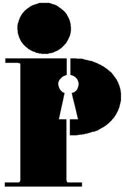

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-1998

Appeal PA-010200-2

Ministry of the Environment

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NATURE OF THE APPEAL:

The appellant submitted a request to the Ministry of the Environment (the Ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) on February 28, 2001 for access to information relating to the operation of a named base metal refinery in Port Colborne. The requested information covered the period 1970 to the date of the request, and included field orders, control orders, certificates of approval, air monitoring data, records relating to metal contamination, soil sampling results, surface water and sediment sampling data and various studies, reports, correspondence, minutes of meetings, memos, e-mail messages, notes of meetings and telephone calls.

On March 9, 2001, the Ministry wrote to the appellant confirming receipt of the request, and indicated that a further response would be forthcoming. Having received no further response, the appellant filed a "deemed refusal" appeal with this office on May 29, 2001. That appeal was resolved when the Ministry issued a decision letter to the appellant on June 11, 2001. This decision contained both an interim access decision concerning the responsive records (with reference to the exemptions that might apply) and a fee estimate of $5,723. The Ministry advised the appellant in the decision letter that it required payment of 50% of the fee estimate ($2,861.50) before it would proceed further. The Ministry also indicated that, because of the number of records involved, it was extending the time to complete the request under section 27 of the *Act* by three months.

Because of the unanticipated costs associated with the request, the appellant asked the Ministry for a list of the types of records included in the various responsive files. The appellant eventually received what it described as an "incomplete" list that, in its view, could not possibly account for the approximately 25,000 pages of records referred to in the fee estimate decision. The appellant asked whether it could pay the costs associated with retrieving these records, and then review them on site before incurring any photocopy charges. The Ministry advised the appellant that it did not have sufficient staff resources to agree to this suggestion.

On September 5, 2001 the requester submitted what it considered to be a narrowed request to the Ministry. This request referred to the file number assigned by the Ministry and read, in part, as follows:

> In an effort to obtain necessary documents in a timelier and less costly fashion I am narrowing my original request to the following documents:
>
> - Dustfall and high volume air sampling data (included in the list of documents identified by the Ministry)
> - All orders (including control orders, stop orders, director's orders, provincial officers orders and field orders) issued to the [named] facility in Port Colborne from 1970 to 1984 regarding air discharges
> - All certificates of approval issued to the [named] facility in Port Colbourne from 1970 to 1984 that related to air discharges
> - All correspondence between [an affected party and the Ministry] related to metal air discharges from the [named] facility from 1970 to 1984.

In its second request letter, the appellant raised two new concerns. First, that its identity as a requester was being disclosed to Ministry employees outside the Freedom of Information and Privacy Coordinator's Office; and second, that requests made by the appellant "are often delayed due to the contentious [issues] management process at the cabinet level".

The appellant also asked that the fee be waived, and identified its reasons for requesting a waiver.

The appellant wrote to this office on November 22, 2001, appealing the fact that it had not received a decision from the Ministry in response to the September 5, 2001 narrowed request, despite assurances from the Ministry that a decision would be forthcoming. In the appeal letter, the appellant submitted that the Ministry should either issue a decision letter or transmit the records forthwith and reimburse the appellant for costs incurred as a result of the delay.

Because of the nature of the issues raised, this appeal proceeded directly to the adjudication stage of the appeal process. I sent a Notice of Inquiry to the Ministry initially, outlining the issues raised in the new appeal. The Ministry submitted representations in response, which were provided to the appellant along with a copy of the Notice. The appellant also provided representations.

DISCUSSION:

COMPLIANCE WITH THE *ACT*

Was the Ministry in a situation of non-compliance with the *Act*?

The Ministry was asked to comment on whether it had properly discharged its statutory obligation to respond to the appellant's September 5, 2001 access request, with specific reference to section 26 of the *Act*. That section states:

> Where a person requests access to a record, the head of the institution to which the request is made or if a request is forwarded or transferred under section 25, the head of the institution to which it is forwarded or transferred, shall, subject to sections 27, 28 and 57, within thirty days after the request is received,
>
> (a) give written notice to the person who made the request as to whether or not access to the record or a part thereof will be given; and
>
> (b) if access is to be given, 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.

The Ministry appears to accept that in not responding to the appellant's request within the 30-day period prescribed by the *Act*, it is in a position of non-compliance. The Ministry's representations outline the reasons for the delay and the efforts put forward by the Ministry in addressing delay issues:

> The delay in responding is attributed, in part, to the fact that the Ministry's Freedom of Information Office has been in transition since March 2001. At the same time the Ministry continues to receive a substantial number of requests under the *Act*. For example, it is projected that 4000 requests will be received for the calendar year 2001, an increase of approximately 200 from the previous year.
>
> These pressures notwithstanding, over the past year the Ministry has committed significant time to processing and responding to large and complex requests made by [the appellant]. … For example, in the context of a separate and different request made by [the appellant], the Ministry made arrangements for [a representative of the appellant organization] to view a significant number of records in a regional office. The Ministry's approach is in keeping with both the spirit and letter of the *Act* and the requester will realize a savings in time and access for that request.

The Ministry also outlines the efforts it has made in dealing with the inventory of requests submitted by the appellant. The appellant appears to disagree with the Ministry on the effectiveness of these efforts with respect to this appeal, stating:

> Despite our efforts to work co-operatively with the [Ministry] to narrow the scope of our request we made no progress during the nine-month period following our initial request.

As far as the September 5, 2001 request is concerned, the Ministry issued a decision letter to the appellant on January 11, 2002. In that letter, the Ministry states:

> … An initial review of the records indicates that it will cost an estimated $2,260.00 to process your request. The fee estimate is based on photocopy and off-site records retrieval charges only, as search and preparation fees have been waived.

The Ministry also indicates that certain exemptions will likely apply to portions of the records, and that a deposit is required in order to continue processing the request.

Based on the material provided to me, it is clear that the Ministry was in breach of its obligations under section 26 of the *Act*. Although a decision was ultimately provided to the appellant, this only occurred on January 11, 2002, after the date when the Ministry provided representations in this appeal, and four months after the appellant's revised request was submitted.

What is the appropriate remedy in the circumstances?

In the Notice of Inquiry, I asked the parties to identify the appropriate remedy, should I determine that the Ministry is in breach of its section 26 obligations.

The Ministry's representations do not deal with this issue directly.

The appellant submits that all fees charged by the Ministry should be waived.

The appellant asked for a fee waiver in its September 5, 2001 request letter. It stated:

> Given the public nature of many of the documents requested as well as the public health and safety concern …, I am requesting that the fee for this request be waived in accordance with section 54(4)(c) of the *Act*. If the fee is waived [the appellant] will disseminate pertinent public health and safety information contained in the documents in a public manner.

In its representations, the appellant adds a second reason for a fee waiver:

> " … the [Ministry] ought to be ordered to provide the information free of charge since it would be fair and equitable to do so having regard to the [Ministry's] inordinate delay (11 months have elapsed since the initial request). Such an order would compensate the appellant for the denial of our rights to timely access to public records under the Act, and would provide a disincentive to future non-compliance by the [Ministry].

In support of its position, the appellant lists a number of examples of instances where the Ministry did not meet the statutory timelines in responding to the appellant's requests. The appellant also refers to five orders issued by this office that, in its view, support the position that denying an institution the ability to charge a fee has been used as a sanction for delay (Orders 193, P-855, M-439, M-452 and PO-1909). The appellant states:

> In these cases, non-compliant Ministries were ordered to respond to the requests without fees as a means to sanction their delay tactics. In this case, the [Ministry] has demonstrated a lack of concern for the purposes of the *Act*.

Because the appellant had not received a response to its request before initiating this appeal, it obviously did not know the Ministry's position on the request for a fee waiver. However, in its January 11, 2002 decision letter, which was provided to the appellant before the appellant submitted its representations on January 30, 2002, the Ministry in fact does address the fee waiver issue:

> … An initial review of the records indicates that it will cost an estimated $2,260.00 to process your request. The fee estimate is based on photocopy and off-site records retrieval charges only, **as search and preparation fees have been waived**. [my emphasis]

The appellant's representations go into considerable detail concerning reasons for the fee waiver request, including supporting documentation on how the information, in the appellant's view, clearly pertains to public health and the dissemination of the information will benefit public health. However, the appellant makes no reference to the Ministry's January 11, 2002 decision letter.

Absent the significant delays associated with processing the appellant's request, in my view, the January 11, 2002 decision by the Ministry to waive the search and preparation fees would have been a reasonable response to the appellant's few waiver request. Past orders dealing with fee waiver have generally distinguished between search and preparation fees, which are indirect in nature, and photocopy charges that are more clearly linked to cost-recovery.

However, in my view, the issue of delay in this case cannot be ignored. The appellant originally submitted its request to the Ministry on February 28, 2001 and, despite working cooperatively with the Ministry to narrow the request and after filing two separate deemed refusal appeals, the appellant did not receive a substantive decision until January 11, 2002, almost 11 months later. And it is important to recognize that this decision is only an interim access decision, requiring the payment of fees before records are assessed against the various exemption claims available to the Ministry under the *Act*. It is also significant to note that the appellant, several months ago, offered to pay the required search fees and then sit down with the Ministry to review the various records in order to reduce photocopy charges, only to have the offer declined by the Ministry. In my view, this case is outside the norm. The Ministry's delays are indefensible, and I find that this is an appropriate case to require the Ministry to waive photocopy charges. I assume that the appellant is still prepared to sit down with Ministry staff and review the various records prior to incurring photocopy costs, and I strongly encourage this reasonable approach to minimizing costs.

CONTENTIOUS ISSUES MANAGEMENT

Identity of the requester

The appellant expresses concern that its identity as a requester has been inappropriately disclosed to other individuals within the Ministry (outside of the Freedom of Information Co-ordintor's office). In its request letter dated September 5, 2001 and again in its representations the appellant states:

> It has come to our attention that it is routine for the [Freedom of Information Co-ordinator's] office to reveal [the appellant] as the requester when contacting Ministry offices regarding a request and that as a matter of practice our FOI request letters are sent to the various offices in full.
>
> ... [the Ministry] has a record of extreme delays in processing requests made by [the appellant]. Discriminatory treatment of [the appellant's] request could be minimized if the appropriate standard of confidentiality were respected.

The appellant asks me include an order provision requiring the Ministry to refrain from disclosing the appellant's identity when processing information requests, except if absolutely necessary.

The Ministry's representations state that it is not the Ministry's practice to disclose personal information, including names, in response to general records requests. However, the Ministry

identifies that there are limited circumstances where disclosure of information for general records requests is necessary. It goes on to identify these instances, for example where an individual has asked to view records on site at a regional office, the Freedom of Information Co-ordinator's office will confirm with the regional office who will be viewing the records, and the requester must show identification when viewing such records. The Ministry goes on to state:

> The Ministry is also mindful of numerous Orders … which have found that "personal information" as defined by section 2 of the Act does not include information about individuals named in their professional or official capacity, or the names of individuals who write letters on behalf of an association or group. In the circumstances of this appeal, both the initial and narrowed access requests were submitted on [an association] letterhead and signed by [individuals in their professional capacity].

The Ministry does, however, go on to state:

> In light of the concerns raised by [the appellant] … the Freedom of Information office will review its practices against the IPC/O's best practice document "Maintaining the Confidentiality of Requesters and Privacy Complaints".

In her *2000 Annual Report*, Commissioner Ann Cavoukian made the following comments regarding this issue:

> 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.

Although the Ministry explains why it is necessary, in exceptional circumstances, to disclose the identity of an individual requester, it does not appear to give sufficient attention to circumstances where a requester, like the appellant in this case, represents an organization. While the Ministry is correct that the identity of requesters in these circumstances is not personal information, it does not appear to take into account the fact that *IPC Practice 16* also deals with situations

where personal information is not at issue. Access to information laws presuppose that the identity of requesters, other than individuals seeking access to their own personal information, is not relevant to a decision concerning access to responsive records. As has been stated in a number of previous orders, access to general records under the *Act* is tantamount to access to the public generally, irrespective of the identity of a requester or the use to which the records may be put. While I am prepared to accept that institutions may want to categorize requesters broadly - "member of the media", "public interest group", "Member of Provincial Parliament" - in order to ensure that Ministers have a "heads up" regarding the disclosure of records that could generate public discussion, this does not extend to the identity of a specific requester. As *IPC Practice 16* states, Ministry employees responsible for receiving access requests under the *Act* must ensure that the identity of a requester is disclosed to others only on a "need to know" basis during the processing of the request. Except in unusual circumstances, there is no need for requesters to be identified because their identity is irrelevant.

The Ministry states in its representations that it is reviewing its practice regarding identifying requesters. For that reason I have decided not to include an order provision as requested by the appellant. However, I will be following up with the Ministry to ensure that its policies and procedures in this regard are consistent with this order and *IPC Practice 16*.

Contentious issues

The Commissioner's *2000 Annual Report* also discusses 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.
>
> …

> 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.

The appellant raises concerns that the delays it experiences in the context of access requests are a result of the government's "contentious issues management process".

In its September 5, 2001 letter, the appellant states:

> The Information and Privacy Commissioner in her year 2000 annual report revealed that delays in processing requests may occur due to a process she refers to as "Contentious Issues Management" by the Cabinet Office. My concern is that by default requests made by [the appellant] are often delayed due to the contentious management process at the cabinet level …

In its representations, the appellant states:

> … Furthermore, we are concerned that [the appellant's] requests may be targeted for diversion to the Cabinet "Contentious Issues Management" process, with resulting delays.

The Ministry addresses this issue by stating:

> The delay in providing an access decision was not the result of the "government and/or the Ministry's issues management or contentious issues management process". As indicated above, the causes for the delay include the: substantial number of records subject to both the initial and narrowed access request; significant number of access requests received by the institution in 2001; and staffing changes in the institution's Freedom of Information Office in the calendar year 2001.

Although the delays experienced by the appellant in this case were significant, based on the explanation offered by the Ministry, I am prepared to accept that they were not a function of problems associated with any issues management or contentious issues management process.

I considered a similar issue in Order PO-1997, also issued today, which involves a different institution and requester. In that case delays were in fact attributable to a contentious issues management process, and I made the following comments that may be useful to the Ministry in dealing with future requests that involve the interplay between the access processes under the *Act* and any contentious issues management process:

> 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*.

Similarly, I would strongly encourage the Ministry of the Environment to consider waiving all fees in future, should its ability to meet its statutory response obligations under the *Act* be compromised by any issues management process in place in the Ministry.

ORDER:

1. I order the Ministry to waive all fees, including photocopy charges.

2. I order the Ministry to issue a final decision to the appellant regarding access to the records in accordance with the *Act*, treating the date of this order as the date of the request, and without recourse to a time extension under section 27 of the *Act*.

3. In order to verify compliance with Provision 1 of the order, I order the Ministry to provide me with a copy of the decision letter referred to in Provision 1 by **April 11, 2002**. 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: March 12, 2002
Tom Mitchinson
Assistant Commissioner