

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3747

Appeal PA17-202

Ministry of the Environment and Climate Change

July 7, 2017

Summary: On February 6, 2017, the appellant submitted a request pursuant to the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ministry of the Environment and Climate Change (the ministry) for access to records. The ministry issued an interim decision, fee estimate and claimed a time extension more than 30 days after receiving the request. The appellant appealed to this office on the basis that the ministry was in a “deemed refusal” situation. This order states that the ministry is found to be in a deemed refusal situation pursuant to section 29(4) of the *Act*. The ministry is ordered to issue a final decision regarding access by July 21, 2017, without any recourse to a further time extension.

Upon further discussions with the ministry, the ministry indicated that third parties may be affected by the release of the records. The ministry failed to identify and provide notice to third parties within thirty days after the request for access was received. However, taking into consideration that the ministry has not yet determined whether third parties may be affected by the release of the records, should affected third parties be identified, the ministry is ordered to issue third party notices by July 21, 2017, and a final decision regarding access by August 24, 2017, without any recourse to a further time extension.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 24, 26, 27, 28 and 29.

Orders and Investigation Reports Considered: Orders MO-1777 and PO-2595

BACKGROUND:

[1] On February 6, 2017, the requester mailed a request to the Ministry of the Environment and Climate Change (the ministry) for access to the following records [under the *Freedom of Information and Protection of Privacy Act* (the *Act*)]:

Requesting a copy of any review the Ministry of Environment and Climate Change (MOECC) may have done on the City of Peterborough Parkway Corridor Class EA.

This would include any review, report, recommendations, record of correspondence, meeting notes, discussion records, etc. on the Parkway Corridor Environmental Study Report between February 7, 2014 and February 1, 2017, prepared by the MOECC Environmental Approvals Branch and/or Regional and/or District Offices.

As well, we are requesting copies of correspondence between the MOECC Environmental Approvals Branch and the Minister of Environment and Climate Change (and his staff) as well as copies of correspondence between MPP Jeff Leal and the Minister of the Environment and Climate Change regarding the Parkway Corridor Class EA between February 7, 2014 and February 1, 2017.

[2] On February 16, 2017, the ministry wrote to the requester and acknowledged receipt of the request for access.

[3] On March 24, 2017, the ministry issued an interim decision, and advised that the total estimated fee for access to the requested records was \$274.00 and that a deposit of half of the estimated fee was required in order to proceed with the request. The ministry also advised that it had extended the time limit for answering the request by 150 days from the date it received the deposit from the requester. The ministry indicated that the additional time was required due to the "extremely large volume of material to be reviewed and prepared for disclosure."

[4] On April 21, 2017, the requester (now the appellant) filed an appeal, stating that the time extension sought by the ministry was not reasonable. Upon review of the appeal, it was also determined that the ministry was in a deemed refusal situation as it did not issue a decision in accordance with section 26 of the *Act*. Appeal PA17-202 was opened.

[5] This appeal was assigned to me to determine if the ministry was in a deemed refusal situation with respect to this request.

[6] On May 1, 2017, this office sent a Notice of Inquiry to the ministry stating that the ministry was in a deemed refusal situation for failing to issue an access decision within the 30 days mandated by section 26 of the *Act*. The Notice advised the ministry

that if a final decision was not issued by May 15, 2017, I would be in a position to issue an order requiring the ministry to provide a decision letter to the appellant.

[7] On May 4, 2017, I spoke with the appellant regarding the time extension sought by the ministry. The appellant raised concerns that the time extension sought by the ministry was excessive.

[8] On May 11, 2017, I spoke with an analyst at the ministry. The analyst advised that the ministry discovered that some of the records have already been made public, which has reduced the scope of the records from 3200 pages to under 1000 pages. The analyst advised that in order for the ministry to adequately process this request, the ministry required 60 days to issue a decision. The ministry anticipated that a decision regarding access to the records could be issued by July 10, 2017.

[9] On May 12, 2017, the analyst at the ministry advised that upon briefly reviewing the responsive records, the ministry believes that third parties may be affected by the release of the records.

[10] During the time period of May 12, 2017 and June 5, 2017, I attempted to assist the parties in reaching a mutually agreeable date for the issuance of a final access decision. The parties agreed to the issuance of a final access decision on July 10, 2017.

[11] On July 6, 2017, the ministry advised that they were not prepared to issue a final access decision on July 10, 2017.

DISCUSSION:

[12] The issues raised by this appeal relate to sections 24, 26, 27, 28 and 29 of the *Act*.

[13] I find that the ministry is in a deemed refusal situation pursuant to section 29(4) of the *Act* as it has failed to issue an access decision pursuant to the statutory timelines set out in section 26.

[14] In reference to the time extension sought by the ministry, former Intake Analyst Lucy Costa discussed the implications of attempting to claim a time extension under section 20 of the *Municipal Freedom of Information and Protection of Privacy Act* (the equivalent of section 27 of the *Act*) after the 30-day response time has expired, in Order MO-1777.

[15] She stated:

“Barring exceptional circumstances, which are not present here, when assessing the time and resources it will need to properly respond to a request, an institution must decide and provide written notice within the

initial 30-day time limit for responding to the request, the length of any time extension it will need pursuant to section 20 of the *Municipal Freedom of Information and Protection of Privacy Act* (Orders P-234, M-439 and M-581, MO-1748.”

[16] The ministry received the appellant’s request on or about February 6, 2017, and did not issue a decision to the appellant or extend the time for its decision pursuant to section 27 of the *Act* within the 30-day statutory requirement. As noted by former Intake Analyst, Huppman in Order PO-2595, “...a deemed refusal is not cured by issuing an interim access decision and fee estimate”.

[17] Therefore, I find the ministry to be in a deemed refusal situation pursuant to section 29(4) of the *Act*.

[18] In reference to the third party notification, Section 28(1) of the *Act* states that:

28. (1) Before a head grants a request for access to a record,

(a) that the head has reason to believe might contain information referred to in subsection 17 (1) that affects the interest 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 subsection (2) to the person to whom the information relates. R.S.O. 1990, c. F.31, s. 28 (1).

Contents of notice

(2) The notice shall contain,

(a) a statement that the head intends to release a record or part thereof that may affect the interests of the person;

(b) a description of the contents of the record or part thereof that relate to the person; and

(c) a statement that the person may, subject to subsection (5.1), within twenty days after the notice is given, make representations to the head as to why the record or part thereof should not be disclosed. R.S.O. 1990, c. F.31, s. 28 (2); 2016, c. 5, Sched. 10, s. 2 (1).

Time for notice

(3) The notice referred to in subsection (1) shall be given within thirty days after the request for access is received or, where there has been an extension of a time limit under subsection 27 (1), within that extended time limit. R.S.O. 1990, c. F.31, s. 28 (3).

[19] As per Section 28(3) of the *Act*, the head must issue a notice to persons whose interests might be affected by the disclosure of the requested records upon receipt of the request.

[20] The ministry has indicated that they have not yet determined whether third parties may be affected by the release of the records. In this case, the ministry has failed to identify and provide notice to third parties within thirty days after the request for access was received, as per section 28(3) of the *Act*.

[21] As affected third parties cannot be denied the opportunity to make representations as to why records or part thereof should not be disclosed and the ministry has failed to determine whether third parties may be affected, in order to ensure that there are no further delays in processing this request, I am ordering the ministry to issue the third party notices and subsequently, a final decision regarding access.

[22] Alternatively, if the ministry determines that no third parties may be affected by the release of the records, I am ordering the ministry to issue a final decision regarding access.

ORDER – IF NO THIRD PARTIES ARE IDENTIFIED:

1. I order the ministry to issue a final decision to the appellant regarding access to the records in accordance with the *Act* without recourse to any further time extension, no later than **July 21, 2017**.

ORDER – IF THIRD PARTIES ARE IDENTIFIED:

2. If third parties are identified and may be affected by the release of the records, I order the ministry to issue third party notices by **July 21, 2017**.
3. I order the ministry to issue a final decision to the appellant regarding access to the records in accordance with the *Act* without recourse to any further time extension, no later than **August 24, 2017**.
4. In order to verify compliance with provision 1 of this Order, I order the ministry to provide me with a copy of the decision letter referred to in Provision 1 no later than **July 21, 2017**, if no third parties are affected by the request, or **August 24, 2017**, if third parties are affected. This should be forwarded to my

attention, c/o Information and Privacy Commissioner/Ontario, 2 Bloor Street
East, Suite 1400 Toronto, Ontario, M4W 1A8.

Original Signed by: _____

Rita Najm
Analyst

_____ July 7, 2017