

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3842

Appeal PA18-34

Ontario Energy Board

May 17, 2018

Summary: The Ontario Energy Board (the board) received a multi-part request for records relating to enforcement actions from January 1, 2004 to February 28, 2017. The board claimed a time extension of ten months under section 27(1) of the *Act*. The parties subsequently agreed to limit the search to one year at a time. The board then issued a fee estimate requesting a 50% deposit and indicated a time extension of three months would be required after receipt of the deposit. After receiving the deposit on September 7, 2017, the board claimed another time extension of approximately six months to June 1, 2018. This order does not uphold the board's decision to extend the time until June 1, 2018. The board is ordered to issue its final decision on or before May 28, 2018.

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

Orders and Investigation Reports Considered: Orders MO-2215 and MO-3353

BACKGROUND:

[1] The Ontario Energy Board (the board) received a multi-part request on March 23, 2017 under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information for the period January 1, 2004 to February 28, 2017:

...We request copies of all documentation and internal records pertaining to the Ontario Energy Board ("Board") staff process for reviewing and approving enforcement actions and/or issuance of voluntary assurances, including but not limited to:

1. All internal staff and Board member correspondence, policies and procedures,
2. All internal review processes of audit results and determination of next steps, including voluntary assurances and fine amounts to be assessed regarding the such,
3. A list of all Board staff members and Board members responsible for or assigned to such review or approval processes, and
4. The dates of all internal meetings for review of audit findings pertaining to all regulated entities, lists of the individuals in attendance, agendas, minutes or notes and results of all meetings.

[2] On April 7, 2017, the requester responded to questions about the request posed by the board, confirming that the time period for the request was January 1, 2004 to February 28, 2017. The requester confirmed that he was seeking access to both copies of the audit results and the details of the process of the board applied in such cases.

[3] The board subsequently issued a decision letter dated April 26, 2017 containing a fee estimate and time extension. In addition, the board provided a link to publicly available documents, which were related to the request. The board's decision indicated that the fee estimate to process the request was \$14,050.00, which was comprised of 300 hours of search time, 100 hours of preparation time and photocopying 10,000 pages of records. The board advised that the time for responding to the request would be 10 months after receipt of a 50% deposit of the fee.

[4] The board's decision stated the following reasons for the time extension:

...the request necessitates a search through a large number of records and may result in a large number of responsive records. Given that, meeting the time limit in FIPPA would unreasonably interfere with the operations of the OEB. Furthermore, the OEB may need to complete consultations with persons outside of the OEB.

[5] The board further advised that some of the possible exemptions that might apply to the records include sections 13, 14, 17, 19, 21 and 67(1) of the *Act* and sections 111 and 128 of the *Ontario Energy Board Act*.

[6] In correspondence dated May 5, 2017, the requester proposed that the board search for the records one year at a time.

[7] The requester also narrowed the requests to only those records relating to the following groups of licensees:

- Electricity Retailers;
- Gas Marketers;
- Unit Sub Metering Providers;
- Electricity Distributors; and
- Electricity Generators.

[8] Following additional communications, the requester wrote to the board on August 2, 2017 indicating that he was looking for information relating to every individual case and reiterating his proposal regarding the search:

To help make this second request more manageable for the OEB, we proposed searching for the records by year and licensee. This would allow you to search for each enforcement action one year at a time rather than conducting the search for the entire 13-year period. You could then send us the records uncovered for each enforcement action by year before commencing the search for the next year.

[9] In response, the board issued a decision dated August 10, 2017 confirming that it would search for the records one year at a time and containing a fee estimate and extension of time for the 2017 portion of the request. The board noted that its understanding was that the request was for all documents that were part of the individual enforcement actions. The board stated it would start with 2017 and once that request was completed, it would move on to 2016 and so forth.

[10] The board's decision indicated that the fee estimate for processing the 2017 portion of the request was \$1,100.00, which represented 23 hours of search time, 7 hours of preparation time and photocopying of 750 pages of records. The board requested a 50% deposit of the fee.

[11] The board advised that the anticipated exemptions that might apply to the records were the same as noted in its April 26, 2017 decision letter.

[12] The board's decision also noted that it required a three-month time extension after receipt of the deposit pursuant to sections 27(1)(a) and (b) of the *Act*. The reason for the time extension was the same as indicated in the board's April 26, 2017 decision.

[13] The board received the fee deposit on September 7, 2017.

[14] On November 17, 2017, the board wrote to the requester advising that the

actual fee for responding to the 2017 request was likely to be higher than the \$1,100.00 estimate, as the actual time spent to search for records was approximately 60 hours to date. It inquired whether there might be a way to further focus the request to reduce the fee amounts. In addition, the board advised it would be unable to issue a final decision by December 7, 2017.

[15] In correspondence dated November 23, 2017, the requester responded that he would like to receive:

1. copies of internal emails circulating draft decisions/orders for review and comment, final decisions/orders, and internal correspondence amongst staff and/or Board members relating to the draft decisions/orders where comment is provided;
2. all case/file notes made by Board members in relation to the assessment and/or review of draft decisions/orders.

[16] He indicated that he was not interested in receiving copies of correspondence solely concerning proposed scheduling of the Board's activities.

[17] In a decision dated December 21, 2017, the board advised that the time for responding to the request has been extended to June 1, 2018.

[18] The requester, now the appellant, appealed the decision.

[19] This office sent a Notice of Mediation dated March 15, 2018 to the appellant and the board.

[20] During mediation, the appellant advised that he was not seeking any third party information that might be contained in the records.

[21] As no further mediation was possible, the appeal proceeded to the inquiry stage.

[22] I sent a Notice of Inquiry to the appellant and the board, setting out the issue in this appeal and inviting them to submit representations. In response, I received representations from the appellant and the board. In their representations, the board advised that it consented to the sharing of its representations. The appellant was advised of this and he likewise consented to the sharing of his representations.

[23] In this order, I do not uphold the board's time extension decision to June 1, 2018.

ISSUE:

[24] The sole issue in this appeal is whether the revised extension of time claimed by

the board to respond to the 2017 portion of the appellant's request is reasonable given the nature of the request.

DISCUSSION:

[25] Time extensions are governed by section 27(1) of the *Act*, 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.

[26] 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;
- 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.

[27] In its representations, the board submits that locating the responsive records for the 2017 year was "a large undertaking." The board states the following:

Given the breadth of the request, the records were spread out among numerous departments and a number of individuals. The OEB first determined which individuals may have emails or files related to the enforcement proceedings and voluntary assurances for the 2017 year. The individuals searched their records and provided copies of their records to legal counsel and the FOI co-ordinator.

The 60 hours of search time far exceeded the search time estimated in the OEB's August 10, 2017 letter.

Tens of thousands of pages were identified by staff as responsive to the request. Given the large number of documents to be reviewed, it was decided that a specialized computer system was necessary to deal with the request.

Reviewing the records is a time consuming process. Given that the records relate to enforcement matters, there needs to be a very detailed review of the records. The records must be reviewed for whether any exemptions apply to the record and whether any redactions are necessary. If redactions are necessary, that will also require additional time.

[28] The board also asserts that meeting the time limit would unreasonably interfere with its operations. The board provides the following details:

The OEB has fewer than 200 employees. It normally receives about 5-10 FOI requests a year and most of those requests are focused on a relatively narrow issue and have a relatively small number of records associated with the request. As such, the OEB does not have an FOI department. The Board Secretary also functions as the FOI co-ordinator and one legal counsel handles all FOI requests in addition to numerous other files. Under normal circumstances, legal counsel would spend approximately 25% of her time on FOI requests.

This request is one of the largest requests the OEB has ever received. Given the very large nature of this request, a second lawyer was assigned to assist with FOI matters and has been responsible for reviewing records for this request (while legal counsel normally responsible for dealing with FOI matters is dealing with other requests). However, this legal counsel also has other files that he is responsible for. The other lawyers at the OEB are at capacity and cannot be assigned to assist in FOI matters. Legal counsel is being supported in his efforts by the IT department and the FOI co-ordinator (who also has other responsibilities at the OEB).

The operations of the institution are already being affected by having so many resources dedicated to one requestor's FOI requests. The OEB has to balance the resources available not just for processing FOI requests but for all obligations of the OEB under the *Ontario Energy Board Act, 1998* and the other statutes that give powers and duties to the OEB. The OEB cannot unfairly jeopardize the work it does on behalf of all ratepayers in the province for one requestor's unusually large FOI request. The OEB cannot process this request any faster than it already is.

The OEB is working diligently to process the request but it is a very time consuming process given the very large number of records and the

detailed review that has to go into reviewing records that relate to enforcement matters.

[29] In his representations, the appellant asserts that the board's time extension is unreasonable. The appellant highlights that he worked with the board to clarify and narrow his request on several occasions. The appellant states the following:

More than a year has passed since the statutory deadline for reply of **April 26, 2017**. The Requester gave the OEB almost 11 months to process this request. However, the OEB failed to issue a final access decision by its own deadline.

The Requester also worked with the OEB to narrow and clarify the scope of this request.

There is no track record of the OEB meeting any of its own proposed deadlines. This conduct is unreasonable and breaches the access procedures in FIPPA.

[30] He further indicates:

The OEB has repeatedly stated that this request necessitates a search through a large number of records. Yet there is no information about how the OEB is conducting its search or review of the requested records. For example, how many files or pages are the OEB required to search? Where are the records located?

[31] Moreover, the appellant points to his proposal to have the board search for records year by year as evidence that he was willing to work with the board to make the request more manageable.

[32] The appellant further states:

Section 27 of FIPPA only permits an institution to extend the time limit for a period of time that is reasonable in the circumstances. The Requester has given the OEB almost a year to process this request. However, as noted above, the OEB did not provide any information on what it has done or needs to do to issue a final access decision. The OEB has already failed to meet its own proposed deadlines. The Requester has no confidence that the OEB will honour its new proposed deadline.

ANALYSIS

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

[34] The board's representations cite sections 27(1)(a) and (b) of the *Act* in support of its claim of a time extension. However, the representations do not subsequently contain any reference to outside consultations. As such, I will consider whether the extension of time claimed by the board to respond to the appellant's request was made in accordance with section 27(1)(a) of the *Act*.

[35] The board submits that staff identified tens of thousands of pages as responsive to the request. It also noted that the 60 hours of search time far exceeded the search time estimated in its August 10, 2017 decision. The board also submits that given the large number of documents, the board acquired a specialized computer system to deal with the request.

[36] Based on the evidence provided, I am satisfied that the request is for a relatively large number of records. In addition, I am satisfied that, in 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 board. However, that alone is not sufficient to support the application of section 27(1)(a) of the *Act*. The board must also establish that meeting the time limit to respond to the request "would unreasonably interfere with" its operations to warrant a time extension to June 1, 2018.

[37] In its submissions, the board states that reviewing the records is "a time consuming process" and that the records must be reviewed to determine whether any exemptions apply. It advises that if redactions are necessary that will also require additional time. The board also submits that the 60 hours of search time exceeded the search time estimated in its August 10, 2017 decision.

[38] In its representations, the board relies on Orders MO-3353 and MO-2215.

[39] In Order MO-3353, Adjudicator Diane Smith considered whether the institution's new revised time extension of one year was reasonable after already claiming a time extension of nine months. The institution had advised that the search was interfering with its operations and in its representations referred to specific projects in which staff were involved. It also submitted that the internal and external consultations were time consuming. The institution also offered to continue to release the records in increments. In that case, Adjudicator Smith reduced the institution's revised time extension to four months. I note that the board does not address these matters in its submissions.

[40] In Order MO-2215, Adjudicator Smith also considered whether the institution's time extension of 10 months was reasonable in the circumstances. In upholding the institution's decision, the adjudicator remarked that there were a large number of records that must be searched and that the appellant had not narrowed the scope of his request. I note that in Order MO-2215, this was the first time extension claimed by the institution, which is not the case in the current appeal. Moreover, in this case the appellant proposed to have the board search for records one year at a time in an effort to make his request more manageable.

[41] In its November 17, 2017 correspondence to the appellant, the board advised the actual time spent to search for records to date was “approximately 60 hours.” In its representations, the board indicates that the search time was 60 hours. Based on my review of the board’s representations, it appears that it has completed its search of responsive records. In addition, it has been almost five months since the board issued its December 21, 2017 decision.

[42] Aside from general comments about the time consuming process of reviewing the records, the board does not provide specific details about the extent of the work that is yet to be done to complete the processing of this request or how much time would be required to undertake this work.

[43] The board indicates that this is one of the largest requests that it has ever received and that the board does not have a freedom of information (FOI) department. It also advises that other staff have been assisting with this request and that these staff have other duties. Although the board advises that legal counsel would typically spend approximately 25% of her time on FOI requests, no information is provided about how much staff time has actually been dedicated to this request.

[44] As set out above, there was a series of efforts made by both parties at the request stage to work to clarify and narrow the scope of the request; thereby, reducing the amount of time required to respond. Ultimately, the parties agreed to limit the search to one year at a time and on this basis, the board issued a decision dated August 10, 2017 relating to the 2017 portion of the request, which is the portion of the request at issue in this appeal. At that time, the board issued a fee estimate and advised that a three-month time extension would apply following receipt of the deposit of the fee estimate. The appellant paid that deposit on September 7, 2017, bringing the end date of the time extension to December 7, 2017. This date was subsequently extended by the board by approximately six more months to June 1, 2018.

[45] After considering the parties’ representations and evidence, I find that the board has not provided sufficient evidence to satisfy me that meeting the time limit to respond to this request “would unreasonably interfere with” its operations to warrant a time extension until June 1, 2018. In its representations, the board did not provide any details on outside consultations which may be required.

[46] Accordingly, I do not uphold the board’s decision to seek a time extension to June 1, 2018 under section 27(1) of the *Act*.

[47] 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 board to issue a final access decision to the appellant no later than May 28, 2018.

[48] 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 May 28, 2018, and the board 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 board's time extension decision for the 2017 portion of the request to June 1, 2018.
2. With respect to those records that do not require third party notice to be given, I order the board to issue a final access decision with respect to the 2017 portion of the request to the appellant no later than **May 28, 2018**.
3. Where affected party notice is required to be given under section 28, I order the board to give such notice no later than **May 28, 2018** 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: _____
Elana Laiken
Acting Adjudicator

_____ May 17, 2018