



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER PO-1826

Appeal PA-990457-1

Ministry of the Environment



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BACKGROUND:

Introduction

This appeal stems from a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) by counsel on behalf of the Sierra Legal Defence Fund (the appellant) on December 1, 1998 for access to information relating to organizations found by the Ministry of the Environment (the Ministry) to be in non-compliance with a prescribed control order, certificate of approval, policy, guideline, statute or regulation. The appellant sought information about both municipalities and companies, relating to both air and water discharges, for the years 1997 and 1998. The appellant indicated that in Order P-1557, which involved a request for similar information, Adjudicator Holly Big Canoe had determined that all access fees should be waived and, therefore, the Ministry should waive the fees for this request as well.

At some point during the month of December, 1998, the appellant and Ministry officials spoke by telephone about this request. The purpose of this discussion was to clarify and/or modify the scope of the request, and to resolve any timing of access issues. Later, during the month of January, 1999, the appellant and the Ministry exchanged correspondence in a continuing effort to reach an understanding on what information was to be disclosed, and when. It appears that the parties had a mutual interest in working cooperatively to reach an informal agreement which would not require strict adherence to the procedures set out in the *Act*. The parties appeared to have an understanding that by narrowing the scope of her request to include only summary information, the appellant would receive information in a more timely way, and the Ministry would be put to less time and effort in responding to the request.

Content of the agreement

Based on my review of this correspondence and the representations of the parties, it is my view that as of the end of January, 1999, the Ministry agreed to provide the appellant with the following information in accordance with the following timetable:

1. Table listing the names of companies or municipalities found by the Ministry to be in non-compliance with a limit prescribed by a control order, certificate of approval, policy, guideline, statute or regulation as a result of water discharge for 1997, together with 10 other categories of information (see paragraph 5 below), by February 26, 1999.
2. Table listing the names of companies or municipalities found by the Ministry to be in non-compliance as a result of air discharge for May 3, 1997 to December 31, 1997, together with the 10 other categories of information, by February 26, 1999.
3. Table listing the names of companies or municipalities found by the Ministry to be in non-compliance as a result of water discharge for 1998, together with the 10 other categories of information, by July 1, 1999.

4. Table listing the names of companies or municipalities found by the Ministry to be in non-compliance as a result of air discharge for 1998, together with the 10 other categories of information, by July 1, 1999.
5. 10 categories of information as follows:
 - (i) location of company plant (either address or municipality);
 - (ii) Ministry District Office company reports to;
 - (iii) type of discharge;
 - (iv) parameter of non-compliance;
 - (v) limit of parameter;
 - (vi) value of non-compliant parameter;
 - (vii) date of non-compliance;
 - (viii) whether non-compliance is of daily, weekly, monthly or annual total or average or other parameter;
 - (ix) instrument containing limit of parameter; and
 - (x) whether company or municipality is subject to investigation or prosecution (by March 26, 1999).

It was also agreed that, at the Ministry's discretion, multiple non-compliances could be grouped together, as long as the range of dates and the highest level of non-compliance were indicated. In addition, the Ministry, at its discretion, could provide comments indicating the unique features of any particular non-compliance example.

The Ministry and the appellant implicitly agreed (and later confirmed) that the Ministry would not claim an exemption under the *Act* for any of the above-listed information.

It was further agreed that, on the basis of the summaries, the appellant could request more detailed information about specific companies or municipalities, and these requests would be treated as part of the original request, and would not have to be made through the Ministry's Freedom of Information Office as new requests under the *Act*. There is, however, disagreement over the extent to which additional information could be requested in this regard. The appellant takes the view that this aspect covered any

information relating to these organizations, while the Ministry is of the view that this part of the agreement was intended only to cover “verification” information.

Events subsequent to the agreement

During the month of March, the cooperative relationship between the appellant and the Ministry began to break down. The appellant wrote to the Ministry stating that she believed the Ministry was not adhering to its time commitments. The appellant and Ministry’s officials then spoke by telephone, and on March 18, 1999, the appellant again wrote to the Ministry setting out her continuing concerns. The Ministry replied by indicating that the records “are not ready [for] disclosure at this time” and that “[w]hile I anticipated that the information would be released by February 26, 1999, unfortunately, the date was too ambitious.”

On April 6, 1999, the appellant wrote to this office setting out her version of events in this matter, and indicating that she still did not have the requested information, despite the Ministry’s agreement to disclose information earlier. On receipt of this letter, this office opened Appeal Number PA-990123-1. I sent a Notice of Inquiry to the parties on April 22, 1999, seeking representations. In its representations, the Ministry enclosed copies of two letters to the appellant dated April 29, 1999 and May 3, 1999, indicating that tables containing information relating to 1997 air and water discharges were disclosed to the appellant. As a result, I closed this appeal, without prejudice to the appellant’s right to appeal any matter other than the timing of access to the records disclosed with the Ministry’s April 29 and May 3 letters.

On August 16, 1999 the appellant again wrote to this office indicating that the Ministry had failed to comply with its agreement to disclose information. This office opened Appeal Number PA-990303-1, and I sent a Notice of Inquiry to the parties seeking representations. On October 7, 1999, the Ministry wrote to the appellant stating that the Ministry had decided to provide the appellant with “full access to the records . . .”, including verification data about the 1997 water and air dischargers, a table relating to the 1998 water dischargers, and a list of companies subject to investigation in relation to the 1998 information. The Ministry, at the same time, wrote to this office stating that it believed this “concludes the processing of this request . . .”

Staff members of this office then attempted to contact the appellant to ascertain whether she was content with the Ministry’s disclosure. Since the appellant did not provide a clear answer, I decided to close Appeal Number PA-990303-1, without prejudice to the appellant’s ability to appeal any matter other than the timing of records disclosed by the Ministry on October 7, 1999.

NATURE OF THE APPEAL:

On December 22, 1999, the appellant again wrote to this office, indicating that the Ministry’s October 7 disclosure was not satisfactory, and that much of the requested information remained undisclosed. In particular, the appellant is unhappy with the lack of detail in the general 1998 water discharge report, and provides a list of six companies for which she believes data is missing. The appellant also indicates that the list of companies under investigation does not include any detailed information about these investigations or

any related prosecutions. The appellant indicated that she requested this information in May 1999 but received no response.

In addition, with respect to the 1997 air and water information, the appellant indicates that she also requested detailed information about investigations and prosecutions of dischargers, but received only incomplete information from the Ministry. The appellant also provides a list of companies for which detailed information was requested, a description of the information provided by the Ministry, and a description of the missing information.

This office opened the current appeal, PA-990457-1, and I then sent Notices of Inquiry and received representations from the parties.

DISCUSSION:

Representations

1998 water discharge report

The Ministry submits that the data contained in the 1998 water discharge report is complete. The Ministry also provides six sets of records which it states are responsive to the list of six companies for which the appellant believes she has not been provided with complete data.

In its representations, the appellant provides a list of 18 companies appearing in the Ministry's water discharge report as posted on its website, for which the appellant states it did not receive detailed information as requested.

In reply, the Ministry states that it did, in fact, provide all of the requested information, including with regard to the 18 companies, and provides some detail in support of this submission.

Follow up information concerning investigations/prosecutions

The Ministry also submits that the additional follow up information being requested regarding investigations and prosecution of dischargers is "in excess of the verification data that [the Ministry] agreed to provide." The Ministry states that "At no time did [the Ministry] offer to provide more than a list of those corporations/municipalities which are or were the subject of an investigation by the [Ministry's] Investigations and Enforcement Branch." The Ministry states that this information has already been disclosed.

The appellant, in its representations, states that it has in fact received detailed information on three of the six listed companies, but that information about the three remaining companies still has not been disclosed.

Timing of access

The Ministry submits that any timing issues were dealt with in the two previous appeals, both of which were resolved. Further, the Ministry states that since it has met all of its disclosure obligations, timing is no longer at issue.

The appellant submits that the Ministry has on numerous occasions in this context failed to provide information in accordance with agreed upon timelines, with no explanation as to the reasons for, and the length, of the delays. The appellant asks me to give “stern condemnation” to this “egregious behaviour.” The appellant further submits:

. . . Indeed, when it came to providing the 1998 waste water non-compliance data, I submit that there is evidence of political interference in both the decisions about what to release and certainly the timing of the release. In March, 1999, the FOI Coordinator indicated that he had the records and that no changes to those records were anticipated, however, the Minister’s office (apparently) did not permit the release of those records until October, 1999, when the Ministry had finished its own report and release it under a Ministerial news release. It is astounding that such direct interference with the provincial freedom of information legislation could transpire, and I submit, that the Minister of the Environment cannot violate his own legislation without consequences. No other explanation was ever provided as to why we waited 7 months for records after they were admittedly ready for release. And I submit that given that those records were in the Minister’s central office during that time, the only inference can be that the Minister or his delegate ordered that the release be delayed in order to facilitate the Ministry “beating us” to the media . . . and, there is no provision for arbitrarily withholding documents that are available and prepared for release.

Requested remedy

The Ministry reiterates that it has met all of its disclosure obligations, and thus the appeal should be dismissed. The Ministry also submits that “the Ministry has already published the 1997 and 1998 summary information on its Website and plans to disseminate future years in electronic format on our Website . . .” In addition, the Ministry states that its staff “... want to work with [the appellant] and the community at large by placing summary information on its Website, negating the need for an FOI request for bulk data.” On this basis, the Ministry asks me to dismiss this appeal.

The appellant requests that I order the Ministry to immediately release the remaining records, and in any event, no more than 10 days after the order. The appellant also requests that this office use its powers under section 52(8) of the *Act* to examine Ministry staff to determine why disclosure of records was delayed. The appellant also asks for an order that the *Act* does not give an institution the power to withhold records once they are prepared for release, and that extensions should be “used sparingly.” Finally, the appellant asks that I direct the Ministry to provide the non-compliance information requested in the future by the appellant within 30 days of the request without exception.

Findings and Conclusions

In my view, the Ministry has not conducted itself appropriately in this matter. It is apparent that the appellant, by accepting the word of Ministry staff that information would be available by certain dates, suffered prejudice by agreeing not to hold the Ministry to the strict procedural requirements of the *Act*. Time and again, dates for disclosure agreed upon by the Ministry were not met, with insufficient or no explanation. As a result, in hindsight, the appellant would have been in a much better position had she insisted on full compliance with the statute. This type of conduct is contrary to the public interest, since it essentially forces requesters such as the appellant to rely on the strict provisions of the *Act*, which results in a more confrontational interaction and ends up using more resources both of the requester and of the Ministry. In my view, it is appropriate for requests of this nature to be handled informally, just as both parties intended; unfortunately, the Ministry's conduct seriously undermined this process.

The appellant has suggested that some or all of the Ministry's delays in this case were due to what she terms "political interference" by the minister's office. I am not in a position to make a finding on this point, and specifically decline to do so. The *Act* designates the minister as the "head" of the institution for the purposes of both accountability and decision making. Consequently, there is nothing inherently inappropriate about a minister being involved in the administration of the freedom of information programs within a ministry. However, in most cases, including the Ministry of the Environment, decision making has been delegated by the minister to appropriate officials within the institution, who have expertise in the operation of both the *Act* and various ministry programs. In my view, delegations of this nature significantly reduce the legitimate role played by the minister and his/her staff. While I acknowledge that the minister's office may have a legitimate interest in being made aware of decisions taken by delegated decision-makers under the *Act* - a "heads up" function if you will - it is not acceptable for any such process to interfere with the timing or other requirements of the *Act*. In this appeal, the only action required by the Ministry was to disclose records in accordance with commitments made in the context of an agreement with the appellant. I can accept that the minister's office may want to know when records are being disclosed in accordance with this agreement, but any delays which may have been associated with actions taken by the minister's office would, by definition, be inappropriate.

Based on the material before me, I am not in a position to clearly identify any records which are responsive to the request, but which have not been disclosed. Part of the difficulty stems from differences of opinion between the parties over the scope of the request and the interpretation of the informal agreement. It is not possible to make a definitive finding in this respect, given the circumstances, especially because this determination turns largely on issues of credibility.

In my view, while it would be possible to make a general order requiring the Ministry to disclose any outstanding undisclosed information, any such order would be futile. The order may or may not result in some additional information being disclosed but, given the history of this matter, it almost certainly would end up back at this office, as a continuing dispute over whether the Ministry has fully complied with my order.

In these circumstances, it is regrettable that the only reasonable course of action available to me is to dismiss this appeal, without prejudice to the appellant making new, specific requests under the *Act* for any information the appellant still seeks, regardless of whether it is or is not within the scope of the agreement between the appellant and the Ministry.

In terms of guidance for the future, it is my view that the idea of preparing a summary of non-compliance information in tabular form, rather than requiring the disclosure of bulk data, is a good one, as the parties appear to agree. In addition, the notion of the parties coming to a mutual agreement as to what will be disclosed when, without having resort to the *Act*, is to be encouraged, consistent with this office's long standing policy of encouraging "routine disclosure/active dissemination" (see, for example, the publication entitled "Routine Disclosure/Active Dissemination (RD/AD): A Joint Project of the Office of the Information and Privacy Commissioner/Ontario and the Freedom of Information and Privacy Branch, Management Board Secretariat", dated April, 1994). However, these approaches will work only if the Ministry is realistic when agreeing to timelines, and avoids providing dates which continually cannot be adhered to. If these timelines are not acceptable to the appellant at the outset, the mechanisms of the *Act* should be invoked, which would permit the Ministry to use the *Act*'s time extension provisions and, on the other hand, allow the appellant to appeal any decision on timing.

With respect to the additional, detailed information concerning investigations and prosecutions, both parties should consider whether this information is more appropriately dealt with by following the process in the *Act*, since it appears to be of a somewhat different character and may raise different issues as compared to the summary information.

ORDER:

I dismiss the appeal, without prejudice to the appellant's right to make new, specific access requests under the *Act* for information it still seeks.

Original Signed By: _____

David Goodis
Senior Adjudicator

October 26, 2000