



**Information and Privacy  
Commissioner/Ontario**

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

# **ORDER PO-2046**

**Appeal PA-010310-1**

**Ministry of Consumer and Business Services**



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## **NATURE OF THE APPEAL:**

This appeal arises out of the release of records by the Ministry of Consumer and Commercial Relations (the Ministry) (now the Ministry of Consumer and Business Services) to a requester, without notification to the appellant under section 28 of the *Freedom of Information and Protection of Privacy Act* (the *Act*).

As background, the appellant and the requester are manufacturers of boilers and major competitors in the Ontario market. In 1997, the two companies submitted competing bids for a contract to install boilers in a certain hospital. The contract was awarded to the appellant. After the boilers were installed, the hospital commenced litigation against a number of parties including the appellant, which resulted in third party claims by the appellant against, among others, the Ministry. The litigation has been settled. The requester was not involved in the litigation.

After the settlement of the litigation, the requester commenced action to set aside a decision of the Technical Standards and Safety Authority (the TSSA), the agency regulating the operation of boilers in Ontario, in respect of the appellant. Further, the requester made an access request under the *Act* to the Ministry for information relating to the regulation of boilers by the TSSA and the former Technical Standards Division of the Ministry, including records relating to the granting of exemptions from the *Operating Engineers Act* (the *OEA*), and records relating specifically to the appellant.

The Ministry identified 197 responsive records and granted access to one record to the requester. The Ministry advised that it was withholding the balance of the records on the basis of the exemptions at sections 22 (information available to the public), 17 (third party commercial information), 13 (advice to government) and 19 (solicitor-client privilege) of the *Act*. The requester appealed the Ministry's decision.

During mediation, the Ministry disclosed to the requester a number of records for which it had claimed the exemption at section 22. The appellant became aware of this disclosure of records and wrote to the Ministry expressing its concern about the disclosure, asking the Ministry to provide it with an index of these records and to direct the requester to return them to the Ministry. After failing to receive a satisfactory answer from the Ministry, the appellant filed an appeal to this office regarding the Ministry's disclosure of records to the requester.

The appellant claims in this appeal that the Ministry has failed to fulfill its obligations under section 28 of the *Act*, in failing to give the appellant notice before making disclosure of the records to the requester. Of particular concern to the appellant is the Ministry's disclosure of certain records relating to the litigation, which it asserts fall within the ambit of the section 17(1) exemption under the *Act*. The appellant seeks a finding and a declaration from this office that the Ministry was in breach of section 28, and an order requiring the requester to return the records to the Ministry.

It should be noted that in response to this appeal, counsel for the requester agreed to segregate the documents at issue and refrain from any further review, copying or disseminating of the documents, and instructed its clients to do the same.

This office sent a Notice of Inquiry setting out the issues in this appeal initially to the Ministry and the requester. Their representations were subsequently provided to the appellant, which was also invited to submit representations. Certain non-confidential portions of the appellant's representations were provided to the Ministry and to the requester, which were invited to submit reply representations.

The requester has written in response to the invitation to submit reply representations, stating that it has recently returned all the documents provided to it in response to its access request. It submits that the issues raised in this appeal are now rendered moot.

Having regard to the issue raised by the requester, I sought the submission of the appellant on the issue of whether the issues raised by the appeal are now moot, and whether the appeal ought to proceed. Having received the representations of the appellant on this issue, I find it unnecessary to invite the Ministry and the requester to provide submissions in response.

## **DISCUSSION:**

The issue before me is whether the appeal is moot and if so, whether it ought nonetheless to proceed to a determination.

In Order P-1295, former Assistant Commissioner Irwin Glasberg considered an argument that the subject matter of the appeals before him was moot:

The leading Canadian case on the subject of mootness is the Supreme Court of Canada's decision of *Borowski v. The Attorney General of Canada*. There, the court commented on the topic of mootness as follows:

The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot ...

In the *Borowski* case, Sopinka J., speaking for the court, indicated that a two-step analysis must be applied to determine whether a case is moot. First, the court must decide whether what he referred to as "the required tangible and concrete dispute" has disappeared and the issues have become academic. Second, in the

event that such a dispute has disappeared, the court must decide whether it should nonetheless exercise its discretion to hear the case.

I have carefully considered the principles articulated in the *Borowski* case and believe that they are equally applicable to the adjudication processes of the Commissioner's office.

I agree with the application of the *Borowski* case in Order P-1295, and will apply that approach here. With respect to the first step of the "two-step" analysis discussed by Sopinka J., it is clear that the appeal before me is moot. At the time it was initiated, there was a live controversy affecting the rights of the parties, in that the requester was in possession of records which the appellant sought to have returned to the Ministry. However, subsequently, this live controversy was removed with the return of the records. The appellant does not dispute this, submitting:

...[the appellant] agrees that determinations of whether a statutory exemption applies to the documents at issue and whether the Commissioner has the jurisdiction to order the return of documents improperly disclosed no longer are connected to a "concrete dispute" because the documents have been returned...

The appellant submits, however, that I ought to exercise my discretion to determine the issues notwithstanding their mootness, as they raise important issues that merit rulings. The two issues, in the appellant's submission, are whether this office has jurisdiction to order the return of documents improperly disclosed, and whether the Ministry in this case breached section 28 of the *Act*. The appellant states that although the requester was the entity in possession of the documents in issue, the dispute raised in this appeal, and in particular with respect to these two issues, is between the appellant and the Ministry and relates to the jurisdiction of this office. Further, it submits, the parties have already completed their representations, so there is no issue regarding the vigour with which the parties would pursue the matter (a concern raised in *Borowski*). It submits that there is a public interest in the jurisdictional issues raised.

I find that no useful purpose would be served by proceeding with this appeal. In Order PO-1997, Assistant Commissioner Tom Mitchinson decided to proceed with a determination of issues raised by the delay in responding to an access request under the *Act*, notwithstanding the argument that those issues were rendered moot by the issuance of a decision letter:

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*.

It is clear that in the above case, the Assistant Commissioner viewed the determination of issues relating to contentious issues management as providing a public benefit. The circumstances in that case are distinguishable from those before me. Here, the issue of whether this office has the jurisdiction to order the return of documents improperly disclosed does not arise often and is not currently the subject of any broader discussion or controversy. Although not without importance, a decision on this issue would not provide useful direction to the wider community on a subject of pressing general interest. I reach the same conclusion with respect to the issue of whether the Ministry has breached its obligations under section 28 in its handling of the request leading to this appeal. In the absence of a live controversy, I am not inclined to proceed with an appeal that does not raise issues of current public interest and importance.

In sum, I do not find this an appropriate case to exercise my discretion to proceed to a determination of the issues raised by the appeal, notwithstanding that they are moot. Accordingly, this appeal is dismissed.

Original signed by:  
Sherry Liang  
Adjudicator

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September 19, 2002