

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER PO-3434

Appeal PA14-364

Ministry of the Environment and Climate Change

December 5, 2014

**Summary:** The Ministry of the Environment and Climate Change (the ministry) received a request for records relating to a proposed wind project. The ministry claimed a time extension for an additional 150 days under section 27 of the *Act*, which was reduced to 120 days during mediation. This order does not uphold the ministry's decision to extend the time for an additional 120 days. The ministry is ordered to issue its final decision on access to records that do not require third party notice on or before December 12, 2014.

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

**Orders and Investigation Reports Considered:** Orders M-1 and Order PO-3151.

### OVERVIEW:

[1] The Ministry of the Environment and Climate Change (the ministry) received a ten-part request on June 30, 2014 under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information for the period February 18, 2014 to June 23, 2014:

Content Details: All "records", as defined in FIPPA, in the custody of, or under the control of, the Ministry of the Environment, Ontario

FILE: REA, [named company], [named project]/[named company],  
Clearview Township, Simcoe County, Ontario

[2] The request identified a specific contract and included a non-exhaustive list of records being sought.

[3] The ministry issued an interim decision letter dated July 22, 2014 containing a fee estimate and time extension. In this decision, the Ministry stated the following:

After a search of the Ministry's Environmental Approvals Branch records were located in response to your request. It is my preliminary decision to provide partial access to the information as the identity of complainants will be removed to protect privacy (Section 21(1)(f) of the Act.) As well, corporate confidential information will require notice to the third party (Section 17(1)(a), (c) of the Act).

[4] The ministry's decision indicated that the fee estimate for processing the request of \$638.00 represented 2 hours of search time, 2.5 hours of preparation time and copying of 2,500 pages of records. The ministry requested a deposit of \$319.00 in order to continue processing the request.

[5] The ministry's decision also stated the following:

A request for records must usually be answered within 30 calendar days, however Section 27 allows for time extensions under certain circumstances. The time limit for answering your request has been extended for an additional 150 days after receipt of your deposit. This additional time is required because of the extremely large volume of material to be reviewed and prepared for disclosure.

[6] The ministry received the fee deposit on August 11, 2014 and the requester (now the appellant) appealed the ministry's decision to extend the time for responding to the request by an additional 150 days.

[7] On August 26, 2014, this Office sent a letter to the ministry to acknowledge receipt of this appeal from the ministry's decision and to advise that it was being placed on hold due to the high volume of appeals filed by the appellant. This Office subsequently reactivated this appeal and sent a Notice of Mediation dated October 27, 2014 to the appellant and the ministry.

[8] In an effort to resolve the appeal, the ministry agreed to reduce the time extension from 150 additional days to 120 additional days, resulting in a change in the due date for a final decision from January 16, 2015 to December 16, 2014. The

appellant did not consider a 120 day extension to be reasonable. As no further mediation was possible, the file proceeded to the inquiry stage of the appeals process.

[9] I sent a Notice of Inquiry to the appellant and the ministry, setting out the issue in this appeal and inviting them to submit representations. I received representations from the appellant and the ministry.

## **ISSUE:**

[10] The sole issue in this appeal is whether the extension of time claimed by the Ministry to respond to the appellant's request was made in accordance with section 27(1) of the *Act*.

## **DISCUSSION:**

[11] Section 26 of the *Act* states as follows:

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 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.

[12] Time extensions are governed by section 27(1) which states:

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.

[13] As noted above, the ministry stated that the additional time is required due to the extremely large volume of records to be reviewed and prepared for disclosure. In its representations, the ministry states that the time extension is reasonable in the circumstances of the request and submits detailed information with respect to its access request workload and compliance and continuity of operations in support of its decision to extend the time limit by 120 days.

[14] The ministry explains that as of November 24, 2014, it has received a total of 6883 new requests in the 2014 calendar year and that it processes an average of 30 requests per day. The ministry goes on to state the following:

...the majority of FOI requests retrieve smaller volumes of responsive records which do not meet the requirements of external consultation under Section 28(1), and are not eligible to receive time extensions under Section 27(1). This sequence of requests must therefore be reviewed and answered within the initial 30-day timeline, concurrently with the Ministry's ongoing review of larger files, specifically the file at issue in the present appeal.

The estimated time allotted for reading does not include additional processes that are integrated with, and essential to, FOI review, including external and internal consultations, cross-referencing with other records, discussions with the Ministry's program area experts and technical leads, consulting relevant IPC Orders, drafting decision letters, administrative documentation, clarifying and revising requests, and responding to the various stages of appeal, including the present appeal and required representations. Cumulatively, these processes require many additional hours to complete, depending on the nature of the records and the subject matter of the request.

The time extension applied to the Ministry's voluminous FOI files not only reflects the time taken to review and prepare a single request for disclosure, but is determined relative to the Ministry's overall request volume. In fairness to all requesters, the Ministry works to respond to requests in the order of the dates received. It is therefore unreasonable to expect that the Ministry is able to work on a single request continuously from the time received to the date of the final decision, given that multiple requests are in process simultaneously, and require compliant responses under the Act.

...

The Ministry notes that accelerating time extensions that are calculated relative to the Ministry's workload jeopardizes the FOI Office's capacity to provide the equality of service that is integrated into its continuity of operations. The Ministry priority is to ensure utmost accuracy, thoroughness and consistency in decisions related to the protection of personal and proprietary information. Accelerating the timelines required to research and apply mandatory exemptions responsibly to large and complex FOI files detracts from the completeness and coherence of the review process and increase the risk of error in the Ministry's administration of the Act.

...

The Ministry notes that the IPC did not provide details of the appeal until the commencement of Mediation in October 2014, leaving the Ministry with limited time in which to adjust and reorganize timelines involving workload and the distribution of Ministry's resources between the access request related to this appeal, and other requests currently in process.

...

In order to ensure consistency, contextual familiarity and continuity of expertise, the Ministry assigned a single Assistant FOI Coordinator to lead the review process on all requests and appeals related to [named project], the majority of which have been filed by the present appellant.

[15] With respect to the retrieval of records, the ministry explains that although the appellant is a "continuing requester", the FOI office does not have immediate access to records relating to the [named project] and must liaise with two branches in order to locate and retrieve the responsive records. The ministry provides the following details:

The Ministry does not have a single available repository of records from which to quickly prepare a release package. The process whereby the responsive records were identified, retrieved from these program areas' file rooms, copied and scanned electronically, and provided to the Ministry FOI Office was detail-oriented and time consuming. It took approximately 4 hours for the entirety of the records to be extracted from the relevant files and organized for copying. The process of scanning, formatting and uploading 1,917 pages of records required approximately 7 additional hours of time from the liaison staff of the Environmental Approvals Access and Service Integration Branch.

...

The Ministry understands that the 2.5 hours of preparation time noted in the interim decision/fee estimate letter, in accordance with previous IPC decisions, only reflects an estimate of the amount of time it will take to manually sever non-releasable information from otherwise releasable records. This estimate does not account for pages that do not require severances, or pages that are withheld in full after thorough reading, consideration and, when necessary, internal consultation. The Ministry notes that every responsive record must be read in full to determine if exemptions detailed in sections 12-22 apply, and the quantities related [to] the chargeable preparation fees are not translatable to the quantity of time necessary to complete all steps in the review process.

...

...The Ministry has processed other previous requests received by this appellant related to the [named project]. Consistent with these previous requests, the records consist of technical reports, letters from the public, and emails exchanged between Ministry staff, and between Ministry staff and external stakeholders, and members of the public. These records contain large bodies of text, and often include personal information, information related to affected parties, and in the case of internal emails, advice and legal analysis exchanged within the Ministry.

The number of records retrieved in response to the present appeal totals 1,917 pages. Consistent with the general estimates, reading 1,917 pages at an average speed of 2 minutes per page would require 3,834 minutes, or 63.9 hours of time from an Assistant FOI Coordinator.

...

...the process of review also requires the FOI Office to initiate consultation with the Ministry program areas to determine the context of certain records... The time required to adequately consult these program areas, as well as to conduct appropriate analysis of the records with respect to previous Ministry decisions and IPC findings, totals approximately 7 hours for this request.

...

The Ministry notes that the 150-day extension from August 2014 to January 2015, calculated from the time the FOI Office received the appellant's payment and request was resumed, combined with the time

outstanding from the first 30 days (the Ministry issued an estimate 22 days after receipt of the request) is equivalent to approximately 790 business hours.

[16] The ministry further submits that since it received the appellant's request, the Assistant FOI Coordinator assigned to the FOI request files involving the [named project] has spent 160 hours on representations regarding related appeals, four of which involve the appellant. In total, the ministry has committed 230.9 hours to this appellant and estimates it will have devoted approximately 39% of the number of business hours between August 2014 and January 2015 once it completes another 80 hours of representations on two appeals involving the appellant for a total of 310.9 hours.

[17] Finally, the ministry submits that the review and consultation process for this appeal is not complete and that it will require a full two weeks to December 16, 2014 to complete a thorough review of this appeal and to fulfill its commitments for three other appeal files involving the appellant within the same timeframe. The ministry states that for all the above reasons, issuing a final decision prior to December 16, 2014 would unreasonably interfere with the operations of the institution. The ministry concludes with the following comments:

...the Ministry has exercised its discretion to apply a reasonable and equitable time extension in order to issue a final decision that is thorough and consistent with the principles of the Act. The Ministry has demonstrated a willingness to work with the appellant in good faith, and revised the timeline significantly from 150 days to 120 days, despite the variety of aforementioned challenges related to the volume of overall requests, and additional appeals filed by [the] appellant that are concurrently in process.

[18] In his representations, the appellant submits that the ministry's time extension is not reasonable and states that this is the sixth request he submitted to the ministry since April 1, 2013. The appellant explains the following:

...MOECC is the designated provincial institution, under O.Reg 359/09, responsible for receipt and review of a large number of records and evaluation of completeness and accuracy, having regard for all requirements of O.Reg 359/09 respecting an application renewable energy approval, including Notices, Content of required reports and municipal and public consultation and comments. This has shut down the only pipeline we have to obtaining records submitted to MOECC and other provincial Institutions, through an Access Request to IPC.

...

**My Access Request MOE-2014-037[59]** is for Access to Information respecting the proposed [named wind project] (Clearview Township, Simcoe County) a Renewable Energy Project (wind), for which approval by the Director, MOECC of a Renewable Energy Application to MOECC is required, which includes determination by MOECC of whether the Application is complete and accurate, and contains specific reports and information as set out in O.Reg. 359/09.

**I require complete and accurate records** in order to determine whether any negative environmental effects that may result from the [named project] will impact me, my family, our home, farm, farm-based businesses, aviation enterprises and employees, including those located at Collingwood Regional Airport. The [named project] is under a Feed in Tariff (FIT) Contract between [named company] and the Ontario Power Authority. My request is not frivolous or vexatious or for the purpose of delay.

**# 2014-037[59] is the sixth FOI Access Request** that I have made to MOECC since April 1, 2013, 20 months past. MOECC's estimates of the number of **pages responsive to my requests now totals more than 9000 pages.**

To date, **MOECC has only released to me 110 pages**, which included **only 57 full content pages**, the balance being exempt, duplicate, illegible, or back pages.

MOECC's total fee estimate for the above is now in excess of \$4000. I have paid in full and on demand all deposits requested, totaling \$1,620.60.

After 20 months, 5 of 7 files of my FOI Access Requests to MOECC are under Adjudication from 3rd party appeals. 2 of 7 are in the final stages of IPC Mediation, with no settlement in sight. No records have been released to me for any of these Requests, with the exception of the 100 pages referred to above.

The time period of my request (2014-[03759]) is Feb.18.14 to June 23.14. This time period comes after the EBR#1 public comment period from Dec.3.13 to Feb/1/14, and before the EBR #2 public comment period from Jul.24.14.



As such, there was little public comment occurring during this time. Following the close of the comment period, the EBR site is closed and will not accept further public comments.

Therefore, I fail to see what extremely large volume of material would need to be reviewed and prepared for disclosure. I would expect that the records for this period would include primarily correspondence and emails, email chains between MOECC, other Institutions, and the Applicant, respecting compliance with O.Reg 359/09.

[19] The appellant also clarifies that his request relates to a specific wind project and two separate and distinct corporations.

### **Analysis**

[20] I have carefully considered all of the information provided to me by both the appellant and the ministry.

[21] The ministry's representations refer to section 27(1)(a) of the *Act* in support of its claim to a time extension. As such, I will consider whether the extension of time claimed by the ministry to respond to the appellant's request was made in accordance with section 27(1)(a).

[22] The ministry has submitted detailed information on its process for processing requests and appeals, including the volume of requests received, the complexity of the nature of requests, the time required for a thorough review and need for internal and external consultation and the time and resources expended on processing the appellant's other requests and appeals.

[23] I acknowledge that the ministry reduced its proposed time extension by 30 days, from 150 days to 120 days. This demonstrates that the ministry is mindful of its obligation under the *Act* to provide access to records in a timely fashion. I also accept that the request is for a relatively large number of records. However, that alone is not sufficient to support the application of section 27(1)(a). The ministry must also establish that meeting the time limit to respond to the request "would unreasonably interfere with their operations".

[24] Consequently, I need to decide whether meeting the time limit would unreasonably interfere with the operations of the institution to warrant an extension of time to December 16, 2014.

[25] In its submissions, the ministry documents the amount of time required to read and review 1,917 pages of records. This does not include the time it already spent to retrieve, scan, format and upload the records. I also note that the request is broad

which adds to the amount of time required for the ministry to locate and review records.

[26] Therefore, based on the above, I am satisfied that under the circumstances, meeting the thirty day time limit set out in section 26 of the *Act* would have unreasonably interfered with the operations of the ministry.

[27] I must now consider whether the length of the ministry's time extension is reasonable. I note that over three months have already passed since the ministry issued its decision and the searches for the responsive records have already been completed. In its representations, the ministry has indicated that it has not yet completed a review of all of the records and that it requires the full 120 days up to December 16, 2014 in order to fully respond to the request. I am not convinced that a 120-day extension is warranted for processing 1,917 pages of records as it appears to be excessive. In Order PO-3151, a decision to extend the time for an additional 90 days for 1,700 pages of similar types of records was not upheld.

[28] Given that this is the sixth request from the same appellant for similar types of records, the ministry already has some familiarity with the records and subject matter. This should result in a swifter review of the records particularly since a single Assistant FOI Coordinator has been assigned to lead the review process for contextual familiarity and continuity of expertise.

[29] In its representations, the Ministry makes reference to section 27(1)(b) of the *Act* in conjunction with section 28(1)(a) and states that based on a preliminary assessment of the records, notice will be required to an affected party. The Ministry does not provide any details on consultations required under section 27 (1)(b) of the *Act*.

[30] The appellant is of the view that notice to third parties creates yet another delay where records cannot be disclosed until the appeal period for the third parties has expired. However, records that are not the subject of third party notice or withheld under relevant exemptions can be disclosed to the appellant with the final decision.

[31] The appellant's submissions include information with respect to his requests in the context of the ministry's Renewable Energy Approvals (REA) process and requirements under Ontario Regulation 359/09. I acknowledge that timely access to the responsive records is necessary for the appellant to determine any negative environmental impacts of a specific wind project. Unfortunately, this is not a relevant consideration in determining whether a time extension is reasonable under section 27(1). Further, the ministry is obligated to give notice under section 28(1) of the *Act* in relation to records involving affected parties.

[32] Section 28(1) of the *Act* states:

Before a head grants access to a record,

(a) that the head has reason to believe might contain information referred to in subsection 17(1) that affects the interests of a person other than the person requesting information,

or

(b) that is personal information that the head has reason to believe might constitute an unjustified invasion of personal privacy for the purposes of clause 21(1)(f),

the head shall give written notice in accordance with section (2) to the person to whom the information relates.

[33] Notice to third parties under section 28(1) of the *Act* is mandatory. In this regard, I refer the parties to Order M-1 where former Commissioner Tom Wright made the following comments:

In its representations, the institution appears to suggest that the fact it was required to send notices to third parties justifies, in part, the time extension. Section 21 of the [Municipal Freedom of Information and Protection of Privacy Act which is equivalent to section 28 of the *Act*] provides for notice to third parties in certain circumstances, but, in my view, the procedures for sending such notices are not relevant to the issue of time extension and are a separate consideration for the institution.

[34] I agree with these comments. Section 28 of the *Act* sets out the relevant timelines that the institution must follow when notifying third parties. Therefore, such notification is not relevant to the issue of the ministry's time extension.

[35] To conclude, I do not uphold the ministry's time extension of an additional 120 days.

[36] With respect to those records that do not require third party notice to be given or for which third party notice has already been given, I will require the ministry to issue a final access decision to the appellant no later than December 12, 2014.

[37] With respect to records affecting third party interests for which notice is required under section 28, notice to affected parties in relation to those records must be given by December 12, 2014, and the ministry must issue a final decision on access to the appellant and to the third parties no later than 30 days following this notification pursuant to section 28(7) of the *Act*.

**ORDER:**

1. I do not uphold the ministry's time extension decision of an additional 120 days.
2. With respect to those records that do not require third party notice to be given, I order the ministry to issue a final access decision to the appellant no later than **December 12, 2014**.
3. Where affected party notice is required to be given under section 28, I order the ministry to give such notice no later than **December 12, 2014** and to issue a final access decision to the appellant and affected third parties no later than 30 days following this notification.

Original Signed By:  
Maria Tzimas  
Acting Adjudicator

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December 5, 2014