printed page to read a record and make a decision as to whether information on that page is releasable as well as sever any information that may be protected according to the Act. This estimated time provides an objective measure that severely restricts the “thinking time” any public servant has to complete activities required to prepare a record for disclosure or protect information included on a record.

Due diligence to reduce risks and obviate potentially damaging consequences to individuals must be exercised as part of the Freedom of

Information process, and is monitored well through appeal to your office ensuring accountability for all Freedom of Information processes.

With respect to [REDACTED] question as to why the estimate charges for an Executive Management review, the Act provides that the final authority for releasing information pursuant to the Act rests with out agency head, SLGA's CEO. The mandatory provisions of the Act require that our CEO protect records supplied by other governments (subsection (1), Cabinet documents (subsection 16(1), third party information (subsection 19(1), those that may disclose personal information (subsection 29(1), and personal information of a deceased individual (subsection 30(1)).

Further, the Act places discretion with the CEO to protect many other types of records, including, for example, those related to information injurious to intergovernmental relations or national defence (section 14), law enforcement and investigations (subsection 15(1) of the Act and subsection 14(f) of the regulations); and, economic and other interests (subsection 18(1)).

Given the varied instances provided by the Act in which the agency head is required to exercise her discretion to protect information or release it, we believe that it is reasonable in our process that our CEO and/or those who report directly to her have the opportunity to review and assess the records and our proposed response to every request under the Act in order to make an informed decision as to whether she should use her discretion to protect the information or provide access to it. Executive Management review is a standard procedure in SLGA process for every Freedom of Information request and is not arbitrarily applied. We believe that this type of review is a requirement to ensure due diligence in the process.

[REDACTED] final question is related to the necessity of making hard copies of electronic mail and if it is not possible to provide her with an electronic copy. To ensure the integrity of all information we provide, SLGA's policy is to provide all responses to FOI requests in hardcopy form, mailed to the address provided on the FOI Request Form. Further, if required, it is difficult to severe [sic] information from an electronic record, at lease without incurring more expense to manually alter the electronic record. . . ."

[10] I intend to restrict my review to the fees charged by the Respondent for the Applicant's amended request.

[11] The first issue I must deal with is whether I have the jurisdiction to review the Respondent's estimate of fees. Section 49(1)(a) of *The Freedom of Information and Protection of Privacy Act* provides that an applicant may request a review where he or she is not satisfied with the decision of a head pursuant to section 7. Section 7(2)(a) states:

“7(2) The head shall give written notice to the applicant within 30 days after the application is made:

(a) stating that access to the record or part of it will be given on payment of the prescribed fee and setting out the place where, or manner in which, access will be available; . . .”

I believe that this section allows me to review the decision of a head regarding the fee applicable with respect to an application. It is also significant that my predecessor in this office came to the same conclusion on a number of occasions.

[12] The amount of fees that a head can claim before granting access is governed by the following provisions of *The Freedom of Information and Protection of Privacy Regulations*:

“6(2) Where time in excess of two hours is spent in searching for a record requested by an applicant or in preparing it for disclosure, a fee of \$15 for each half-hour or portion of a half-hour of that excess time is payable at the time when access is given.

(3) Where a search and retrieval of electronic data is required to give access to a record requested by an applicant, a fee equal to the actual cost of the search and retrieval, including machinery and operator costs, is payable at the time when access is given.

7(2) Where the amount of an estimate exceeds the actual amount of fees determined pursuant to section 6, the actual amount of fees is the amount payable by the applicant.

8(1) No fees are payable where access to a record is refused.

(2) Where a deposit has been paid pursuant to subsection 9(4) of the Act and access to the record requested is refused, the deposit is to be refunded to the applicant.”

In addition, section 6(1)(a) of the Regulations provide that the prescribed fee for photocopying is \$0.25 per page.

[13] The Applicant has raised the issue of whether “preparing” a document for disclosure includes a review of the document to be determined if it should be disclosed. Clearly, the review of the documents is necessary to determine whether portions need to be severed or whether the document must be entirely withheld from disclosure pursuant to either the mandatory or discretionary exemptions under the Act. The review may constitute the most significant portion of the time taken to prepare the document for disclosure. The wording of section 7(2) is therefore, in my opinion, broad enough to include the time taken to review a document and therefore the Respondent is entitled to charge fees for that time.

[14] The fees charged for the review time as well as other preparation time must however be reasonable. The Respondent has indicated that it has charged fees based on its employees spending five minutes per document to review, assess and sever the records including the recovered e-mails. In my position, I have had ample experience in the review of a large number of documents to determine if they should be disclosed. From this experience, I have found that it would take considerably less than five minutes per document to make this review and prepare the document if the documents were reviewed in large numbers. It will be obvious on many of those documents whether they should be disclosed and the review will take seconds as opposed to minutes. In my opinion, a more reasonable estimate would be two minutes per document.

[15] The Respondent has also claimed it will take two employees five minutes per document for Executive Management review and assessment. Although I respect the Respondent’s position that its Chief Executive Officer, as the designated head, is responsible for determining whether documents can be disclosed, and that this review is essential to the preparation of the documents for disclosure, I do not believe that it is reasonable for the Applicant to be charged for two executive officers or employees to conduct the review. The charges should be limited to one employee

performing the review. As stated above, it is very doubtful that the review will take five minutes per documents. A more reasonable time for each review would be two minutes.

[16] Section 6(3) of the Regulations provides that the Respondent is entitled to charge the actual cost to search and retrieve electronic data. The Applicant has charged this cost at \$25.00 per hour for programming time and \$75.00 per hour to run the program. It has provided no basis for these amounts. The costs are likely reasonable although in order to ultimately claim the actual costs of the retrieval, the Respondent will have to provide the Applicant with detailed calculations as to how these figures were determined including the qualifications of the employees or consultants who were engaged to program and run the retrieval process and the actual hours required from each in order to complete the retrieval process.

[17] Based on these changes, I would recommend that the Respondent's fees be reduced as follows:

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|---|-----------|
| Review, assessment and severance of Charitable Gaming Branch Documents: | |
| 8.5 hours (based on 2 minutes per page for 250 pages) at \$15 per half hour | |
| less the first 2 hours | \$195 |
| Review, assessment and severance of other Division Documents: | |
| 1.5 hours (based on 2 minutes per page for 48 pages) at \$15 per half hour | 45 |
| Identification of e-mails | |
| 8 hours for program time at \$25 per hour | 200 |
| 4 hours for run time at \$75 per hour | 300 |
| Review, assessment and severance of retrieved e-mails: | |
| 3.0 hours (based on 2 minutes per page for 96 pages) at \$15 per half hour | 90 |
| Executive Management review and assessment | |
| 1.0 hour (based on 2 minutes per page for 24 pages) at \$15 per half hour | 30 |
| Photocopying costs (200 pages at 0.25 each) | <u>50</u> |
| Total | \$910 |

[18] Pursuant to section 8(1) of the Regulations, the Applicant should not have to pay these fees for any documents that are not disclosed. In preparing its final account, the Respondent should therefore reduce the above fees accordingly in proportion to the documents entirely withheld from disclosure.

[19] For the reasons outlined above, it is therefore my recommendation that the Applicant only be required to pay a deposit of one half of the estimated costs of \$910 or \$455 in order for the Respondent to proceed with the access application.

[20] Dated at Regina, in the Province of Saskatchewan, this 25th day of September, 2003.

RICHARD P. RENDEK, Q.C.
Acting Commissioner of Information
and Privacy for Saskatchewan

