

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3048

Appeal PA11-550

Alcohol and Gaming Commission of Ontario

February 6, 2012

Summary: The appellant made a four-part access request under the *Freedom of Information and Protection of Privacy Act* to the Alcohol and Gaming Commission of Ontario. The Ministry of the Attorney General, on behalf of the AGCO, issued a time extension decision, which was appealed to this office. In this order, the adjudicator does not uphold the time extension decision, finding that it was premature.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, s. 27(1).

Orders Considered: M-555, MO-2234, P-81, PO-2634.

BACKGROUND:

[1] The Alcohol and Gaming Commission of Ontario (the AGCO) received an access request under the *Freedom of Information and Protection of Privacy Act* (the *Act*), dated October 17, 2011 for the following:

[Part 1]) all direction to exclude records issued by the Alcohol & Gaming Commission of Ontario ("AGCO") from 2007 to present day;

[Part 2]) all minutes of AGCO Board Meetings since 2000;

[Part 3)] all communications between AGCO and all parties, a, b, c, d, e, f, g (as below) and Ontario Provincial Police, concerning all direction to exclude records, from 2007 to present; and

[Part 4)] all communications, correspondences, directives, documents, contracts, agreements, since April 2000, to the present day, between the AGCO and each of

- (a) Ontario Lottery & Gaming [Corporation]
- (b) Ontario [Ministry] of Energy & Infrastructure
- (c) Ontario [Ministry] of Finance
- (d) Ontario [Ministry] of Finance
- (e) Complex Services Inc.
- (f) Falls Management Co.
- (g) Casino Niagara & Niagara Fallsview Casino Resort (a.k.a. Niagara Casinos).

Personal [information] can be severed. I request a fee waiver in full, not only in part, on the grounds that payment of any amount by me for the responsive records would be a financial hardship. ...

[2] On November 2, 2011, the Ministry of the Attorney General (the ministry), on behalf of the AGCO, sent an e-mail to the requester, confirming receipt of her request and seeking clarification with respect to parts two and four. The email stated that "this request may be quite voluminous" and the ministry "has begun a search for responsive records; however, would like to ask if there is any specific record or issue in order to further narrow/clarify [sic] this request."

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

[4] With respect to part four of the request, the requester indicated that she did not wish to narrow her request, even though responsive records may be voluminous. She further clarified that the responsive records for this part of the request are those which relate to "all matters dealing with the Direction to Exclude." She stated:

That is, responsive records are not limited to any particular Direction to Exclude record, but to all discussions, policies, procedures, issuance of, actions taken as a result of, and all actions directed as a result of, by the Board and overall, ALL MATTERS that have any relation to Direction to Exclude. [original emphasis]

[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.

. . .

The next categories of records [parts 3 and 4] can be compiled when the first two categories, as above, are completed. I propose that you may extend the time needed to compile these #3 and #4 category records, once the #1 and #2 category records are compiled, and provided to me.

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

[8] On December 1, 2011, the ministry sent the requester an email, advising that it agreed to respond to the request separately, and that it:

. . . will issue its decision on item #1, all direction to exclude records issued by AGCO from 2007 to present, before December 30, 2011.

. . . will then begin processing item #2 in the new year, and upon completion, the ministry will proceed with item #3 and #4.

[9] The requester responded by advising that the proposed December 30, 2011 date was not satisfactory and expressed concerns regarding the delay on the part of the AGCO in processing part one of the request. The requester and the ministry subsequently exchanged further e-mails, where the requester continued to express concerns regarding the delay.

[10] On December 7, 2011, the ministry issued an access decision in response to part one of the request, providing partial access to the records. The ministry then advised the requester that it was processing part two of the request, and that "an interim fee estimate and/or decision will follow within 30 calendar days."

[11] On December 16, 2011, the ministry issued a time extension letter to the requester, advising that it was processing part two and that "an interim fee estimate and/or decision will follow within 30 calendar days, on or before January 15, 2012." It also noted that it had extended the time to respond to the balance of the request "because your request necessitates a search through a large number of records and meeting the time limit would unreasonably interfere with the operations of the institution." The ministry advised the requester that:

We are aiming towards a March 1, 2012 deadline, however each item may require further clarification and/or fee estimate which may extend the time.

[12] On December 21, 2011, the requester (now the appellant) appealed the ministry's time extension decision to this office.

[13] During the mediation of this appeal, specifically on January 12, 2012, the ministry issued an interim fee notice to the appellant regarding part two of her request, advising that access to the responsive records will be granted in part. The decision also included a fee estimate in the amount of \$780.00 and a statement regarding the fee waiver request.

[14] The ministry subsequently advised the mediator that it was awaiting a response to its letter of January 12, 2012 before taking any further action on part two of the request.

[15] In regard to the time extension letter, the appeal then moved to the adjudication stage of the process, where an adjudicator conducts an inquiry. I sought, and received, representations from the ministry and the appellant. During the inquiry stage, on February 3, 2012, the ministry issued an interim fee/access decision to the appellant with respect to parts three and four of the request.

[16] For the reasons that follow, I do not uphold the time extension.

DISCUSSION:

[17] Time extensions are governed by section 27(1) of the *Act*. One of the issues in this appeal is whether the extension was reasonable in the circumstances of the request, in the context of the provisions of section 27(1). Factors which might be considered in determining reasonableness include:

- the number of records requested;
- the number of records the institution must search through to locate the requested record(s);
- whether meeting the time limit would unreasonably interfere with the operations of the institution; and
- whether consultations outside the institution were necessary to comply with the request and if so, whether such consultations could not reasonably be completed within the time limit.

[18] A number of orders, beginning with Order P-28, have found that where the institution is responding to a number of separate requests by the same individual, which collectively require a search through a large number of records or necessitate consultation, section 27 is not properly triggered.

The request

[19] The AGCO provided the institutional representations in this appeal. In addition to the background information set out previously, the AGCO provided additional information regarding the request and the discussions between the appellant and the ministry.

[20] The AGCO is an institution for the purposes of the *Act*. Its head is the Attorney General. As such, access requests for records in the custody and control of the AGCO are made through the ministry. Ministry staff communicates directly with requesters and relays information to the AGCO. The AGCO then makes recommendations to the ministry, but the final decision with respect to access requests rests with the ministry's head, the Attorney General.

[21] The AGCO states that the ministry received the appellant's request on October 24, 2011, and forwarded it to the AGCO the same day. The AGCO began to search for records on October 25, 2011 and on October 26, 2011, recommended to the ministry that it seek a time extension. The AGCO submits that this recommendation was based on the broad nature of the request, which covers a very large number of records, as well as the requirement to conduct searches in numerous departments within the organization. As an example, the AGCO states:

[I]tem 4 alone sought access to a copy of every piece of correspondence between the AGCO and each of the listed entities. This would necessitate, in addition to other searches, a physical search through every gaming file from April 2000 to the date of the request . . . Third party notification is required in some cases. As part of the request stretch back to the year 2000, five banker boxes of records located off-site were retrieved. A physical search through these files is required as some of the responsive records are intermingled with other records. A banker's box has approximately 1,500 pages, which means approximately 7,500 records must be reviewed. On site, 50 linear inches have been identified as responsive to the request. These figures are with respect to paper records only. Electronic records, such as emails, must also be retrieved.

[22] On November 10, 2011, the AGCO provided the ministry with a fee estimate, which indicated a search time of 155 hours. The total number of pages for photocopying was estimated to be approximately 1000 pages and the total number of hours for preparation was estimated to be approximately 23 hours. The AGCO did not recommend granting a fee waiver.

[23] The AGCO submits that, in email communication sent to the ministry on November 17, 2011, the appellant agreed that the ministry could respond to each of the four parts of the request separately, beginning with parts one and two of the request. Once parts one and two were compiled, the processing of parts three and four of the request could commence.

[24] The AGCO states:

Having received clear agreement from the appellant in the email of November 17, 2001, on November 21, 2011, [the ministry] provided the AGCO with timelines to respond to each part of the request separately and provided a 30 day turnaround time for each.

[25] On November 30, 2011, the ministry relayed to the AGCO that the first part of the request was due on December 17, 2011. On December 1, 2011, the ministry sent an email to the appellant setting out the timeline for processing each part of the request. A decision with respect to item one would be issued before December 30, 2011. Item two would be processed in the new year. Upon completion of item two, the ministry would proceed with items three and four.

[26] The AGCO submits that also on December 1, 2011, the appellant sent a series of four emails to the ministry, objecting to the date of December 30, 2011. The appellant stated in her email that "such exact records, the Direction to exclude, have been disclosed by the AGCO under FIPPA requests, and there is no cause for any further delay." The AGCO submits that the appellant appears to be requesting records that she

has already had an opportunity to both view and examine and that the appellant's ultimate refusal to work with the ministry in narrowing the scope of her request should be understood in this context.

[27] The AGCO also submits that in the fourth email sent by the appellant on December 1, 2011, she stated:

[N]owhere do I ask, nor do I seek that the AGCO and the Ministry process all of my request at once. When I first agreed that my request may be separated into items #1, #2, #3 and #4, I explained that it was based on the fact that it is very convenient, simple, easy, fast to locate the records in item #1 and #2, and that this should not be a matter of any difficulty.

[28] The AGCO states that it continued to rely on the November 17, 2011 email as providing the clearest agreement from the appellant on how to proceed with the request.

[29] On December 16, 2011, the ministry sent a time extension letter to the appellant in regard to parts three and four of the request.¹ In its letter of December 16, 2011, the ministry advised that, with respect to part two of the request, an interim fee estimate and/or decision will follow by January 15, 2012. The ministry extended the time for processing the request to March 1, 2012 and stated:

We are aiming towards a **March 1, 2012** deadline; however, each item may require further clarification and/or a fee estimate which may extend the time. [original emphasis]

[30] It is this letter that is the subject matter of this appeal.

[31] 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 request and, on January 12, 2012, the ministry issued a fee estimate to the appellant, which was lower than that recommended by the AGCO. While awaiting additional financial information, 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.

Representations regarding the time extension

[32] The AGCO submits that all of the circumstances of the request must be appreciated in order to determine whether the time extension was reasonable. The circumstances of this request include, in addition to requiring a search through a very

¹ As previously set out in this order, a final decision letter regarding part one of the request was issued on December 7, 2011. In that decision, the ministry granted partial access, and waived the fee.

large number of records to locate numerous responsive records, consideration of a fee waiver based on financial hardship.

[33] The AGCO states that this four-part request involves a large number of records. The ministry attempted to work with the appellant to narrow the scope of her request, but she refused. The ministry then advanced a compromise solution whereby the request was split into four parts, to which the appellant ultimately agreed. This solution would assist both the AGCO and the ministry in processing the request in a way that would not interfere with the operations of either organization.

[34] The AGCO submits that there are three factors, which might be considered in determining the reasonableness of the request for a time extension. The first factor is the number of requested records. The AGCO submits that it located approximately 1080 records responsive to part two of the request. The records must then be reviewed to ensure they are responsive and prepared for disclosure, which includes a consideration of the mandatory statutory exemptions, as well as an appropriate exercise of discretion with regard to discretionary exemption. In addition, the records must be photocopied. The AGCO states:

In spite of the appellant's belief that processing and review is instantaneous, the work involved is, in fact, painstaking and time-consuming.

[35] The second factor the AGCO refers to is the number of records the institution must search through in order to locate the records responsive to the request. As previously set out, the AGCO states that five banker boxes of off-site records were retrieved and must be reviewed for responsive records. This represents approximately 7,500 pages. In addition, on-site, 50 linear filing inches have been identified as potentially responsive to the request. The AGCO submits that it is clear that this is a very large volume request.

[36] The third factor the AGCO enumerates is whether meeting the time limit would unreasonably interfere with the operation of the institution. The AGCO states that it has assigned two additional staff members to assist in processing this request, as well as the records management staff members who will continue to process this request in accordance with its obligations under the *Act*. However, the AGCO states, in spite of these efforts, the necessary work to complete the request still has a significant impact on other day-to-day activities within it.

[37] The AGCO further submits that a time extension is justified based on the work required to respond to one request alone, not based on the work required to respond to all parts of the appellant's requests. As previously stated, the AGCO submits that the ministry worked with the appellant to develop a compromise of processing the request in four parts, and that this solution was ultimately agreed to by the appellant. The

AGCO states that the only reason there is an appeal is because the appellant appeared to change her mind in her first email of December 1, 2011 but by the fourth email, appeared to change her mind again. The AGCO submits that the time extension should, therefore, be upheld.

[38] 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 title² 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.

[39] 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.

[40] 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.

[41] The appellant also submits that the same process could be undertaken by the AGCO with respect to parts three and four of her request. The appellant states that the majority of records should be available electronically, permitting rapid electronic key word searches, within each ministry and agency listed in parts three and four of the request. In addition, the appellant acknowledges that there may be some records that are exclusively available in hard copy for which manual searches will be necessary, but reiterates that the majority of the records should be available electronically.

Analysis and findings

[42] The relevant sections relating to time extensions are sections 24, 26 and 27 of the *Act*. Section 24 states, in part:

² Minutes of Board Meetings.

24(1) A person seeking access to a record shall,

(a) make a request in writing to the institution that the person believes has custody or control of the record;

(b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record; and

(c) at the time of making the request, pay the fee prescribed by the regulations for that purpose.

...

(2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[43] Section 26 sets out the time for responding to the request and section 27 sets out the circumstances under which a time extension can be claimed. These sections state:

26. Where a person requests access to a record, the head of the institution to which the request is made or if a request is forwarded or transferred under section 25, the head of the institution to which it is forwarded or transferred, shall, subject to sections 27, 28 and 57, within thirty days after the request is received,

(a) give written notice to the person who made the request as to whether or not access to the record or a part thereof will be given; and

(b) if access is to be given, give the person who made the request access to the record or part thereof, and where necessary for the purpose cause the record to be produced.

27(1) A head may extend the time limit set out in section 26 for a period of time that is reasonable in the circumstances, where,

(a) the request is for a large number of records or necessitates a search through a large number of records and meeting the time limit would

unreasonably interfere with the operations of the institution; or

- (b) consultations with a person outside the institution are necessary to comply with the request and cannot reasonably be completed within the time limit.

(2) Where a head extends the time limit under subsection (1), the head shall give the person who made the request written notice of the extension setting out,

- (a) the length of the extension;
- (b) the reason for the extension; and
- (c) that the person who made the request may ask the Commissioner to review the extension.

[44] In this appeal, the ministry issued a time extension letter on December 16, 2011 with respect to parts three and four of the request and an interim fee estimate on January 12, 2012 respecting only part two of the request. On February 3, 2012, the ministry issued an interim fee estimate/access decision to the appellant with respect to parts three and four of the request. As previously stated, it is the time extension letter of December 16, 2011³ that is the subject matter of this appeal, and not the interim fee estimates relating to part two, three and four of the request.

[45] In Order P-81, former Commissioner Sidney Linden set guidelines for the issuance of final and interim access decisions, fee estimates and time extensions. These guidelines were reviewed, considered and ultimately reaffirmed in Order M-555.

[46] Order P-81 describes the interim access decision and fee estimate procedures as follows, beginning with a discussion of the time extension provisions found in section 27 of the *Act*:

"Interim" section 26 decisions are not binding on the head and, therefore, cannot be appealed to the Commissioner.

...

Regardless of whether the head has issued an "interim" section 26 notice (based on a representative sample or consultations) or a regular section

³ This letter advised the appellant that each item may require further clarification and/or fee estimate which may extend the time.

26 notice (based on inspection of the actual requested record), *if the notice is accompanied by a fees estimate, the issuance of the fees estimate has the effect of suspending the 30 day time limit imposed by section 26. If the institution sends a fees estimate to the requester on day 14, for example, day 15 is deemed to be the day after the institution receives the required deposit from the requester or issues a decision to waive fees pursuant to a request for waiver.* If the requester appeals the issue of fees, the running of the 30 day period is suspended. It begins to run again on the day after the appeal is resolved, either by Order of the Commissioner or mediated settlement between the parties.

As soon as the question of fees is resolved and the 30 day time limit is reactivated, the institution must retrieve and review all of the requested records for the purposes of determining whether access can be given. If the records are to be disclosed, section 26(b) requires the head to "...give the person who made the request access to the record or part thereof, and where necessary for the purpose cause the record to be produced..." within the balance of the 30 day time limit.

...

The 30 day time limit referred to in my discussions is subject to the extension provisions of sections 27 and 28 of the Act, in the usual manner.

[Emphasis added.]

[47] In Order M-555, former Senior Adjudicator John Higgins reaffirmed the approach taken in Order P-81. In regard to when a time extension may be claimed under section 27, he stated:

In my view, Order P-81 also stands for the proposition that, once the question of fees is settled and any requested deposit has been paid, if the institution finds that it faces one of the situations described in section 20 [of the *Municipal Freedom of Information and Protection of Privacy Act*, the equivalent of section 27 of the *Act*], it may claim a time extension at that point (subject to the requester's right to appeal that time extension in the usual way). I agree with this interpretation, which is set out in the summary of steps for responding to a request found on page 13 of Order 81, and particularly step 5, which states:

receipt of deposit or decision to waive fees reactivates the 30-day time limit, *subject to extensions under sections 27*

and 28 [the provincial Act's equivalents of sections 20 and 21 of the Act], and ...

- if an "interim" section 26 [the ... equivalent of section 19 of the Act] notice was sent, head reviews all of the records covered by the request and issues a final decision under section 26. (Emphasis added.)

[48] Therefore, these orders indicate that once the deposit has been paid, the 30-day time period for responding under the *Act* is reactivated and, if it wishes to do so, the institution must issue a time extension under section 27 before the expiry of the 30 days.⁴

[49] In Order MO-2234, one of the issues under consideration by Adjudicator Colin Bhattacharjee was whether an institution could claim a time extension with respect to items for which it had already made an interim access decision and, if so, whether the time extension claimed by the institution was reasonable. Adjudicator Bhattacharjee did not uphold the institution's decision to claim a time extension, finding that the institution had prematurely claimed the time extension for responding to those items for which it had issued an interim access decision. He further held that the institution could claim a time extension only after it had received the appellant's deposit.⁵

[50] I adopt the reasoning taken by Adjudicator Bhattacharjee and will apply it to the circumstances in this appeal. In this appeal, on December 16, 2011, the ministry issued a time extension relating to parts three and four of the request. It then issued an interim fee/access decision on January 12, 2012 only with respect to part two of the request. The time extension decision of December 16, 2011 contemplated possible future interim fee/access decisions with respect to parts three and four of the request. On February 3, 2012, the ministry issued an interim fee estimate and interim access decision to the appellant with respect to parts three and four of the request. In my view, the ministry's decision to claim a time extension with respect to parts three and four of the request was premature as it was not entitled to do so until such time as it had provided the appellant with an interim fee estimate. Accordingly, I will not uphold the time extension with respect to parts three and four of the request.

⁴ See also Orders M-439, M-1777 and PO-2634.

⁵ In Order MO-2234, Adjudicator Bhattacharjee had upheld part of the institution's fee estimate.

ORDER:

I do not uphold the ministry's time extension with respect to parts three and four of the request.

Original Signed by: _____
Cathy Hamilton
Adjudicator

_____ February 6, 2012