



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

# ORDER PO-1643

Appeal PA-980285-1

Ministry of Education and Training



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## **NATURE OF THE APPEAL:**

This is an appeal under the Freedom of Information and Protection of Privacy Act (the Act). The requester asked the Ministry of Education and Training (the Ministry) for access to all versions of briefing and issue notes relating to Bill 160, The Education Quality Improvement Act. The request covers the time period of September 1 through December 15, 1997. The request is dated April 3, 1998.

On June 19, 1998, the Ministry issued an interim decision to the requester. The interim decision stated that a fee estimate of \$146.40 had been assessed for the request. Further, the interim decision stated that some of the responsive records might be exempt under sections 12, 13, 17 and 19 of the Act. The Ministry advised the requester that a deposit of \$73.20, half of the total estimate, was required before the Ministry would proceed with the request.

On July 17, 1998, the requester accepted the fee estimate of \$146.40 and sent the Ministry a deposit of \$73.20. On or about August 31, 1998, the requester contacted the Ministry as no further communication had been received from the Ministry. The requester was advised that the Ministry was in the process of compiling the records and making appropriate severances.

The Ministry did not issue a final decision letter to the requester as required by sections 26 and 29 of the Act within the 30 days prescribed by the Act, nor did the Ministry request a time extension to process the request under section 27(1) of the Act. Accordingly, the Ministry placed itself in a "deemed refusal" situation pursuant to section 29(4) of the Act.

The requester (now the appellant) appealed the Ministry's deemed refusal to provide access to the records. On November 17, 1998, the Ministry and the appellant were each sent a Notice of Inquiry. The Notice stated that the Ministry was in a "deemed refusal" situation because a decision letter had not been issued to the appellant within the time period set out in section 26 of the Act. The Notice also indicated that I would attempt to settle the appeal but if a settlement was not reached by December 1, 1998, I would be in the position to issue an order requiring the Ministry to issue a decision letter to the appellant.

In Order P-81, former Commissioner Sidney B. Linden outlined a scheme to be followed in situations where institutions found themselves in a position to issue interim decisions. Former Commissioner Linden made the following comments with respect to the issuance of interim and final decisions:

Section 26 requires the head to issue a notice to the requester within a 30-day period, subject to time extensions under sections 27 and 28. After the head receives the request and any necessary clarification is done, the 30-day time period begins to run. If the head intends to provide full access, he or she must advise the requester and cause the record to be produced. In cases where access is to be granted, either totally or partially, the head may also decide to charge a fee. If so, a fees estimate must be provided to the requester. If the head determines that access can only be granted in part or not at all, section 29 of the

Act stipulates that the notice must set out the specific provisions of the Act under which access is denied.

...

Regardless of whether the head has issued an "interim" section 26 notice (based on a representative sample or consultations) or a regular section 26 notice (based on inspection of the actual requested record), if the notice is accompanied by a fees estimate, the issuance of the fees estimate has the effect of suspending the 30-day time limit imposed by section 26. If the institution sends a fees estimate to the requester on day 14, for example, day 15 is deemed to be the day after the institution receives the required deposit from the requester or issues a decision to waive fees pursuant to a request for waiver. If the requester appeals the issue of fees, the running of the 30-day period is suspended. It begins to run again on the day after the appeal is resolved, either by Order of the Commissioner or mediated settlement between the parties.

As soon as the question of fees is resolved and the 30-day time limit is reactivated, the institution must retrieve and review all of the requested records for the purposes of determining whether access can be given. If the records are to be disclosed, section 26(b) requires the head to "...give the person who made the request access to the record or part thereof, and where necessary for the purpose cause the record to be produced..." within the balance of the 30-day time limit.

If access is not granted, either in whole or in part, the head is required by subsection 29(1)(b) of the Act to advise the requester of:

- (b) where there is such a record,
  - (i) the specific provision of the Act under which access is refused,
  - (ii) the reason the provision applies to the record,
  - (iii) the name and position of the person responsible for making the decision, and
  - (iv) that the person who made the request may appeal to the Commissioner for a review of the decision.

By necessary inference, the provisions of subsection 29(1)(b) of the Act require that the head provide the requester with a general description of the records responding to the request, and, with respect to all records withheld by the institution, the head should clearly identify the specific sections or subsections of the Act used to exempt specific portions of

each record. These activities must also be completed within the 30-day time limit set out in section 26. In cases where the head had previously issued an "interim" section 26 notice with a fees estimate, this second notice would constitute the institution's final decision under section 26 and it is therefore appealable to the Commissioner.

I adopt the approach taken by former Commissioner Linden for the purposes of this appeal. The request was made on April 3, 1998. Clarification of the request was not sought by the Ministry. Nor was a time extension requested by the Ministry. Accordingly, the 30-day period began upon receipt of the request and a decision should have been issued by May 3, 1998.

While an interim decision was issued by the Ministry on June 19, 1998, this decision was made well after the expiration of the 30-day period. Therefore, the Ministry had already passed the 30-day time frame before the interim decision was made. Further, the appellant accepted the fee estimate and paid the fee deposit on July 17, 1998, yet to date, no final decision has been issued by the Ministry.

On December 1, 1998, I was advised by the Ministry's Acting Co-ordinator that the Ministry has not yet received all of the responsive records from the program areas and it is uncertain when a final decision will be issued by the Ministry.

Given the above, I am ordering the Ministry to issue a decision letter to the appellant with respect to her request for records.

**ORDER:**

1. I order the Ministry to provide the appellant with a decision on access to the records responsive to the request of April 3, 1998 by **December 11, 1998**, without recourse to a time extension.
2. In order to verify compliance with Provision 1, I order the Ministry to provide me with a copy of the decision letter referred to in Provision 1 by **December 14, 1998**. This should be forwarded to my attention, c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.

Original signed by: \_\_\_\_\_  
Janice Nemeth

December 4, 1998

Acting Adjudicator