Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER MO-2116

Appeal MA06-386

City of Ottawa

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NATURE OF THE APPEAL:

The City of Ottawa (the City) received a request dated August 2, 2006 under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to all "evaluation notes" on the north-south light rail project compiled by the supply-management division.

As a result of discussions between a representative of the City and the appellant, the request was revised on August 16, 2006 to be a request for the following information:

> Evaluations of the three final consortia as well as presentations made to the Selection Panel during the last year.

The City wrote to the requester on October 3, 2006 advising that the three affected parties (*i.e.*, the three final consortia) whose interests may be affected by disclosure had been identified and that it was required to give notice to the affected parties pursuant to section 21 of the *Act*. The City stated:

> A decision as to whether the records will be disclosed will be made by November 3, 2006 and you will be notified of this determination following this date.

On that same date, the City wrote to the three affected parties advising them of the access to information request pursuant to section 21 of the *Act* and enclosing copies of the responsive records in which they had an interest. In that letter, the City stated:

> The requester is looking for documentation related to "evaluations of the three final Consortia as well as presentations made to Selection Panel during the last year."
>
> …
>
> Should you feel that any part of the attached record meets the above-noted requirements of section 10 of the Act, please forward your concerns to us in writing, **no later than October 24, 2006**. Please note that in order to support your claims against disclosure of the records, you must provide us with detailed factors and information that speak to all three parts of section 10 of the Act. The City will consider your response in its final decision. Under section 21(7)(b) of the Act, if the third party has not responded within 21 days after notice is given, we then have the authority to proceed without consent of the third party.
>
> …
>
> You will be notified in writing shortly after November 3, 2006 of our decision regarding the release of the records.

On October 10, 2006, staff in the office of the City discovered that they had inadvertently enclosed confidential information that should not have been sent to the third parties with the correspondence of October 3, 2006. The City's staff telephoned the affected parties and requested that the correspondence dated October 3, and the enclosures be returned to the City, and that any copies that may have been made, be destroyed.

The City re-sent its notices to the affected parties on October 19, 2006. This notice contained the same information that was contained in its letter of October 3, 2006, except that the confidential information had been removed. It provided that the affected parties had until November 9, 2006 to submit representations regarding the access to information request. It also provided that the affected parties would be notified shortly after November 19, 2006 of the City's decision regarding the release of the records.

The City also sent a letter to the requester dated October 19, 2006 explaining the circumstances surrounding its decision to re-issue the notices to the affected parties. The City's letter to the requester stated:

> [U]nfortunately, due to a technical error in the third party process, it became necessary to re-issue the third party notices and associated documentation for consideration by the affected parties.
>
> As a result of the re-distribution of the notices, the time limit and date for response and final decision have had to be re-issued as well. It is now anticipated that a decision will be made by November 19, 2006 as to what records will be disclosed. You will be notified of the decision shortly thereafter.

I understand that only one affected party (the first affected party) has responded to the notice sent by the City. The first affected party wrote to the City by letter dated October 17, 2006 and objected to the release of the information requested on the basis of section 10(1) of the *Act*. The other two affected parties have not yet provided representations to the City.

The requester (now the appellant) filed an appeal with this office on November 2, 2006 in which it stated as follows:

> [T]he City has failed to comply with its obligation under the Act to provide access to information in a timely manner. Specifically:
>
> - In response to an access request filed by [named individual], and which was received by the City of Ottawa on August 16, 2006, the City of Ottawa has failed to provide to the requestor, within the prescribed time limit of 30 days, written notice as to whether or not access to the record or part of it will be given (Sec. 19(a));

- The City of Ottawa has failed to comply with the requirement in the Act to provide written notice to the requestor that the time limit set out in Section 19 was being extended and to provide a reason for the extension (Sec. 20(1) and (2));

- The City of Ottawa has failed to provide notice to any and all affected persons under Section 21 of the Act within the prescribed time limits (Sec. 21(3));

- The City of Ottawa has failed to provide notice to the requestor within the prescribed time limits that a Sec. 21 notice was being sent to an affected person (Sec. 21(4)).

Subsequent to the filing of the Notice of Appeal with this office and following the commencement of my inquiry in this matter, the City issued an interim decision letter dated November 3, 2006 that relates to all of the responsive records except those that were subject to the notices to the three affected parties. In the interim decision letter, the City granted access to some of the responsive records in full and denied access to other responsive records in whole and/or in part on the basis of sections 11, 12 and 14 of the *Act*. In the interim decision letter, the City stated:

> Further to my letter dated October 19, 2006, a final decision regarding the remaining documents will be provided when all of the third party representations have been received and analyzed. That decision will be made as soon as possible, respecting the revised deadline for third-party responses of November 9, 2006.

The appellant will be able to appeal the denial of access by the City in its November 3, 2006 decision if the appellant chooses to do so. That denial of access is not the subject of this order, which deals with the matters raised in the appellant's letter of appeal, set out above. In essence, the issues are: (1) Was there a "deemed refusal" to grant access to the requested records, as contemplated in section 22(4) of the *Act* based on the timing of the City's notification of October 3, 2006? (2) Did the City claim a time extension under section 20? (3) Did the City comply with the notification requirements under the Act? (4) If there was a deemed refusal or non-compliance with the notification requirements, what is the appropriate remedy?

As regards my jurisdiction to conduct an inquiry into these issues, section 39(1) entitles a requester to appeal "any decision of a head under this Act…." Section 22(4) provides that if the City does not respond to a request within the time frames stipulated under the *Act*, it is "deemed to have given notice of refusal to give access to the record …" which gives rise to a right of appeal. Any claim for a time extension may also be appealed. As well, decisions regarding notification of affected parties may be the subject of an appeal (see Order PO-1694-I).

All of these issues in this appeal relate to the City's processing of the request. This office has devised several processes for issues of this nature, which are characterized as "straightforward appeals", including deemed refusal and time extension appeals. These processes are intended to produce expeditious results for all requesters, to ensure that requests proceed as quickly as

possible to access decisions by institutions such as the City. In processing this file, I have followed the procedure for deemed refusal appeals, which entails sending an immediate Notice of Inquiry and moving quickly to order in the event that the matter is not resolved.

With a view to gathering the facts that were relevant to the appeal, I instructed an Adjudication Review Officer with this office to speak to the appellant and the City and to invite them to provide me with information, correspondence and other documentation that are relevant to the appeal. I also instructed the Adjudication Review Officer to determine whether a resolution was possible through an informal mediation process. In response to my invitation, the appellant and the City provided this office with copies of relevant information, correspondence and other documentation regarding the issues in this appeal. Mediation did not resolve the issues between the parties, and I am therefore issuing this order to deal with the completion of the appellant's request by the City.

DISCUSSION:

DEEMED REFUSAL/THIRD PARTY NOTIFICATION

Applicable Legislation

The time limits and the procedures prescribed by the *Act* for providing access decisions to requesters, and notifying affected parties, are set out in sections 19, 20 and 21. Section 22(4) provides that failure to provide an access decision within the statutory time frame is a "deemed refusal". These sections read, in part:

> 19. 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 18, the head of the institution to which it is forwarded or transferred, shall, subject to sections 20, 21 and 45, 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 of it will be given; and
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> 20(1) A head may extend the time limit set out in section 19 for a period of time that is reasonable in the circumstances, if,
>
> (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) A head who extends the time limit under subsection (1) 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.

21(1) A head shall give written notice in accordance with subsection (2) to the person to whom the information relates before granting a request for access to a record,

(a) that the head has reason to believe might contain information referred to in subsection 10 (1) that affects the interest of a person other than the person requesting information; or

(3) The notice referred to in subsection (1) shall be given within thirty days after the request for access is received or, if there has been an extension of a time limit under subsection 20 (1), within that extended time limit.

(4) A head who gives notice to a person under subsection (1) shall also give the person who made the request written notice of delay, setting out,

(a) that the disclosure of the record or part may affect the interests of another party;

(b) that the other party is being given an opportunity to make representations concerning disclosure; and

(c) that the head will within thirty days decide whether or not to disclose the record.

(5) Where a notice is given under subsection (1), the person to whom the information relates may, within twenty days after the notice is given, make representations to the head as to why the record or part should not be disclosed.

(6) Representations under subsection (5) shall be made in writing unless the head permits them to be made orally.

(7) The head shall decide whether or not to disclose the record or part and give written notice of the decision to the person to whom the information relates and the person who made the request within thirty days after the notice under subsection (1) is given, but not before the earlier of,

> (a) the day the response to the notice from the person to whom the information relates is received; or
>
> (b) twenty-one days after the notice is given.
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> (8) A head who decides to disclose a record or part under subsection (7) shall state in the notice that,
>
> (a) the person to whom the information relates may appeal the decision to the Commissioner within thirty days after the notice is given; and
>
> (b) the person who made the request will be given access to the record or part unless an appeal of the decision is commenced within thirty days after the notice is given.
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> (9) A head who decides under subsection (7) to disclose the record or part shall give the person who made the request access to the record or part within thirty days after notice is given under subsection (7), unless the person to whom the information relates asks the Commissioner to review the decision.
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> 22(4) A head who fails to give the notice required under section 19 or subsection 21 (7) concerning a record shall be deemed to have given notice of refusal to give access to the record on the last day of the period during which notice should have been given.

From a review of the sections reproduced above, it is clear that in the absence of affected party notification, the City has thirty days to respond to an access to information request (section 19). Where a time extension is claimed, this must be done in writing and the requester must be advised of their right to appeal. Before granting access to a record in which an affected party might have an interest under the *Act*, the City must give notice to the affected party. Section 21(2) provides that the notice to the affected party shall include a statement that the City intends to disclose the record, a description of the record and a statement that the affected party may, within twenty days, make representations as to why a record or part of a record should not be disclosed. The City must give this notice within thirty days after the request for access is received (section 21(3)). Section 21(4) requires the City to notify the requester of the delay that will result from the requirement to give notice to the affected party.

When notice has been given under section 21(3), the City must make a final access decision within thirty days of giving notice, but not before representations are received from the affected party or twenty-one days after notice is given, whichever is earlier (section 21(7)). After the final access decision is issued, the affected parties and the requester have thirty days to file an appeal with this office (section 21(8)). In other words, if the City concludes the process under section 21 by issuing a decision to grant access to information that was subject to third party

notification, it must allow for a thirty-day appeal period *after* the date of that decision before disclosing the records, in order to protect the rights of affected parties.

The appellant's position is that the time for notifying the third parties under the *Act* should be calculated from August 2, 2006 when the appellant filed the initial request that is at issue in this appeal. In the alternative, the appellant argues that if the time for notifying the third parties is not calculated from August 2, then it should be calculated from August 16, 2006, the date when the scope of the appellant's request was clarified.

The appellant provided little support for its position regarding the former argument but did provide some evidence to support its alternative position. The appellant admitted that there were discussions between the appellant and the City about the possibility of narrowing the request dated August 2, 2006 but that any discussions that it had with the City about the scope of the request ended on August 16, 2006. At the conclusion of the discussions on August 16, 2006, the appellant submits that an agreement was reached that the request would be narrowed to include records relating to the "evaluations of three final consortia. As well as presentations made to Selection Panel during the last year."

The appellant submits that at no time following the narrowing of the scope of the appeal on August 16 was there ever any discussion about the appeal being held in abeyance or being put on hold for any reason. The appellant submits that the parties did not reach any agreement or understanding to extend the time for the City to respond to its request. The appellant also refers to section 20(2) and argues that an extension of time must be made in writing to be valid.

The City takes the position that the time for delivery of the third party notices began to run from September 5, 2006 and not August 16, 2006 as is suggested by the appellant. In support of its position, the City submits that a member of the Supply and Management Office of the City who had possession of and familiarity with the responsive records was away in the period of time following August 16, 2006. The City advised the representative for the appellant of this and asked if the appellant would be prepared to wait until this individual returned to the office on September 5, 2006 before the City would commence its review of the responsive records. The City submits that it had an agreement with the appellant that the request would be put on hold pending the return of this individual. The City states in its interim decision letter dated November 3, 2006:

> Through joint agreement between the original requester, [named individual] and the ATIP office, the request was held in abeyance pending the availability of Supply Management staff in early September who had possession and knowledge of the responsive records. As well, the requester advised on this same date that he might wish to further clarify the request depending on the outcome of the meeting with Supply Management staff. During this period efforts were made to find the most economical means to meet the requester's information objectives, with his concurrence.

It was not until October 3, 2006 that a notice to the third parties was sent by the City.

From the foregoing submissions by the appellant and the City, it is evident that the City and the appellant have a different perspective on what discussions took place and what agreements were reached regarding the treatment of the appellant's request. Regardless, I find that it was not until August 16, 2006 that the scope of the request was clarified and defined by the appellant. The fact that the appellant admits that it was engaged in discussions with the City until that day regarding the scope of the request is highly persuasive. It would not be possible for the City to provide a response to the request without some clarity about the scope of the request

I also find that the City did not claim a time extension under section 20 of the *Act*. Section 20(2) expressly requires written notice of a time extension, and provides for an appeal process if the requester disagrees. No such notice was issued in this case. Although the City is of the view that it had agreed on an extension with the appellant, the provisions of the *Act* must be observed. The *Act* does not contemplate time extensions being authorized by informal agreement, and its provisions must be followed. The requester's right to appeal must be preserved. Because the provisions of the *Act* were not followed, I find that there was no valid extension of time in the circumstances of this appeal.

Because I have found that the scope of the request was clarified on August 16 and that the time for delivery of the response to the request was not extended, it follows that the City should have issued a notice to the affected parties and to the appellant within thirty days of August 16, 2006. The result is the affected party notice should have been issued on or before September 15, 2006. Once that date came and went, the City was in a "deemed refusal" under section 22(4). The appellant could have filed an appeal on that basis, but did not do so until November 2, 2006. I would also observe that the deemed refusal was not, in my view, cured by the late issuance of notification to the affected parties on October 3, 2006. As well, the issuance of the notice on October 3 did not comply with the time requirements in section 21(3).

Unfortunately, even the late notification of October 3 had to be revised. The City has provided evidence to support its position that the original notice to the affected parties was defective and as a result, the City was compelled to issue a revised third party notice on October 19, 2006. As previously noted, the City then gave the third parties twenty days from the date of the revised notice to respond (*i.e.* until November 9, 2006). The City submits that the 20 days should run from the date of the revised notice because of the defect in the original notice. The result of this position is that the final disclosure decision of the City was potentially delayed by an additional 16 days.

I have reviewed the original notice sent to the third parties and the subsequent revised notice. In the circumstances of this appeal, I do not agree with the City that it was necessary to give the third parties a further twenty days from the date of the revised notice to submit representations.

The affected parties knew what information the appellant was requesting following the receipt of the first notice. The notice was in compliance with the *Act* and contained all of the information that the City was required to include under section 21(2) of the *Act*. Nevertheless, the notice provisions of the *Act* exist for the purpose of protecting affected parties' rights, and in this instance, the City has advised them that they have until November 9, 2006 to provide

representations. In my view, any remedy based on the fact that the first notices were sufficient would be unfair to the affected parties if it involved any change to the November 9 deadline for their submissions to the City, especially in view of the fact that November 9 is two days from the date of this order.

In any event, as I have already noted, the City was already in a deemed refusal position, and had not complied with the notice requirements under section 21, when it issued the notices on October 3 and October 19. Any errors that it made at this stage only compounded the delay that the appellant experienced in this appeal. I now turn to consider the appropriate remedy.

In the notice of appeal filed with this office, the appellant states:

> The net effect of these failures by the City of Ottawa to comply with the provisions of the [Act] has been to delay the decision on whether to release any or all of this information to the [appellant] until after the municipal elections to be held on November 13, 2006. Had the City of Ottawa complied with the provisions of the Act, this decision would have been made prior to those elections – elections in which light rail has been a central issue for candidates and electors.

In order to determine the appropriate remedy, I must have regard to all of the circumstances of the appeal and the rights of the affected parties who clearly have an interest in the outcome.

As discussed above, any remedy that abbreviates the affected parties' time for providing representations would not be fair to them, given that the deadline is only two days from now, and would not protect their rights as the *Act* intends. Accordingly, the affected parties have until November 9, 2006 to provide representations to the City regarding the release of the responsive records in which they have an interest. As previously noted, written representations have already been received from the first affected party and it does not consent to the release of any information in the responsive records that it may have an interest in. The City is currently awaiting representations from two other affected parties.

Normally, unless all of the affected party representations are received before November 9, the City would have 10 days following that date to make a final access decision. In view of the delays that have already occurred in this file, which flow from the City's non-compliance with the time frames in the *Act* for issuing an access decision (triggering a "deemed refusal") and providing affected party notification, as outlined above, I have decided to abbreviate this period. I will order the City to issue its final access decision to the appellant and the affected parties by **5:00 p.m. on November 10, 2006**.

There is no evidence that the City acted in bad faith, and I commend the City for its recent interim access decision and release of a significant portion of the responsive records. Nevertheless, the delays caused by non-compliance with the *Act* are of significant import as the information that is the subject of the request is an issue in the municipal election campaign that will be held on November 13, 2006.

In terms of the impact of this order, it is important to note that once the City receives the affected party representations and issues its final decision, if it decides to disclose the records about which the affected parties were notified, it must give them thirty days to appeal that decision to the Commissioner, and *must not* disclose those records until the end of that appeal period. Alternatively, if the City decides to deny access, the appellant may decide to appeal that denial of access.

The final access decision to be issued by **November 10, 2006 at 5:00 p.m.** should comply with the requirements of sections 21(8), 21(9) and 22(1), as applicable.

ORDER:

1. I order the City to issue a final decision in this appeal by **5:00 p.m. on November 10, 2006**, and to comply with sections 21(8), 21(9) and 22(1), as applicable.

2. To verify compliance with this order, I reserve the right to require the City to provide me with a copy of the decision letter issued pursuant to order provision 1.

Original Signed by: November 7, 2006
John Higgins
Senior Adjudicator