

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3849

Appeal PA18-44

Ontario Energy Board

May 30, 2018

Summary: The Ontario Energy Board (the OEB) received a multi-part request for records relating to cost assessments from January 1, 2004 to February 28, 2017. The OEB issued a fee estimate requesting a 50% deposit and indicated a time extension of six months would be required after receipt of the deposit under section 27(1) of the *Freedom of Information and Protection of Privacy Act* (the *Act*). After receiving the deposit on September 7, 2017, the OEB advised in subsequent correspondence that the request would likely be completed later than the six months set out in its original estimate. After the time extension was appealed, the OEB advised that it would be able to issue its final decision on July 1, 2018. This order upholds the OEB's time extension decision and allows an extension of time until July 1, 2018. The OEB is ordered to issue its final access decision on or before July 3, 2018, given the statutory holiday.

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 PO-1876, P-234, MO-1777, M-581.

BACKGROUND:

[1] The Ontario Energy Board (the OEB) received a multi-part request (Request

number 1)¹ on March 27, 2017 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 methodology of the Ontario Energy Board (the "Board") for determining all regulated entities' calculations and remittances of individual quarterly cost assessments, 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 the OEB posed about the request, confirming that the request covered the time period of January 1, 2004 to February 28, 2017. In addition, the requester clarified:

If the listed items are not helpful in scoping the request, then please simply provide all documentation and records which do relate to the methodology used by the Board for determining all regulated entities' calculations and remittances of individual quarterly cost assessments.

[3] The OEB issued a decision letter dated April 26, 2017, containing a fee estimate and notice of a time extension. In addition, the OEB provided a link to publicly available documents regarding its cost assessment methodology. The OEB's decision specified that the fee estimate to process the request was \$4,920.00, which was comprised of 100 hours of search time, 30 hours of preparation time and photocopying approximately 5,000 pages of records. The OEB requested a fee deposit of 50% in order to proceed with the processing of this request.

[4] The OEB also indicated that pursuant to sections 27(1)(a) and (b) of the *Act*, the time for responding to the request would be six months after receipt of the deposit. The letter indicated the following reason for the time extension:

¹ The requester also submitted another request (Request number 2) to the board on the same date, which was the subject of another appeal (resulting in Order PO-384) to this office.

...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 [the *Act*] 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 OEB also advised that some of the possible exemptions that might apply to the records include sections 13, 17, 19 and 21 of the *Act*.

[6] The requester sent the OEB a letter on August 2, 2017, confirming a July 19, 2017 discussion regarding his two requests. With respect to this request, the requester stated:

...I clarified that we are not looking for all individual determinations of cost assessments. Rather, we are looking for the generic process, including internal documents relating to the process that are not available on the Ontario Energy Board website. As an example, I clarified that an RFP from the OEB for a consultant to determine the method of assessments would be included in the search.

Notwithstanding this clarification, you advised that the cost and timing for the search relating to the cost assessments would remain the same as the initial estimate.

[7] On August 10, 2017, the OEB sent the requester a letter regarding the clarification of the request. The OEB stated that the fee estimate and extension of time set out in its April 26, 2017 letter were still valid and it reproduced the information from its earlier decision letter.

[8] The OEB received the fee deposit of \$2,460.00 on September 7, 2017. Therefore, based on the timeline set out in the OEB's April 26, 2017 and August 10, 2017 letters, the processing of the request was expected to be completed by March 7, 2018.

[9] Following inquiries regarding the status of the request, in a letter dated December 21, 2017 (the "December time extension decision"), the OEB wrote the following to the requester:

You also asked for an update on the status of FIPPA-2017-001 and when you would receive those results. The search for records responsive to that request is underway but it is too soon to estimate when that request will be completed. However, it is likely to be later than the six months set out in the original estimate. We will provide you with an updated estimate once the search for records is completed.

[10] The requester, now the appellant, appealed the December time extension

decision.

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

[12] During mediation discussions, the appellant advised that he was not seeking any third party information that might be contained in the records. The OEB indicated that it could issue its final access decision on July 1, 2018. The appellant was not satisfied with this proposed deadline.

[13] An institution's final access decision is the written notice given to a requester as to whether or not access to the requested records, or parts thereof, is granted².

[14] In this case, as no further mediation was possible, the appeal proceeded to the inquiry stage. The parties were informed in advance of mediation that any information provided during mediation may be used in reaching a final decision.

[15] I sent a Notice of Inquiry to the appellant and the OEB, setting out the issue in this appeal and inviting them to submit representations. In response, I received representations from the appellant and the OEB. In their representations, the OEB 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.

[16] The OEB reiterated in its representations that it could issue its final access decision on July 1, 2018.

[17] In this order, I uphold the OEB's time extension to July 1, 2018.

ISSUE:

The sole issue in this appeal is whether July 1, 2018 is a reasonable timeframe for the OEB to issue a final access decision to the appellant given the nature of the request.

DISCUSSION:

[18] 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

² Section 26.

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.

[19] Section 27(2) of the *Act* states:

Where a head extends the time limit under subsection (1), the head 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.

[20] 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.

[21] In its representations, the OEB asserts that locating the responsive records for this request was "a massive undertaking." The OEB states the following:

Finding all records that relate to the generic process for determining cost assessments for the past thirteen years was a massive undertaking. Given the breadth of the request, the records are spread out among numerous departments and a large number of individuals. The OEB first determined which individuals may have emails or files related to the cost assessment methodology. Many of those individuals were no longer at the OEB so they could not search the records themselves. All of their emails had to be retrieved from archives.

The number of records from the relevant individuals that needed to be searched was very extensive as it spanned a period of thirteen years. It was therefore determined that the OEB would require a specialized computer system to deal with the request, and we acquired such a system.

Uploading the files to the computer system was a lengthy process. Once the files were uploaded, search terms were used to narrow the number of records. Even after the computer word search, there were tens of thousands of records that needed to be reviewed for responsiveness. If a record is found to be responsive, it needs to be reviewed for whether any exemptions apply to the record and whether any redactions are necessary. If redactions are necessary, that also requires additional time.

As a result of the computer search, there are well over 100,000 pages to review for relevance, exemptions, and redactions. The estimated search time included in the fee estimate was 100 hours. To date, the lawyer assigned to the file has far exceeded that amount of time searching the records for relevance. There is also a large amount of time required to review the documents once they are found to be relevant. While the OEB is not allowed to charge for that time, it is still time that needs to be spent processing the request.

[22] The OEB also submits that meeting the time limit would unreasonably interfere with its operations. The OEB 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 focussed 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.

The appellant's request is the largest request the OEB has ever received. Given the very large nature of this request, legal counsel is now spending approximately 85% of her time on the appellant's FOI request. The other 15% of her time has to be spent on other matters. Some of these lawyer's duties have already been transferred to other lawyers at the OEB. Furthermore, a second lawyer was assigned to the other FOI request from this requester to help the two FOIs proceed. The other lawyers at the OEB are at capacity and cannot be assigned to assist in FOI matters. Legal counsel is being supported in her 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 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 large number of records.

[23] The OEB also states that the appellant did not narrow the scope of the request nor did he narrow the time period covered by his request.

[24] In his representations, the appellant submits that the OEB's time extension is unreasonable. The appellant notes that he communicated with the OEB to clarify and narrow his request several times. The appellant indicates the following:

Between March and August 2017, the Requester worked with OEB to clarify and narrow the scope of this request. The Requester advised OEB on multiple occasions that he was looking for all documentation and records relating to the OEB's internal process for determining the cost assessments. Both parties understood that the request was for records pertaining to the **generic** process, including internal documents that were not publicly available on the OEB website. The Requester also suggested that third party information be redacted so that the OEB can process this request faster.

On August 10, 2017 (not April 26, 2017 as stated on page 2 of the Notice of Inquiry³) the OEB wrote to the Requester and advised that it needs a six month extension after receipt of the 50% deposit.

The OEB provided high level reasons for why it needs a time extension...The OEB did not disclose, and the Requester did not receive, any particulars respecting the number of files, records or pages that employees need to review to satisfy this request.

The Requester accepted this proposed schedule and believed the OEB could meet its own proposed deadline.

³ I note that the board issued time extension and fee estimate decisions on April 26, 2017 and August 10, 2017 and I had copies of both letters before me.

On September 6, 2017, the Requester paid the deposit in the amount of \$2,460 to the OEB. The Requester also wrote to the OEB and requested the OEB start processing this request immediately.

The OEB was to make an access decision by no later than **March 7, 2018** as per its own deadline.

...

The OEB failed to meet its own March 7th deadline.

[25] The appellant also states:

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.

...

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.

[26] The appellant also asserts that the OEB treated his two access requests as one request. The appellant indicates:

The OEB treated FIPPA-2017-001 and FIPPA-2017-002 as one request. This is improper. Previous decisions by the Information and Privacy Commissioner of Ontario (the "IPC") indicate that an institution cannot treat two or more requests filed by the same party as one request. Section 27(1) is not triggered simply by the fact that the Requester filed both requests.

The OEB failed to process this request because it dedicated its team and focus to FIPPA-2017-002. For example, the OEB did not give the Requester any written notice respecting this request by the April 26th deadline. Instead the OEB only responded to FIPPA-2017-002 by that deadline.

...the OEB is not entitled to treat two separate access requests filed by one party as one consolidated request. FIPPA requires the OEB to process this request as a separate and distinct request from FIPPA-2017-002. Both requests should have equal priority.

The OEB also does not have an automatic right to rely on the time extension provisions in s. 27 of FIPPA.

[27] The appellant also asserts that section 27(1)(b) of the *Act* is not triggered by the facts of this appeal, as he made it clear from the outset that "he is not looking for confidential information and that third party information can be redacted."

ANALYSIS:

[28] I have carefully reviewed all of the information provided to me by both the appellant and the OEB.

[29] The OEB's representations cite sections 27(1)(a) and (b) of the *Act* in support of its claim of a time extension. However, its representations do not subsequently contain any reference to outside consultations. As such, I will consider whether the December time extension decision is supported by section 27(1)(a) of the *Act*.

[30] The OEB advises that there are "well over 100,000 pages" to review for this request. It also highlights that to date, it has "far exceeded" the search time estimated in its April 26, 2017 decision and reproduced in its August 10, 2017 letter. The OEB also submits that due to the extensive number of records, which spanned a period of thirteen years, it acquired a specialized computer system to deal with the request. It also notes that uploading the files to the computer system was a lengthy process.

[31] Based on the evidence before me, 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 OEB. However, that alone is not sufficient to support the application of section 27(1)(a) of the *Act*. The OEB must also establish that meeting the time limit to respond to the request "would unreasonably interfere" with its operations to specifically warrant a time extension to July 1, 2018.

[32] In its representations, the OEB submits that the search time has, to date, far exceeded the 100 hours set out in its fee estimate. Based on my review of the OEB's representations, it appears that the OEB has located the records in response to the request, although the approximately 100,000 pages of records need to be reviewed for responsiveness, as well as any necessary redactions. The OEB does not specify how many hours it anticipates the review will take; however, it advises that it can issue a final decision on July 1, 2018.

[33] The OEB advises that this is the largest request that it has ever received. It also notes that the OEB does not have a freedom of information department. The OEB submits that the legal counsel who is assigned to this request is now spending approximately 85% of her time on this request, while under normal circumstances legal counsel would spend approximately 25% of her time on FOI requests. It also notes that

other staff have been assisting with the request and that these staff have other responsibilities. Moreover, the OEB indicates that some of the legal counsel's duties have already been transferred to other lawyers.

[34] The appellant asserts that he worked with the OEB to clarify and narrow his request. I note that the appellant clarified his request on several occasions and answered questions posed by the OEB. However, it does not appear as though this resulted in the scope of his request being narrowed. This is evidenced by the fact that the OEB advised the appellant that despite the appellant clarifying that he was looking for the generic process, rather than the individual determinations of cost assessments, the cost and timing for the search would remain the same as set out in its initial estimate in its April 26, 2017 decision. I also note that the request spans a period of thirteen years.

[35] The appellant argues that the OEB treated his two access requests as one, which is improper and that section 27(1) of the *Act* is not triggered simply by the fact that he filed both requests. He cites the fact that the OEB did not give him any written notice respecting this request by the April 26, 2017 deadline and that the OEB only responded to his other request by that deadline. I do not find, however, that the OEB treated the appellant's two access requests as one.

[36] First, the OEB did issue a decision letter containing a fee estimate and time extension concerning this request on April 26, 2017, of which I have a copy. Moreover, the OEB's representations note that a second lawyer was assigned to the appellant's other FOI request to assist the two requests in proceeding. The OEB advised in its December 21, 2017 correspondence that the same employees are responsible for reviewing records for both requests and asked the requester if he had a preference for which request is to be given priority.

[37] The appellant also asserts that the OEB does not have an automatic right to rely on the time extension provisions in section 27 of the *Act* and that the OEB must provide evidence that the section is properly triggered. The appellant relies on Order PO-1876, in which former Acting Adjudicator Mumtaz Jiwan considered whether the institution's time extension of thirty days was reasonable in the circumstances. Acting Adjudicator Jiwan did not uphold the institution's time extension as she found that the institution did not provide sufficient evidence with respect to either of the criteria set out in sections 27(1)(a) and (b) of the *Act*. I note that in order PO-1876, the request covered a three-month period and the institution did not indicate in its representations that the request required a review of a large number of files or records. In this case, the request spans a period of thirteen years and there are over 100,000 pages for the OEB to review.

[38] As detailed above, there was a series of efforts made by both parties at the request stage to work to clarify the scope of the request. Ultimately, the request was clarified; however, the scope was not narrowed, as the time frame remained a thirteen-

year period. In addition, the OEB advised in its August 10, 2017 correspondence that its original fee estimate and six-month extension of time following receipt of the deposit were still valid, as it had already assumed that it was the generic process that was the subject of the request. The appellant paid that deposit on September 7, 2017, bringing the end date of the time extension to March 7, 2017. In response to inquiries about the status of the request, the OEB sent a letter to the requester on December 21, 2017 advising that the search was underway and that while it was too soon to estimate when that request would be completed, it was likely that the request would be completed after the initial six-month time extension.

[39] No firm commitment as to the date the access decision would be issued was given. It was only during mediation that the OEB advised that it could issue its final decision on July 1, 2018.

[40] As set out in section 27(2) of the *Act*, the notice of extension must contain the length of the extension, the reason for the extension, and the fact that the person who made the request may ask the Commissioner to review the extension. While the OEB's December time extension decision included appeal provisions, it did not state the length of the extension or the reasons why an additional extension was being claimed.

[41] Instead, the OEB only advised the requester that it was likely that the request would be completed after the initial six-month time extension, i.e. after March 7, 2018. The OEB did not advise the appellant when it would be able to issue its final access decision until he appealed to this office. Once the OEB realized that it would be unable to complete the search in the original six-month period, it was required to provide the appellant with a date when it could issue a final decision, pursuant to section 27(2) of the *Act*.

[42] I am also cognizant of the concerns raised by former Commissioner Tom Wright regarding the use of a second time extension by an institution. In Order P-234, he stated:

...Generally speaking, it is my view that an institution, when assessing the time and resources it will need to properly respond to a request, must decide within the initial 30 day time limit for responding to the request, the length of any time extension it will need. Although I have concerns about the use of two separate time extensions, I have accepted that the 100 day time extension was reasonable and, in the particular circumstances of this appeal, I have decided to make allowances.

[43] When assessing the time and resources an institution will require to respond to a request, unless there are exceptional circumstances, 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 require pursuant to section 27 of the *Act*⁴. In the very exceptional circumstances that an institution does claim a second time extension, the notice must advise the requester the length of the extension and reason for the extension, as well as the requisite appeal provisions. I would encourage the OEB to keep this in mind when claiming time extensions in future requests.

[44] After considering the parties' representations and evidence, I am satisfied that responding to the appellant's request necessitates a search through a large number of records and that meeting the time limit would unreasonably interfere with the operations of the OEB. Although the OEB did 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, the OEB did provide other relevant considerations. I considered the fact that the OEB has to review over 100,000 pages for relevance, that the request covered a period of thirteen years and that legal counsel is now spending 85% of her time to process the request while being assisted by other staff, as persuasive evidence to satisfy me that its proposed timeframe to issue a final access decision is reasonable in the circumstances. I also note that this extension adds almost four months to the original decision. Although a significant amount of time, I find that this is not unduly long given the amount of work that the OEB has indicated is required.

[45] Accordingly, I uphold the OEB's December time extension decision and I allow an extension of time until July 1, 2018. I note that July 1, 2018 falls on a weekend and that July 2, 2018 is a statutory holiday, consequently the OEB has until July 3, 2018 to issue a final access decision.

[46] Although third party information is not being sought by the appellant, the OEB is nonetheless obligated to determine whether notice to affected parties is required pursuant to section 28 of the *Act*.

ORDER:

1. With respect to those records that do not require third party notice to be given, I order the OEB to issue a final access decision to the appellant no later than **July 3, 2018**.
2. Where affected party notice is required to be given under section 28, I order the OEB to give such notice no later than **July 3, 2018** and to issue a final access decision to the appellant and affected third parties no later than 30 days following this notification.

⁴ Orders MO-1777, P-234, M-581

3. The OEB shall have no recourse to any further time extensions with respect to this request.

Original Signed by: _____

Elana Laiken
Acting Adjudicator

_____ May 30, 2018