

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4431

Appeal PA23-00292

Metrolinx

August 23, 2023

Summary: Metrolinx received a request for emails and attachments regarding the caisson installation, soil conditions, and/or ground settlement/movement issues, impacting a certain bridge in the course of the construction of the Stouffville Line GO Expansion project. Metrolinx claimed a time extension of 245 days to December 18, 2023 under sections 27(1)(a) and (b) of the *Act*. This order upholds Metrolinx's time extension decision and allows an extension of time until December 18, 2023.

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-3300, PO-3842, PO-3849, and PO-4172.

BACKGROUND:

[1] Metrolinx received a request on January 25, 2023¹ under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

¹ The requester submitted three other requests to Metrolinx on the same date, one of which is the subject of another time extension appeal filed with the Information and Privacy Commissioner on the same date as this appeal, which has resulted in Order PO-4432).

All emails (including attachments) to, from or within Metrolinx regarding the caisson installation, soil conditions, and/or ground settlement/movement issues, impacting the [named company] bridge (Belleville Subdivision Bridge) in the course of the construction of the Stouffville Line GO Expansion project.

For the time period of January 1, 2021 to January 25, 2023

[2] Metrolinx issued a fee estimate on February 24, 2023. The fee estimate to process the request was \$16,605, which was comprised of 529 hours of search time, and 24.5 hours of preparation time. The letter advised that a time extension would be required in accordance with sections 27(1)(a) and 27(1)(b) of the *Act* following receipt of the fee deposit of \$8,302.50. The letter further advised that certain specified exemptions in the *Act* may apply to the records.

[3] Metrolinx received the requester's fee deposit on April 3, 2023.

[4] Metrolinx issued a decision to the requester on April 17, 2023 extending the time for responding to the request by 245 days (35 weeks), to December 18, 2023. The letter indicated that the time limit is being extended in accordance with sections 27(1)(a) and (b) of the *Act*. The letter stated:

The initial 60 days of the time extension will be utilized to conduct a search through a large volume of records. The remaining 185 days will be required in order to review the large volume of records to respond to your request. Meeting the time limit would unreasonably interfere with the operations of the institution. In addition, consultations with parties outside of Metrolinx are necessary to comply with the request and cannot reasonably be completed within the time limit.

[5] On May 12, 2023, the requester, now the appellant, filed an appeal with the Information and Privacy Commissioner of Ontario (the IPC), appealing Metrolinx's decision to extend the time for responding to the request.

[6] This office sent a Notice of Appeal to the parties on May 16, 2023 and a Notice of Mediation to the parties on May 19, 2023.

[7] During the mediation stage of the appeal, following discussions between the parties and the mediator, the appellant revised the request as follows:

All emails (including attachments) to, from, or within Metrolinx regarding settlement issues related to the crossing at Belleville Subdivision Mile 199.50 in the course of the construction of the Stouffville Line GO Expansion project.

For the time period of January 1, 2021 to January 25, 2023.

[8] The revised request did not result in a reduction of the time extension period.

[9] Following further discussions with the mediator, the parties were unable to resolve this time extension appeal through the process of mediation. As no further mediation was possible, the matter proceeded to the inquiry stage of the appeal process.

[10] As the Acting Adjudicator, I sent a Notice of Inquiry to the parties, setting out the issue in this appeal and inviting them to submit representations. In response, I received representations from both parties.²

[11] In this order, I uphold Metrolinx's time extension decision and dismiss the appeal.

ISSUE:

[12] The sole issue in this appeal is whether the extension of time claimed by Metrolinx to respond to the appellant's request is reasonable in the circumstances of the request, in the context of sections 27(1)(a) and 27(1)(b) of the *Act*.

DISCUSSION:

[13] 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.

[14] 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);

² Only the non-confidential portions of Metrolinx's representations are referenced in this order.

- 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.

[15] In its representations, Metrolinx submits that the 35 week time extension is reasonable given the circumstances of the request, in the context of sections 27(1)(a) and 27(1)(b) of the *Act*.

[16] Metrolinx submits that the timeframe of the request spans over two years, and the request covers "a wide variety of communications (and attachments) to, from, or within Metrolinx pertaining to the settlement issue(s)."

[17] With respect to the search, Metrolinx submits that it implemented a task force with the primary function of conducting the search. It submits that the total search time for this request is estimated at 529 hours, involving 22 employees across 4 program units.

[18] With respect to preparation of the records, Metrolinx submits that the review of the records involves a "line by line in detail" review due to the complex background, context and nature of the records, and possible exemptions to be applied. It submits that there are between 6000 to 8000 pages of records to: review, organize in chronological order, convert into PDF format to allow for any redactions to be applied, and sort.

[19] Metrolinx submits that, in calculating the time extension period, it took into consideration Metrolinx's overall workload which involves responding to other requests, including several by the appellant, and "it is unreasonable to expect that the Coordinator would devote their entire time to this request alone."

[20] Metrolinx further submits that the appellant has also made a related request to another organization which has notified Metrolinx that it will be engaging in consultations with Metrolinx on voluminous records. Those records will have to be reviewed in order to respond to that consultation.

[21] Regarding consultations outside the institution, Metrolinx submits that the request requires "consultations and third party notice to other organizations" which could not reasonably be completed within the time limit.

[22] In its representations, the appellant submits that the 35 week time extension is not reasonable given the circumstances of the request, in the context of sections 27(1)(a) and 27(1)(b) of the *Act*.

[23] The appellant submits that Metrolinx failed to provide any evidence, "apart from

simply the volume of records," to show that compliance with the statutory time limit would unreasonably interfere with its institutional operations.

[24] The appellant submits that in IPC Order PO-3842, a time extension of 6 months was denied where insufficient evidence was provided to establish that meeting the time limit would unreasonably interfere with the institution's operations.

[25] The appellant also submits that "Metrolinx has a dedicated FOI coordinator whose role is to facilitate responses to exactly these requests. This militates against any argument that compliance with the time limit would interfere with operations." The appellant points to IPC Order PO-3849 where it submits the adjudicator accepted evidence that the institution did not have a dedicated FOI coordinator "as supporting a contention that compliance would interfere with the institution's operations."

[26] The appellant requests that Metrolinx be ordered to provide access on a "rolling" basis "where responsive records are provided as they become available." The appellant submits that this "would ease any potential operational restrictions on Metrolinx while providing the Appellant with the records on a timelier basis." The appellant submits that the Commissioner should exercise its power to order "rolling" access in this case. The appellant points to section 54(3) of the *Act*, which it submits provides that "the Commissioner's order can contain any terms and conditions the Commissioner considers appropriate."

[27] The appellant cites IPC Order PO-3849 as supporting its contention that, in previous IPC orders, institutions have been ordered to provide access "within two separate staged timeframes: the first for records that did not require third party notice or for which third party notice had already been given, and another for records that still required third party notice."

[28] The appellant also cites IPC Order MO-3300 in support of its request for ordering "rolling" access. The appellant submits that, in that order, "the adjudicator noted that the requestee had itself offered to release information on an ongoing basis as the review of the documents and emails was completed."

[29] The appellant further submits that Metrolinx has not provided any evidence that third party consultations would be unachievable in a reasonable time frame.

ANALYSIS

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

[31] Metrolinx's representations cite sections 27(1)(a) and (b) of the *Act* in support of its claim of a time extension. Based on the evidence provided, I find that section 27(1)(a) of the *Act* applies and I uphold Metrolinx's time extension.

[32] I am satisfied that the request is for a large number of records.

[33] I am also satisfied that, in the circumstances, meeting the 30 day time limit set out in section 26 of the *Act* would unreasonably interfere with Metrolinx's operations. I accept that the search time is hundreds of hours, involving many employees, across several program areas. I accept that the preparation time involves a detailed review of voluminous records, followed by the need to organize, convert and sort those records. I also accept that, in calculating the time extension period, Metrolinx took into consideration its overall workload priorities. This includes responding to other requests, including several from the appellant, and responding to a consultation from another organization in response to a related request made to that organization by this appellant.

[34] I have considered the appellant's request for an order under section 54(3) of the *Act* requiring Metrolinx to provide access on a "rolling" basis where responsive records are provided as they become available. As I understand the appellant's argument, the appellant wishes for Metrolinx to issue successive access decisions and to provide access to records on a piecemeal basis as it completes its searches and record preparation. I decline to make such an order. Metrolinx is entitled under the *Act* to extend the time for *making a decision* and the appellant is entitled to appeal its time extension, which the appellant has done. Until Metrolinx makes its access decision, there will be no disclosure of any records. Given the number of records and the preparation involved in this appeal, I find that requiring Metrolinx to issue multiple decisions on an on-going basis is not reasonable.

[35] The appellant relies on Orders MO-3300 and PO-3849 in support of the request for an order for "rolling" access. I note that "rolling" access was not ordered in either of these orders. In MO-3300, the parties agreed among themselves at the request stage that the institution would limit the search to one year at a time, and issue access decisions accordingly. In PO-3849, it was ordered that a final access decision would be issued on a specified date, and any outstanding third party notices would be issued by that same specified date.

[36] In considering an appropriate date for Metrolinx to complete its processing of the request and issue a final access decision, I have considered previous IPC orders including the orders cited by the appellant in its representations.

[37] In Order PO-4172, the adjudicator found that a 60 day time extension was a reasonable time for processing a request involving 2000 pages of records. The adjudicator stated:

In reviewing orders involving the processing of a large number of records, I note that in Order MO-3353, Adjudicator Smith ordered a four month extension to complete processing 4000 pages of records and in Order PO-2950, Adjudicator Hale accepted a 90 day time extension for 3800 pages

of records. Based on the submissions of the ministry and the findings in such orders, I accept that 60 days is a reasonable time for processing a request involving 2000 pages of records.

[38] In its representations, the appellant points to Orders PO-3842 and MO-3300 as examples of time extension decisions being denied because there was insufficient evidence that the request would interfere with the institution's operations. I note that the circumstances in those appeals are quite different from the circumstances in this appeal.

[39] In PO-3842, the adjudicator found that the institution 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." In contrast, in the current appeal, Metrolinx has provided specific details regarding the work involved in processing this request. As well, in PO-3842, the actual search time was 60 hours (compared to 529 hours in this appeal), and the 6 month time extension period at issue was the second time extension after a previous 10 month time extension.

[40] In MO-3300, the adjudicator denied a 6 month time extension and ordered the institution to issue a decision within 3 months of payment of the fee deposit by the appellant. In that appeal, the 6 month time extension was being sought only to allow the institution to search for the records and identify which third parties to notify, and it did not include an additional period beyond the 6 month time period sought by the institution to prepare the records for disclosure. As well, in that appeal only 4 people at the institution needed to search their record holdings, as opposed to 22 people in the current appeal.

[41] After considering the parties' representations and evidence, I find that Metrolinx has 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 December 18, 2023 under section 27(1)(a) of the *Act*.

[42] Accordingly, I uphold Metrolinx's decision to seek a time extension to December 18, 2023 under section 27(1)(a) of the *Act*. Metrolinx's representations indicate that the time extension period includes the time necessary to notify affected third parties, as contemplated by section 28(3) of the *Act*. In the circumstances of the appeal, I will require that Metrolinx complete any notice to affected parties within the December 18, 2023 deadline.

[43] Having found that Metrolinx is entitled to a time extension of 245 days under section 27(1)(a), I also considered whether Metrolinx's time extension meets the conditions in section 27(1)(b), specifically that "consultations with a person outside the institution are necessary to comply with the request and cannot reasonably be completed within the time limit."

[44] A time extension under section 27(1)(b) cannot be used to extend the time for third party notice under section 28. While Metrolinx submitted representations to support the application of section 27(1)(b), I find it has not established that section 27(1)(b) applies in the circumstances.

ORDER:

I uphold Metrolinx's decision under section 27(1) to extend the time limit in section 26 to issue an access decision to the request to **December 18, 2023**.

Original signed by: _____
Lani Freedman
Acting Adjudicator

_____ August 23, 2023