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

ORDER PO-1997

Appeal PA-010111-3

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/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

On January 24, 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 information pertaining to Ontario's Open Heritage Classic golf tournament. The request read as follows:

> Please provide records for 1999, 2000 of the private sector and local sponsors funds, funds conditions, committed/contributed to [a named organization] for the Ontario Open Heritage Classic golf tournament.
>
> Could I please also have January 2001 briefing notes, issue sheets, memos connected to the Ministry's funding of this event and concerns about such funding. Include reviews, reactions to mid-January, 2001 media stories on the funding of this event.
>
> Other data on above subject already released under FOI.

On February 28, 2001, the Ministry provided a fee estimate, which the requester (now the appellant) appealed. That appeal was later settled.

In order to reduce the amount of the fee, the appellant provided the Ministry with a narrowed request in April 2001. The Ministry advised the appellant that an access decision and a revised fee estimate would be provided by May 11, 2001. The Ministry noted that it required this additional time to consult with third parties who may have an interest in the records.

The Ministry's decision was not issued by May 11, 2001, and the appellant appealed the "deemed refusal". This second appeal was also settled when the Ministry issued a decision letter on June 11, 2001. The substance of that decision is the subject of the current appeal.

In its June 11, 2001 letter, the Ministry identified 12 responsive records, numbered 1-11 and 20. The Ministry provided full access to three records, and partial access to the other nine. The Ministry indicated that certain portions of the nine records were not responsive to the appellant's request, and other portions qualified for exemption under section 17(1)(a) of the *Act*, (third party information). The Ministry also provided the appellant with an index describing the responsive records. Following that decision and at the request of the appellant, the Ministry agreed to reconsider those portions of the records it had considered "non-responsive". As a result, additional pages or portions of pages were disclosed to the appellant.

The appellant then appealed the Ministry's decision concerning the remaining "non-responsive" information and the section 17(1)(a) exemption claim. He also expressed concern that the Ministry had not notified all appropriate affected parties.

In the course of mediation, the parties confirmed that Records 1, 6, 10, 11 and 20 were not at issue in this appeal. The Ministry also confirmed that only one affected party had been contacted regarding disclosure of the financial/commercial information contained in the records. This affected party, the company that organized the golf tournament, objected to disclosure on the basis that it did not have permission from its sponsors, who are identified in the records, to

release the amounts they had each contributed, and that disclosure of the information could severely impact upon future fundraising activities. The Ministry did not notify any of the individual sponsors.

Mediation was not successful in resolving the remaining issues, and the appeal proceeded to the inquiry stage. I determined that a number of the identified sponsors were only proposed sponsors of the event, and not actual sponsors, and that only portions of some of the records contain information relating to actual sponsors. I also identified the Ministry's "contentious issues management" process as a possible cause for the delay in dealing with the appellant's request, and decided to add this issue to the scope of the appeal.

I sent a Notice of Inquiry initially to the Ministry, the original affected party identified at the request stage, a consulting company working for that affected party, and four other affected parties that were sponsors of the golf tournament. I decided it was not necessary to notify the proposed sponsors, since the information about them originated with the organizers of the event. I received representations from the Ministry only. I then sent the Notice of Inquiry, along with the non-confidential portions of the Ministry's representations, to the appellant, and received representations from him in response.

RECORDS:

The following records or portions of records are at issue in this appeal:

- Record 2 - Planned Revenues and Expenses - 1999 (portions of page 2)
- Record 3 - Project Evaluation Report - 1999 (portions of page 6)
- Record 4 - Legal Contract – 1999 (pages 3-5, Schedules A and B, and portions of pages 1 and 2)
- Record 5 - June 15, 1999 Invoice (portions of page 2)
- Record 7 - Revenue and Expense Plan -2000 (page 3 and portions of page 2)
- Record 8 - Project Evaluation - 2000 (portions of pages 2 and 4)
- Record 9 - Legal Contract - 2000 (pages 3-5, Schedules A and B, and portions of pages 1 and 2)

DISCUSSION:

RESPONSIVENESS OF RECORDS

The Ministry takes the position that certain portions of the records are not responsive to the appellant's request. The Ministry submits:

> It is the Ministry's position that the requester's second request is clear because it asks for information on the "private sector and local sponsors funds, funds conditions, committee/contributed to [the named organization] for the Ontario Open Heritage Classic golf tournament" and not the potential or actual expenses incurred by [the named organization].

> The requester advised he would file a second request for third party information that he did not include in his first request. He then made a second request that sought the third party information about private sector funding. In the ministry's view, the records responsive to this request were the third party, private sector funding records only.

The Ministry also submits that the appellant's second request was specific and focused, and that he demonstrated a familiarity with the request process and the subject matter. On that basis, the Ministry states that it had no doubts about what information the requester was interested in receiving, and it therefore saw no need to seek clarification from him.

The Ministry also reviews the nature of the portions of the records it claims are non-responsive, and explains that the Ministry took the position that the relevant portions relate to revenues and funding information, and not to expenses and other information. The Ministry states:

> It is the Ministry's position that neither the expense plans nor the remaining portions of the legal agreements are responsive to the requester's request, which was only for third party sponsorship information.

However, at the end of its representations, the Ministry states that it is willing to provide the appellant with access to the information it considers to be non-responsive.

It would appear to me that the Ministry has taken an overly restrictive interpretation of the scope of the appellant's request. He was clearly interested in obtaining details regarding the funding of the golf tournament in question, and made efforts to work with the Ministry to define his request as specifically as possible in order to reduce time and costs. Not knowing the specific content of the records, the appellant understandably was handicapped in his ability to identify the requested information precisely and, in my view, it appears that the Ministry may have taken advantage of this situation in defining the scope of the request narrowly. Had there been any doubt as to whether the "non-responsive" information was of interest to the appellant, a simple phone call to him would have provided the necessary clarity. The Ministry chose not to do so. Although the Ministry has now agreed to treat these "non-responsive" portions as falling within the scope of the appellant's request, I find that they were reasonably responsive all along, and that the Ministry's narrow interpretation of responsiveness contributed to the delays associated with resolving the issues associated with the appellant's request and appeals.

THIRD PARTY INFORMATION

The Ministry originally claimed section 17(1)(a) as the basis for denying access to certain records. However, it withdrew this exemption claim in its representations.

As stated earlier, at the inquiry stage of this appeal, I identified five affected parties, in addition to the one affected party notified by the Ministry, whose interests might be affected by disclosure of the records. Four of these affected parties were sponsors of the golf tournament. I notified these six affected parties, and provided them with an opportunity to provide representations to me. None responded.

The records can be divided into three groups.

Group #1 records contain information relating to the organizers and actual sponsors of the event, and include the amount donated by the various sponsors. These records are: a portion of page 2 of record 2, a portion of page 6 of record 3, a portion of page 2 of record 4, a portion of page 2 of record 5, a portion of page 2 of record 7, and portions of pages 2 and 4 of record 8. In all of these records, the names of the actual sponsors have been disclosed, but not the amounts of sponsorship.

Group #2 records contain information relating to proposed sponsors that did not end up donating sponsorship funds for the event. The records in this second group are: a portion of page 2 of record 2, and a portion of page 6 of record 3, a portion of page 2 of record 4, a portion of page 2 of record 7 and portions of pages 2 and 4 of record 8. The names of the proposed sponsors have been disclosed, but not the proposed amounts of sponsorship.

Group #3 records contain information that the Ministry initially identified as "non-responsive" to the request. These records are: a portion of page 2 of record 2 and a portion of page 3 of record 7, which relate to the estimated expenses for the event; and portions of pages 1 and 2 of records 4 and 9, and pages 3 – 5 of records 4 and 9 and the attachments to records 4 and 9 (records 4 and 9 are executed legal contracts with attached letters and projected costs).

For a record to qualify for exemption under section 17(1)(a) of the *Act*, the Ministry and/or the parties who are resisting disclosure must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; **and**

2. the information must have been supplied to the Ministry in confidence, either implicitly or explicitly; **and**

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in section 17(1)(a) will occur.

Type of Information

Based on my review of the records, I find that they contain financial and/or commercial information as those terms have been defined by this office in previous orders.

Supplied in confidence

In order to meet this element of the exemption, the affected parties and/or the Ministry must demonstrate that the information contained in the records was **supplied** to the Ministry, either explicitly or implicitly, **in confidence**.

From my review of the records, it appears that records 2, 5 and 7, and the first attachment to records 4 and 9, were provided to the Ministry by the company organizing the event (the affected party notified by the Ministry) or by the consulting company working for the organizer.

The other records at issue do not appear to have been supplied to the Ministry; however, previous orders have held that information contained in a record would "reveal" information "supplied" by the affected party if its disclosure would permit the drawing of accurate inferences with respect to the information actually supplied to the institution (See Order P-1553). In that regard, some information contained in the remaining records contains information which may reveal information supplied to the Ministry by the organizer or the consultant.

As set out above, records 4 and 9 are contracts with attachments. This office has addressed the issue of whether information contained in a contract can have been "supplied" for the purpose of section 17(1) of the *Act* in previous orders as follows:

> Because the information in a contract is typically the product of a negotiation process between the institution and the affected party, the content of contracts generally will not qualify as originally having been "supplied" for the purposes of section 17(1) of the *Act*. A number of previous orders have addressed the question of whether the information contained in a contract entered into between an institution and an affected party was supplied by the third party. In general, the conclusion reached in these orders is that, for such information to have been "supplied" it must be the same as that originally provided by the affected party. [See, for example, Orders P-36, P-204, P-251 and P-1105]

Although arguably the financial information contained in Records 4 and 9 may have been initially supplied by one of the affected parties, the bulk of the information in these two records was not "supplied" to the Ministry for the purpose of section 17(1). In light of my findings below, it is not necessary for me to determine precisely which portions of records 4 and 9 were "supplied" to the Ministry for the purpose of section 17(1).

Neither the Ministry nor any of the affected parties notified by me provided representations dealing with the issue of whether the records were supplied in confidence. There is nothing on the face of any of the records to indicate that they are confidential documents and, in the absence of any representations on this issue, I am not persuaded that there is any basis for concluding that they were supplied to the Ministry implicitly in confidence.

Accordingly, I find that the second requirement of section 17(1)(a) has not been established. Because all three requirements must be established in order for records to qualify for this exemption, none of the records so qualify.

Although not necessary to do so, I have decided to address the third requirement of section 17(1)(a) as well.

Harms

In order to meet part three of the section 17(1) test, the Ministry and/or the affected parties must demonstrate that one of the harms enumerated in section 17(1) could reasonably be expected to result from disclosure of the information. The onus or burden of proof lies on the parties resisting disclosure of the record, in this case, the Ministry and the affected parties.

The only reference to potential harm that is before me in this appeal comes from the submissions of the affected party notified by the Ministry at the request stage. In objecting to disclosure, this party stated to the Ministry:

> We do not have permission from our sponsors to release the amount of funding that each of them has contributed. Therefore should we allow this information to be public we feel that it would severely impact upon future fundraising activities to the extent that the tournaments could possibly not be held.

The Ministry chose not to notify these sponsors before denying access to the records.

As far as Group #2 records are concerned, absent evidence or representations, I see no possibility of competitive harm through disclosure of information concerning potential sponsors who did not even become involved in donating to the golf tournament.

Regarding the actual sponsors included in Group #1, in the absence of any representations, I am not persuaded that any of these affected parties, who were notified, could reasonably be expected to suffer competitive harm through disclosure of information concerning their sponsorship of the golf tournament. On the contrary, it strikes me that corporations sponsor events such as this precisely to publicize the fact that they are sponsors. With respect to the two affected parties involved in setting up this event, neither of these parties have provided representations regarding how the disclosure of the records could result in the types of harms contemplated by section 17(1)(a), and I am satisfied that this exemption does not apply.

As far as the Group #3 records are concerned - the ones initially identified by the Ministry as "non-responsive" - I find that none of these records qualify for exemption under section 17(1)(a). The type of information contained in these records relates either to the projected costs and/or expenses of the tournament, or the copies of the agreements and attachments. The appellant has already been provided with records containing very similar information, including the type of financial and/or commercial information covered by section 17(1).

Therefore, I find that section 17(1)(a) of the *Act* does not apply to any of the records, and they should be disclosed to the appellant.

CONTENTIOUS ISSUES MANAGEMENT

Given the circumstances surrounding the processing of the appellant's initial and subsequent related request, I questioned whether the significant delays he experienced were impacted by any issues management process in place at the Ministry, and included this issue within the scope of

the appeal. The Ministry was asked a number of questions concerning whether the appellant's request was processed through the Ministry's and/or the government's issues management process and/or "contentious issues management" process, and if this process contributed to the delay in the Ministry's ability to meet its statutory responsibilities. The Ministry was also invited to comment on the remedies that might be appropriate in the circumstances.

The Ministry takes the position that any issues concerning delays are not relevant in the context of this appeal. In its view, the issue of delay, which was relevant in the previous deemed refusal appeal, "was settled and closed when the ministry issued its decision letter" in that appeal. In effect, the Ministry is suggesting that the issue is moot and that I should not proceed to consider it in this appeal.

I do not agree with the Ministry. Whether or not the Ministry is correct in characterizing the delay issue as moot, I am not precluded from proceeding to consider it here. It is within my discretion as an adjudicator to determine what issues are appropriately addressed in the context of an appeal, based on the particular facts and circumstances before me. In exercising discretion in this regard, I am mindful of the need to ensure that some useful purpose is served in proceeding to deal with an issue that may not be directly relevant to the outcome of a particular appeal. In the circumstance of this appeal, although it could be argued that the issue of delay experienced by the appellant was addressed through the issuance of the Ministry's decision letter, in my view, the potential for systemic delays faced by institutions in administering both the statutory access scheme under the *Act* and a separate process for managing contentious issues remains an important issue. It has been raised publicly by this office on a number of occasions, and was the subject of focused discussion in the Commissioner's *2000 Annual Report*. In order to provide the Ministry and other institutions with direction in dealing with the tension between statutory access rights and contentious issues management, I have decided in this case that it is appropriate for me consider all circumstances leading up to the Ministry's substantive determination on access, including circumstances that contributed to the delays in providing the appellant with a proper and timely decision letter, as required by the *Act*.

The Ministry's representations confirm that the appellant's request was identified as "contentious" and that it was processed as part of the "heads up contentious issues management process". The Ministry points out that this process is designed to not interfere with the processing of access requests under the *Act*, and that the effective and prompt implementation of the contentious issues request process is essential to the timely processing of this type of access request.

In explaining the delay in issuing the decision letter to the appellant, the Ministry states:

> The Ministry's decision was provided 30 days after its statutory deadline for processing the request. This delay in processing was due to the Ministry's delay in obtaining appropriate sign-offs in a timely manner. While the Ministry is small in size it is regionally vast and in this instance reviews of records and approvals were required from staff in Sault Ste. Marie, Toronto and Thunder Bay.

> In recognition of the delay in responding to the request, when the Ministry issued its June 11, 2001 decision letter, the Ministry waived the balance of the fees owing of $3.00. In addition, the Ministry did not charge any fees for photocopying the 45 pages of records released promptly to the requester when he asked for a reconsideration, prior to mediation. Further the Ministry will waive any further photocopying fees for additional records as part of this appeal.

In her *2000 Annual Report*, Commissioner Ann Cavoukian discussed the issue of the possible impact of the "contentious issues management" as follows:

> We have begun to be concerned that there may be a systemic problem, unrelated to the requirements of the *Act*, that is contributing to the relatively low compliance rates within the provincial sector.
>
> Although we have not been provided with details or copies of any policy documents, we have learned through our work in mediating and adjudicating provincial appeals that certain access requests that are determined to be "contentious" are subject to different response and administrative procedures. This "contentious issues management" process is managed by Cabinet Office. Our understanding of the process is sketchy, and ministry Freedom of Information and Privacy Co-ordinators are extremely reluctant to provide us with details; however, as we understand it, the process generally operates as follows: if an access request is made by certain individuals or groups (i.e., media, public interest groups, politicians), and/or the request concerns a topic that is high profile, politically sensitive or current, ministry Freedom of Information and Privacy Co-ordinators must follow the contentious issues procedures. Once designated into this category, the process requires the immediate notification of the Minister and Deputy Minister, along with the preparation of issue notes, briefing materials, etc. Cabinet Office is often involved in this process.
>
> A basic premise underlying the operation of all freedom of information schemes is that the identity of a requester should only be disclosed within an institution on a "need to know" basis. Requiring individuals to demonstrate a need for information or explain why they are submitting a request would erect an unwarranted barrier to access. *IPC Practice 16: Maintaining the confidentiality of Requesters and Privacy Complainants* (re-issued September, 1998) sets out some basic principles, two of which are of particular importance here:
>
> > - employees of an institution responsible for responding to requests - generally the Freedom of Information and Privacy Co-ordinator and assisting staff - should not identify any requester to employees outside the Co-ordinator's office when processing requests for general records;
> >
> > - when an individual requests access to his or her own personal information, while the Co-ordinator may need to identify the

> requester to other employees in order to locate the records or make decisions regarding access, the name of the requester should be provided only to those who need it in order to process the request.

While Ministers and Cabinet Office officials may, on occasion, have a legitimate interest in being made aware of decisions taken by delegated decision makers under the *Act*s, it is not acceptable for the contentious issues management process to routinely identify the requester, delay access, or in any other way interfere with the timing or other requirements of the *Act*. Truly effective freedom of information laws cannot tolerate political interference in either the decision-making or administrative processes for responding to access requests.

Although we have been advised by Cabinet Office that the number of contentious issue requests is small, and that steps are being taken to ensure that processes do not interfere with the 30-day response time frames, our experience over the course of the past year leads us to conclude that Cabinet Office has under-estimated the impact of its process on timely response and disclosure rates. Our office has dealt with a significant number of provincial "deemed refusal" appeals and other appeals where access decisions have been delayed due, at least in part, to the apparent conflict between the statutory obligations provided by the *Act* and the contentious issues management process. In Order PO-1826, for example, the appellant suggested that some or all of the Ministry's delays in this case were due to "political interference." While not in a position to make a finding on that point, the adjudicator did state:

> 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.

….

We recognize that the Ontario Cabinet Office's contentious issues management process was designed so as to not interfere with the administration of access requests within the time limits specified in the *Act*. It is intended to be a "heads up" process, not a "sign off" process. However, it does not always work that way. It is not acceptable for disclosure of records to be delayed past the statutory response date in order to accommodate an issues management priority. Nor is it acceptable for any contentious issues management process to routinely identify the requester.

In the circumstances of this appeal, the Ministry acknowledges that the appellant's request was processed through a separate processing stream used for "contentious issue requests". It is not

clear whether this is a Ministry-specific stream, or one that is administered by Cabinet Office. In any event, the Ministry acknowledges that the procedures for dealing with "contentious issues requests" must not compromise processing standards for access requests under the *Act*. This is encouraging. However, it would appear from the circumstances of this appeal that these contentious issues management procedures may not have been followed. The appellant's original request was submitted to the Ministry on January 24, 2001, and it was only after filing a fee appeal and a subsequent deemed refusal appeal that the appellant was finally provided with a substantive decision under the *Act* on June 11, 2001, almost 5 months later. This is clearly not acceptable.

The Ministry appears to acknowledge that the delays in these circumstances were excessive, and uses the fee waiver provisions of the *Act* as a remedy. Although the records provided to the appellant as a result of this order come several months after they should have, the Ministry has decided that no further fees will be charged, including photocopy fees. It is not clear whether the Ministry also intends to refund any fees already paid by the appellant. I would encourage the Ministry to do so since, in my view, foregoing fees is a reasonable remedy in this type of circumstance, and one that the Ministry and other institutions should consider following when, despite procedures that are meant to address the situation, an issues management or contentious issues management process has compromised a requester's right of access within the time standards established by the *Act*.

ORDER:

1. I order the Ministry to disclose all remaining portions of Records 2, 3, 4, 5, 7, 8 and 9 to the appellant by **April 16, 2002** but not before **April 11, 2002**.

2. In order to verify compliance with the provisions of this order, I order the Ministry to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 1, only upon request.

Original signed by: March 12, 2002
Tom Mitchinson
Assistant Commissioner