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

INTERIM ORDER PO-1694-I

Appeal PA-990037-1

Ministry of the Environment

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NATURE OF THE APPEAL:

The Ministry of the Environment (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to:

> all information, data, letters, reports, applications, etc., in the possession of the Ministry of the Environment that relates to contamination of the property of [a named company] (the company) and remediation as it may affect the [requester's] property ...

The request also included any records relating to the previous owner of the company's property.

The Ministry notified the company, pursuant to section 28 of the Act, stating that it planned to disclose records provided by the company, and sought the company's views regarding disclosure of 17 records identified in an attached index.

In response, the company asked the Ministry to confirm that the only records the Ministry intended to disclose were the 17 records identified in the Ministry's index. The Ministry advised the company that "only those documents that require notice in accordance with the FOI Act were listed on the index". The Ministry's Freedom of Information and Privacy Co-ordinator went on to state:

> It is my intention to release additional records which were ministry generated as well as others received from [the company] or consulting firms. The additional records do not require notification in accordance with the Act.

The company expressed concern that these additional records contain the company's information and might qualify for exemption under section 17(1) of the Act. The company stated:

> In the circumstances it would appear that the additional records required notification in accordance with the Act. [The company] must insist on its full rights of notification with respect to any records which you intend to disclose.

The Ministry refused to permit the company to review the additional records or to make submissions with regard to their disclosure.

Before any action was taken by the Ministry, the company (now the appellant) appealed the Ministry's refusal to provide it with notice under section 28(1)(a) of the Act for the additional records.

A Notice of Inquiry was sent to the appellant, the original requester and the Ministry. The parties were asked to provide representations on three issues:

1. whether the Ministry's refusal to provide section 28 notice for the additional records was an appealable decision under the Act;

2. if so, whether the Ministry had failed to fulfil its obligations regarding notification; and
3. if so, what was the appropriate remedy in the circumstances.

Representations were received from all three parties.

DISCUSSION:

IS THE MINISTRY'S REFUSAL TO PROVIDE SECTION 28 NOTICE FOR THE ADDITIONAL RECORDS AN APPEALABLE DECISION UNDER THE ACT?

The rights of appeal under the Act are outlined in section 50(1), which reads as follows:

> A person who has made a request for,
>
> (a) access to a record under subsection 24(1);
>
> (b) access to personal information under subsection 48(1); or
>
> (c) correction of personal information under subsection 47(2),
>
> or a person who is given notice of a request under subsection 28(1) may appeal any decision of a head under this Act to the Commissioner.

The Commissioner or her delegate only has jurisdiction to review a decision made by a head under the Act. If the head has not made a decision under the Act, either expressly or by necessary implication, then the Commissioner has no jurisdiction to conduct an inquiry, and no ability to grant a remedy under the Act. (See Order P-1390)

It is clear from the position taken by the Ministry throughout its dealings with the appellant on this matter that it views the decision not to provide notice regarding the additional records as final and not appealable.

The requester disagrees with the Ministry, and submits:

> It is my respectful submission that [the appellant] should have the right of appeal as the documents relate to their property and their investigations. It is unreasonable to eliminate the right of appeal if the Ministry inappropriately fails to list a document as this would eliminate all appeals on "missed" documents and failed notice.

The appellant makes two alternative arguments on this issue. First, it takes the position that notice has in fact been provided with respect to the additional records. The appellant states:

> In fact, the Ministry **did** provide [the appellant] with notice which covered the "additional records", purportedly under section 28 of the *Act*, but then declined to specifically identify those "additional records" for [the appellant], pursuant to subsection 28(2) of the *Act*, thereby precluding [the appellant] from both a consideration of whether it might consent to disclosure of any specific record or whether it would resist disclosure of any specific record, pursuant to section 17(1) of the *Act*. (emphasis in original)

Alternatively, the appellant submits that the Ministry's action in not providing specific notice with respect to the additional records is an appealable decision. The appellant submits:

> ... it should be noted that section 50(1) provides a broad right of appeal to the Commissioner under the *Act* with respect to "**any** decision" [emphasis added] of a head under this *Act*. The process of the *Act*, as section 50(1) makes clear, is engaged by the making of the request. Once the request has been made, then "any decision" made by the involved institution must of necessity be under the *Act*.
> ...
>
> ... An appellant is given standing to "... appeal any decision of a head under this *Act* to the Commissioner" by virtue of having received notice of "a request" under section 28(1). Consequently, once a person has received notice of a request, any request, under section 28(1), that person has standing to appeal **any** decision of a head under this *Act* [emphasis added] to the Commissioner. Neither the appeal rights of the appellant having received a request under section 28(1), nor the jurisdiction of the Commissioner, are in any way circumscribed by the contents of the section 28(1) notice. Rather the appeal rights, and corresponding jurisdiction of the Commissioner, are cast broadly to encompass "any decision" under the *Act*.

Section 28(1) of the Act reads, in part, as follows:

> 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 interests of a person other than the person requesting information;
> > ...
>
> the head shall give written notice in accordance with subsection (2) to the person to whom the information relates.

I find that the first position put forward by the appellant is not supported by the wording of section 28(1)(a). In applying this section, a head must first identify all responsive records, and then consider the need for formal third party notice for each record, based on the requirements of paragraph (a). Although the appellant was made aware of the existence of the additional records through the course of responding to the original notice, it is clear that the Ministry concluded that the requirements of paragraph (a) were only present with respect to the 17 records for which specific notice was given. In my view, no formal notice was provided under section 28(1)(a) with respect to the additional records and, therefore, section 28(2) has no application in the circumstances.

However, I do accept the appellant's alternative position that the Ministry's action in not providing notice with respect to the additional records is an appealable "decision" for the purposes of section 50(1). Section 28(1) gives a head responsibility to decide whether to provide notice, based on a determination of whether the requirements of paragraphs (a) or (b) are present. In other words, the head is required to make a discretionary decision, and he/she has two options: notify or not notify. If discretion is exercised in favour of notification, then this is clearly a "decision" under the Act, and the appeal provisions of section 50(1) are available. If, on the other hand, a head decides to exercise discretion by not notifying, in my view, it necessarily follows that this too constitutes a "decision" which is subject to review by the Commissioner. (See Order P-1390)

I acknowledge that many decisions of this nature will not be known to the Commissioner, and that records will frequently be disclosed on the basis of the exercise of discretion in favour of not notifying. However, in situations where an affected party has been provided by an institution with notice of a request under section 28(1) and objects to the absence of notification with respect to certain records, the appeal provisions of section 50(1) will apply. My conclusion that this discretionary decision is a "decision" by a head under the Act and therefore reviewable on appeal is consistent with the principle in section 1(a)(iii) that "decisions on the disclosure of government information should be reviewed independently of government".

For these reasons, I find I have jurisdiction to conduct an inquiry and to grant a remedy under the Act.

HAS THE MINISTRY FULFILLED ITS OBLIGATIONS REGARDING NOTIFICATION TO THE APPELLANT UNDER SECTION 28 OF THE ACT?

In order to discharge the responsibilities under section 28(1)(a), a head must provide notice with respect to any responsive records that he/she "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", in this case, the appellant.

The Ministry submits that notice is not required with respect to the additional records because they do not qualify for exemption under section 17(1) of the Act. The Ministry points out that it cannot be assumed that all information supplied by a third party would fall under the notice requirements, and that the Ministry has

discretion to determine the likelihood of any particular record meeting the requirements of section 17(1) in the context of making a notification decision.

The Ministry points out that:

> The Ministry has the required authority to release the information (section 168 of the EPA [the Environmental Protection Act] and prior to 1996 chose to provide information without invoking the FOI process.

The Ministry states that providing section 28 notice with respect to all documents involving a specific property would be both labour intensive and time consuming, and result in unnecessary delay.

The requester submits that unless there is at least some evidence to the contrary, it should be assumed that the Ministry properly exercised its discretion and objective judgement.

The appellant submits that the Ministry was aware at the time of the original request that it took the position that the additional records qualified for exemption under section 17(1). The appellant points out that the records:

> ... *do* contain information referred to in subsection 17(1), and specifically that the records are "confidential". In the circumstances, it is difficult to fathom how the Ministry could determine that it had *no* reason to believe that the "additional records" *might* contain such information.

The appellant goes on to state that:

> In deciding in the face of representations to the effect that the "additional records" are confidential and do fit within section 17 that the Ministry had *no* reason to believe that the "additional records" *might* contain information referred to in subsection 17(1), the Ministry contravened the *Act*, exceeding its jurisdiction thereunder, and violated [the appellant's] right to fairness and natural justice.

In Order PO-1657, Senior Adjudicator David Goodis dealt with a situation where records containing the personal information of both an appellant and an affected person were disclosed without notification under section 28(1)(b). Senior Adjudicator Goodis made the following statements in his order:

> In my view, the purpose of these provisions of section 28 is to ensure that procedural fairness is accorded to individuals whose privacy interests may be at stake. Adherence to these provisions permits the subject individual to make representations as to whether or not the information should be disclosed and, if the head decides to disclose information, to appeal the matter to the Commissioner before disclosure actually takes place.
> ...

> In these circumstances, there was a "reasonable doubt" as to whether disclosure would constitute an unjustified invasion of the affected person's personal privacy, and thus the [Criminal Injuries Compensation] Board had ample reason to believe that disclosure "might" constitute an unjustified invasion within the meaning of section 28(1)(b). Therefore, the Board ought not to have deprived the affected person of notice under this provision, and should have given her an opportunity to make representations on the issues prior to disclosure.

Although Order PO-1657 involved notification under the personal privacy provisions of section 28(1)(b), I find that Senior Adjudicator Goodis' comments are equally applicable to the third party notification provisions of section 28(1)(a).

In my view, use of the word "might" in section 28(1)(a) creates a low threshold in determining whether notification is required.

In order to trigger the notification requirements under section 28(1)(a), a head must first have reason to believe that a record **might** contain one of the types of information listed in section 17(1) (ie. a trade secret or scientific, technical, commercial, financial or labour relations information). If it does, the head must then consider whether disclosure of this information **might** affect the interest of a person other than the person requesting the information. In addressing this second requirement, the head should be guided by the provisions of section 17(1). For example, if the head has reason to believe that the information **might** have been supplied implicitly or explicitly in confidence, then notification is required. Similarly, if the head has reason to believe that disclosure of the record **might** result in one or more of the harms identified in section 17(1), then notification must also be given.

If a head concludes that a record **might** contain section 17(1)-type information, and that this information **might** have been supplied in confidence, in my view, it is not appropriate for an institution to decide that notice is unnecessary based on an assessment that the potential for harm from disclosure does not meet the threshold established by section 28(1)(a). The potential for harm is a determination that must be made in the individual circumstances of a particular request and, in my view, the notification requirements of section 28 were designed to allow affected persons an opportunity to provide input on this issue before a decision is made regarding disclosure.

I have reviewed the additional records at issue in this appeal. Many of them do not appear to contain trade secrets or any commercial, financial, scientific, technical or labour relations information; others were not supplied to the Ministry by the appellant; others are addressed to the requester; and others are already in the possession of the requester, as indicated in correspondence sent to the Ministry during the course of this appeal. However, some other records contain information which is highly similar in nature to the information contained in some of the 17 records for which notification was provided; and the content of other records created by individuals other than the appellant would appear to include information originally supplied to the Ministry by or on behalf of the appellant.

Further, the appellant has made it clear that it does not agree with the Ministry's view regarding the confidential nature of certain records. The question of whether information was "supplied in confidence" is one of the issues to be considered in the context of a section 17(1) exemption claim. In my view, the Ministry had reason to believe that records containing section 17(1)-type information **might** have been supplied in confidence, and that disclosure of this information **might** affect the interests of the appellant.

Accordingly, I find that the requirements of section 28(1)(a) are present for some of the additional records, and the appellant is entitled to notice under this provision and the opportunity to make representations on these records prior to disclosure.

WHAT IS THE APPROPRIATE REMEDY IN THE CIRCUMSTANCES OF THIS APPEAL?

The Ministry has asked me to determine which of the additional records require notification.

The requester has expressed concern with the delay associated with the release of responsive records. He offers the following suggestions as appropriate next steps:

1. Immediately provide copies of all Certificates of Approval and supporting documents.

2. Immediately provide copies of all documents, monitoring and sampling results, annual reports, etc., required under the Certificates of Approval.

3. Immediately provide all sampling and monitoring results, but without the interpretations and professional opinions.

4. Immediately provide all correspondence which deals with the conduct or actions of [the requester] as it is completely inappropriate for any statements or misrepresentations made by [the appellant] to be withheld any longer.

5. Immediately provide all [Ministry] generated documents.

6. Direct [the appellant] to provide detailed submissions within 3 weeks as to why the documents listed in the present s. 28 notice violate s. 17 and why disclosure is not appropriate. Three weeks is more than enough time as [the appellant] has already had the documents for months.

7. Direct [the appellant] to provide detailed submissions within 6 weeks as to why other documents in the Ministry file require s. 17 protection. In this way, the onus is on [the appellant] rather than the Ministry.

> 8. [The Commissioner's Office] must render its final decision within 2 months in order to avoid further delays associated with [the appellant's] appeals.

As far as point 6 is concerned, it should be noted that the Ministry has issued a decision with respect to the original 17 records. This decision has been appealed, and the requester has been identified as an affected party in that appeal (Appeal PA-990200-1).

The appellant submits that:

> ... the Commissioner should provide [the appellant] with an opportunity to exercise its rights under the *Act*, by ensuring that an impartial adjudicator provides it with the notice prescribed under subsection 28(2) of all of the records encompassed by the request, including the "additional records", so that [the appellant] can consider the disclosure of each record and make the appropriate submissions with respect to each record.

Section 28(1) of the Act places a statutory responsibility on the head of an institution, not the Commissioner. The head must identify the required notifications in the context of deciding whether records should be disclosed or withheld to protect third party interests, both personal and commercial. The Commissioner's role is to provide an opportunity for an independent review of a head's decision prior to the actual disclosure of records, should an appeal be made by an affected person or party.

In the unique circumstances of this appeal, I have decided to craft a remedy which will allow for an expeditious determination of the proper treatment of all responsive records, while at the same time permitting the parties, in particular the appellant, an opportunity to make representations on all records for which notification under section 28(1)(a) should have been given. I have decided on this course of action based on the Ministry's clear indication to the appellant that it intends to disclose all records other than the 17 records for which notice was given. In my view, to require the Ministry to apply the interpretation of section 28(1)(a) outlined earlier in this order and provide notification with respect to some of the additional records, would only add unnecessary procedural steps to a matter which will ultimately require consideration by this Office. That being said, I want to be clear that the responsibility to notify when considering access requests under the Act rests with institutions, pursuant to the requirements of section 28. The interpretation I have provided on the application of section 28(1)(a) should assist the Ministry in discharging these statutory responsibilities in future.

The Supplementary Notice of Inquiry attached to this Interim order identifies those records for which notification should have been issued by the Ministry pursuant to section 28(1)(a) of the Act. All other responsive records, with the exception of the 17 records for which notice has already been given (Appeal PA-990200-1), do not require notification.

ORDER:

1. I order the Ministry to disclose all responsive records identified in the Supplementary Notice of Inquiry attached to this order as not requiring notice, with the exception of the 17 records for which notice has already been given (Appeal PA-990200-1), by **August 16, 1999**, but not before **August 10, 1999**.

2. In order to verify compliance with this Interim order, I reserve the right to require the Ministry to provide me with a copy of the records disclosed to the requester.

Original signed by: July 9, 1999
Tom Mitchinson
Assistant Commissioner