



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

ORDER PO-1918

Appeal PA-010130-2

Ministry of Northern Development and Mines



80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Télé: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

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On February 9, 2001, the Ministry of Northern Development and Mines (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to the creation and funding of the Canadian Ecology Centre (the CEC). In particular, the requester, a member of the media, was seeking access to records dealing with the creation of the CEC and the funding it has received since its inception from the Northern Ontario Heritage Fund, as well as information pertaining to any evaluations of the performance of the CEC.

On March 9, 2001, the Ministry responded to the request by providing the requester with an interim fee estimate of \$6,295 and requesting that he pay a deposit of \$3,147.50, or 50% of the estimated fee pursuant to section 7 of Regulation 460. The Ministry further advised the requester that until such time as the payment of the deposit was made the processing of the appeal would not continue further. Finally, the Ministry indicated that notification of third parties will be required and that the third party and personal privacy exemptions in sections 17(1) and 21(1) may apply to the records which are ultimately identified as responsive to the request. By issuing an interim fee estimate, the Ministry was able to stop the running of the 30-day time period under section 26 just short of its expiration, to begin running again at such time as the 50% deposit was paid.

On March 30, 2001, following discussions between the requester and the Ministry, a second more detailed fee estimate was provided in the amount of \$4,415 and the requester was advised that the mandatory exemptions in sections 17(1)(a) and (c) and 21(1) may apply to some of the responsive records.

On April 5, 2001, the requester, now the appellant, appealed the Ministry's decision regarding the amount of the fee estimate to the Commissioner's office and the lack of a decision letter regarding the Ministry's position on access to the requested records under section 26. As a result of the mediation efforts of the staff of this office, on May 4, 2001 the Ministry further revised the amount of the fee estimate to \$2,600. On June 1, 2001, the appellant paid 50% of the estimated fee (\$1,300) in accordance with the requirements of the *Act* and section 7 of Regulation 460. By doing so, the thirty-day time period for the issuance of a decision letter by the Ministry began to run again.

The appellant indicated on June 15, 2001 that he intended to pursue his appeal with respect to the Ministry's alleged contravention of its obligations under sections 26 and 28 of the *Act* and on June 18, 2001 withdrew his appeal of the Ministry's fee estimate.

The sole remaining issue to be addressed in this appeal is whether the Ministry complied with its obligations under sections 26 and 28 of the *Act* in responding to the appellant's request. I provided the Ministry and the appellant with a Notice of Inquiry, seeking their submissions on the application of sections 26 and 28 to the circumstances of this appeal. Both the Ministry and the appellant provided me with submissions. Because the timing of the outcome of this appeal required a prompt decision and because of the nature of the issue under consideration, I did not exchange the representations of the parties, as is normally the case.

DISCUSSION:

HAS THE MINISTRY COMPLIED WITH ITS OBLIGATIONS UNDER SECTION 28 OF THE ACT?

Section 28 of the *Act* imposes certain requirements on an institution in situations where it has reason to believe that the disclosure of information contained in a requested record may affect the interest of a third party. The section states:

- (1) 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 interest of a person other than the person requesting information; or
 - (b) that is personal information that the head has reason to believe might constitute an unjustified invasion of personal privacy for the purposes of clause 21(1)(f),

the head shall give written notice in accordance with subsection (2) to the person to whom the information relates.

- (2) The notice shall contain,
 - (a) a statement that the head intends to release a record or part thereof that may affect the interests of the person;
 - (b) a description of the contents of the record or part thereof that relate to the person; and
 - (c) a statement that the person may, within twenty days after the notice is given, make representations to the head as to why the record or part thereof should not be disclosed.
- (2.1) If the request covers more than one record, the description mentioned in clause (2)(b) may consist of a summary of the categories of the records requested if it provides sufficient detail to identify them.
- (3) The notice referred to in subsection (1) shall be given within thirty days after the request for access is received or, where there has been an extension of a time limit under subsection 27(1), within that extended time limit.
- (4) Where a head gives notice to a person under subsection (1), the head shall also give the person who made the request written notice of delay, setting out,

- (a) that the record or part thereof may affect the interests of another party;
 - (b) that the other party is being given an opportunity to make representations concerning disclosure; and
 - (c) that the head will within thirty days decide whether or not to disclose the record.
- (5) Where a notice is given under subsection (1), the person to whom the information relates may, within twenty days after the notice is given, make representations to the head as to why the record or the part thereof should not be disclosed.
- (6) Representations under subsection (5) shall be made in writing unless the head permits them to be made orally.
- (7) The head shall, within thirty days after the notice under subsection (1) is given, but not before the earlier of,
- (a) the day the response to the notice from the person to whom the information relates is received; or
 - (b) twenty-one days after the notice is given,
- decide whether or not to disclose the record or the part thereof and give written notice of the decision to the person to whom the information relates and the person who made the request.
- (8) Where a head decides to disclose a record or part thereof under subsection (7), the head shall state in the notice that,
- (a) the person to whom the information relates may appeal the decision to the Commissioner within thirty days after the notice is given; and
 - (b) the person who made the request will be given access to the record or to a part thereof, unless an appeal of the decision is commenced within thirty days after the notice is given.
- (9) Where, under subsection (7), the head decides to disclose the record or a part thereof, the head shall give the person who made the request access to the record or part thereof within thirty days after notice is given under subsection (7), unless the person to whom the information relates asks the Commissioner to review the decision.

In the present appeal, the Ministry received the appellant's request on February 9, 2001. It was then required to do one of two things. Under section 26, it is to render a decision with respect to access to the requested records unless the circumstances described in section 28, the presence of

a third party's interests, are extant. In situations where a third party's interests may be affected by the disclosure of information, section 28(3) requires the Ministry to provide the third party with the notification described in subsection (1) within 30 days of the date of receipt of the request. In this case, because a third party's interests were affected, this notification would have been made by March 11, 2001.

The time period for third party notification under section 28(1) was, however, stopped for a period between March 9 and June 1, 2001, when the 50% interim fee deposit was paid. However, the notification period was restarted with the payment of the fee deposit and the time period for the third party's section 28(1) notification expired on June 3, 2001. The Ministry has still not, to date, provided the third party notification, as is required by section 28(1). I note that the Ministry did not request an extension of that time limit under section 27(1) of the *Act*. Clearly, the Ministry did not comply with the requirement that the third party notification take place within 30 days of its receipt of the request. Even with the "stopping of the clock" between the time of its issuance of an interim fee estimate on March 9, 2001 and the date the fee was paid, June 1, 2001, the Ministry was, and remains, far past the required 30-day time period for issuing the required third party notification under section 28(3).

WHAT IS THE APPROPRIATE REMEDY?

In Order PO-1900, I was faced with a very similar fact situation involving the same parties. In considering the appropriate remedy in that decision, I found that:

In fashioning a remedy in the present circumstances, I am required to ensure that the rights of the third party to object to the disclosure of the requested information within the 20 day notification period are not abridged. The time period for the decision of the Ministry on whether to grant access to the information is not, however, similarly fixed. I will, accordingly, order the Ministry to render a decision on access to the requested information immediately following its receipt of the third party's representations under section 28(5). As those representations are to be received by the Ministry no later than May 8, 2001, I will order the Ministry to issue a decision with respect to the disclosure of the requested information under sections 28(7) and (8) within two days of its receipt of the third party's representations, and in any event by no later than May 10, 2001.

In this way, the rights of the third party to object to the disclosure of the requested information are not impinged and the Ministry's decision on access will be made promptly upon receipt of the third party's submissions.

In the present appeal, the appellant expresses in no-uncertain terms his views on what he feels to be a "failure to comply" with the requirements of the *Act* "while employing what appears to be a more cynical methodology." The appellant is seeking a remedy which will serve as a deterrent which is, in his view, "clearly called for".

The Ministry has outlined in detail the difficulties it has experienced in gathering the responsive records from its offices in various locations in Northern Ontario. It submits that:

the request is for a large number of records and was the first request of such magnitude processed by any of our program areas involved including the Freedom of Information and Privacy Office. The Ministry has had difficulty in all aspects of processing the request including the search, issuing the fee estimate, determination of responsiveness and coordination of records between the program areas.

Following its review of the steps taken to determine the appropriate fee estimate and narrow the scope of the request with the assistance of the appellant and the Mediator, the Ministry submits that:

Although the Ministry was not in a position to issue third party notification at this time it was unable to seek an extension as through the processes of issuing revised fee estimates and mediation the search for responsive records was complete. The records however had not been coordinated among the program areas or transported to the Freedom of Information and Privacy Office for review for third party notification.

Third party notification will be issued on or before June 29, 2001 and the ministry expects to provide the requester with a decision on access to the records by July 30, 2001.

In my view, the remedy which I determined to be the most appropriate in Order PO-1900 is again the proper one in the present appeal, particularly bearing in mind the rights of the third party to appeal a decision by the Ministry to provide access to the records. I will, accordingly, order that the Ministry issue the third party notification required by section 28(1) by no later than July 3, 2001. Section 28(7) provides that an institution which has given notice under section 28(1) must, within 30 days of the notification, but not earlier than the day the response is received from the third party or twenty-one days after the date of notification to the third party, decide whether or not to disclose the requested records.

Accordingly, I will order that the Ministry provide the third party notification under section 28(1) by no later than July 3, 2001, with the date for receiving the third party's submissions on access by July 24, 2001 (20 days). I will also order the Ministry to render its decision to the appellant with respect to access to the requested information immediately thereafter, and in no case later than July 26, 2001. Again, as was the case in Order PO-1900, the rights of the third party to object to the disclosure of the records by way of submissions to the Ministry will not be impinged by this decision and the Ministry will be required to move promptly in giving the third party notification and, ultimately, making a decision respecting access.

While I recognize the frustration expressed by the appellant with what he perceives to be the delaying tactics of the Ministry, I must ensure that the rights of all parties, including third parties, are protected and observed in the processing of appeals under the *Act*.

ORDER:

1. I order the Ministry to provide the third party notification required by section 28(1) by no later than July 3, 2001.
2. I order the Ministry to provide the appellant with a decision under sections 28(7) and (8) respecting access to the requested information within two days of its receipt of the representations of the third party and in any event no later than July 26, 2001.
3. I order the Ministry to provide me with a copy of the decision provided to the appellant pursuant to Provision 1 by sending a copy to my attention c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario M5S 2V1.
4. I remain seized of this appeal should any further problems be encountered with respect to issues surrounding the time frames for compliance with the provisions of the *Act*.

Original signed by: _____
Donald Hale
Adjudicator

June 29, 2001 _____