

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3725

Appeal PA16-613

Metrolinx

April 27, 2017

Summary: On September 17, 2015, the appellant submitted a request pursuant to the *Freedom of Information and Protection of Privacy Act* (the *Act*) to Metrolinx for access to records. Metrolinx failed to provide the appellant with an access decision within the prescribed time limit under the *Act*. The appellant appealed to this office on the basis that Metrolinx was in a “deemed refusal” situation. In this order I find that Metrolinx is in a deemed refusal situation pursuant to section 29(4) of the *Act*. Metrolinx is ordered to issue third party notices by May 8, 2017, and a final decision regarding access by May 30, 2017, without any recourse to a further time extension.

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

BACKGROUND:

[1] On September 17, 2015, the requester submitted a request to Metrolinx for access to the following records [under the *Freedom of Information and Protection of Privacy Act* (the *Act*)]:

The information requested includes all written (hard copy and electronic) documents between 2009 and to date in 2015, including all notes, letters, emails, text messages, smart phone messages (including Blackberry and iPhone messages), calendar entries, voicemails, or any other form of

written record as well as reports and memos (including draft documents), consultants reports and minutes of meetings and telephone calls, plans, sketches, specifications:

- In Metrolinx's files and among and between staff within Metrolinx including communications with, and records associated with, independent contractors, sub-contractors and consultants retained by Metrolinx;
- between Metrolinx staff and its agents and contractors, sub-contractors, and any of the staff at the following: the Ministry of Transportation, Ministry of Municipal Affairs and Housing, Ministry of the Environment, the Town of Richmond Hill, the Regional Municipality of York, Toronto Region Conservation Authority, Department of Fisheries Canada and or/ the Church;

Pertaining to:

1. Investigations and studies conducted for the GO Gormley Station site and surrounding lands dealing with stormwater management including assessment, planning, design, construction, monitoring and inspection during construction, remedial/restorative activities, the conveyance of storm water from the GO Gormley Station to the Subject Land, including but not limited to storm water quality and quantity downstream impacts, predictions and field measurements on the GO Gormley Station and the Subject Land, and environmental impacts all with respect to the pre and post development condition of the GO Gormley Stations requirements and comments from government officials and agencies (including pre-construction water quality and quantity conditions and expected/planned post construction water quality and quantity conditions) related to the foregoing;
2. Technical reports, investigations and studies conducted for the GO Gormley Station dealing with transportation (traffic and parking), including assessment, planning, design, construction, approvals, requirements, specifications and comments from government officials and agencies (including estimated and anticipated traffic volumes and design requirements for the Gormley/Stouffville intersection and the GO Gormley Station driveway;
3. Detailed construction drawings and specifications for the GO Gormley Station, associated with the access, driveway and retaining wall adjacent to the Subject Land, including tendered

drawings any subsequent change orders and amended/additional drawings and specifications;

4. Sedimentation control plans, details and activities (including construction monitoring reports and activities) pertaining to GO Gormley Station site and the Subject Land, including approvals, requirements and comments from government officials and agencies;

5. Pre-development grades and planned post-development grades for the GO Gormley station and their relationship to the Subject Land and other adjacent land;

6. The Subject Land including decisions, discussions, assessment of impacts, plans, access, directions to communicate, consult including all coordination and communication activities with the Church;

7. Decisions concerning remedial works to be undertaken on the Subject Land, including landscape drawings and sediment control plans and activities concerning restoration/remediation of the Subject Land following installation of the retaining wall, sedimentation control, dissipation and treatment of storm water;

8. How the recommendations of the Environmental Assessment approving the GO Gormley Station were implemented, concerning protection of the Rouge River PSW;

9. Access/egress requirements for the GO Gormley Station and Subject Land;

10. The construction of a retaining wall on or adjacent to the Church land including but not limited to the predicted impact on the Church land;

11. The impact of the proposed access driveway servicing the GO Gormley Station on access to the Church land;

12. Access and egress to the Subject Land associated with its development as a Church; and

13. The subject matter of the two attached letters dated May 13, 2009 and October 5, 2010.

[2] On October 20, 2015, Metrolinx issued an interim decision, and advised that the total estimated fee for access to the requested records was \$2950.00 and that a deposit

of half of the estimated fee (\$1475) was required in order to proceed with the request. Metrolinx advised that in order to fulfill the request, record collection by approximately 8 staff members will be required and will generate approximately 5800 pages of records. Metrolinx indicated that it will require a time extension in accordance with sections 27(1)(a) and 27(1)(b) of the *Act*, as processing the request will necessitate a search through a large number of records. Metrolinx stated that formal notice containing details of the time extension would be provided, following receipt of the fee deposit.

[3] On May 12, 2016, the requester wrote to Metrolinx indicating the requester's acceptance of the fee estimate and provided a cheque for the deposit in the amount of \$1475.00.

[4] On June 9, 2016, Metrolinx acknowledged receipt of the deposit paid by the requester. Metrolinx also indicated that it had closed the file, as it had not received a response to its interim fee decision; however, Metrolinx decided to reopen the file and process the request. In the June 9, 2016 letter, Metrolinx claimed a time extension for an additional 22 weeks to November 16, 2016 in order to respond to the request for access. Metrolinx indicated that the time extension was required as the request was for a large volume of records, and will require consultations with third parties outside of Metrolinx, and would therefore unreasonably interfere with the operations of the institution.

[5] On November 21, 2016, Metrolinx contacted the requester by email advising that it would not be able to meet the deadline for response and proposed to extend the time to issue a response to February 15, 2017.

[6] On November 21, 2016, the requester (now the appellant) filed an appeal, alleging that Metrolinx was in a deemed refusal situation as it did not issue a decision in accordance with section 26 of the *Act*. Appeal PA16-613 was opened.

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

[8] On December 5, 2016, this office sent a Notice of Inquiry to Metrolinx stating that Metrolinx 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 Metrolinx that if a final decision was not issued by December 19, 2016, I would be in a position to issue an order requiring Metrolinx to provide a decision letter to the appellant.

[9] On January 5, 2017, I spoke with the Freedom of Information Coordinator (FOIC) for Metrolinx who advised me that several thousand documents still needed to be copied and/or formatted and that third party consultations needed to be completed. In addition, the records would require further processing before being disclosed. The FOIC advised me that by the end of March 2017, a response to the requester would be

issued and the records would be ready for release.

[10] During the time period of January 5, 2017 and March 20, 2017, I attempted to assist the parties in reaching a mutually agreeable date for the issuance of a final access decision. It was agreed by both parties that Metrolinx would provide its final access decision by March 31, 2017.

[11] Metrolinx failed to provide its final access decision by March 31, 2017.

[12] On April 5, 2017 I emailed the FOIC to inquire about the status of the request.

[13] On April 11, 2017, the FOIC advised me that he required additional time to prepare the records and submit them for internal approval.

[14] An informal settlement was no longer possible.

DISCUSSION:

[15] I find that Metrolinx 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.

[16] 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).

[17] 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. As of the date of this order, it is unclear if Metrolinx has notified those parties who might be affected.

[18] Although Metrolinx may have failed to provide notice to third parties within thirty days after the request for access was received, affected third parties cannot be denied the opportunity to make representations as to why records or part thereof should not be disclosed.

[19] To ensure that there are no further delays in processing this request, I am ordering Metrolinx to issue all required the third party notices (if they have not already done so) and subsequently, a final decision regarding access.

ORDER:

1. I order Metrolinx to issue third party notices by **May 8, 2017**.
2. I order Metrolinx 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 **May 30, 2017**.
3. In order to verify compliance with provision 1 of this Order, I order Metrolinx to provide me with a copy of the decision letter referred to in Provision 1 no later than **May 30, 2017**. 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: _____

Francesco Russo
Analyst

April 27, 2017
