



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

# **ORDER PO-2243**

**Appeal PA-030106-4**

**Ministry of the Environment**



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## NATURE OF THE APPEAL:

This is a deemed refusal appeal under the *Freedom of Information and Protection of Privacy Act* (the *Act*) with regard to a request made to the Ministry of the Environment (the Ministry).

Section 26 of the *Act* requires the Ministry to issue a decision within 30 days of receipt of a request. If a decision is not issued within that time period, the Ministry is in a "deemed refusal" situation pursuant to subsection 29(4) of the *Act*. That provision states:

A head who fails to give the notice required under section 26 or subsection 28(7) concerning a record shall be deemed to have given notice of refusal to give access to the record on the last day of the period during which notice should have been given.

The appeal before me has a long and complex history involving three previous appeal files. It is therefore necessary for me to provide a more detailed account of the history of this matter than would otherwise be included.

On January 23, 2003, the Ministry received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for the following information:

I am requesting all reports, briefing notes, memos, e-mail correspondence, plans, documents, specifications, policy statements, faxes, meeting notes, and other such information produced within the ministry or received by the ministry from any other source specifically involving the Bruce Nuclear Power Development (Tiverton, ON) associated with the following:

1. Environmental Non-Compliance Report details (Dec 30 1999 to Dec 30 2002)
2. Certificate of Approval exceedences or Amendments (Dec 30 1999 to Dec 30 2002)
3. Events reports, spills, or discharges to the environment (Dec 30 1999 to Dec 30 2002)
4. Acute lethality / toxicity violations (Dec 30 1999 to Dec 30 2002)

By "Bruce Nuclear Power Development" I mean to include all corporations, government bodies, etc. that have operations on the site including:

- Ontario Power Generation
- Bruce Power
- Hydro One
- AECL
- any others that apply

Further I am requesting all reports, briefing notes, memos, e-mail correspondence, plans, documents, specifications, policy statements, faxes, meeting notes, and other such information produced within the ministry or received by the ministry

from any other source pertaining to mortality or adverse effects of discharges from any entity at the BNPD to the Environment affecting waterfowl and aquatic life within the timeframe of Dec 30 1999 to Dec 30 2002.

I am also requesting all reports, briefing notes, memos, e-mail correspondence, plans, documents, specifications, policy statements, faxes, meeting notes, and other such information produced within the ministry or received by the ministry from any other source pertaining to the following:

- hydrazine
- morpholine
- ammonia
- chromium
- cesium-137
- carbon-14

within the timeframe of Dec 30 1999 to Dec 30 2002.

Further I am requesting all reports, briefing notes, memos, e-mail correspondence, plans, documents, specifications, policy statements, faxes, meeting notes, and other such information produced within the ministry or received by the ministry from any other source pertaining to water quality or aquatic life including all trout species in regards to Stream "C" within the timeframe of Dec 30 1999 to Dec 30 2002.

On February 28, 2003, the Ministry responded to the requester by issuing an interim decision. In its decision the Ministry indicated that although no final decision had been made regarding access, as the records had not yet been reviewed, section 17(1)(a) and (c) and 21(1)(f) of the *Act* will likely apply. A preliminary search for records was conducted and the following was located:

- Owen Sound District office had approximately 4000 pages;
- Environmental Assessment and Approvals Branch had approximately 9100 pages;
- Environmental Monitoring and Reporting Branch had 9 pages;
- Environmental SWAT Team, Spills Action Centre had no records.

The decision also included the following fee estimate:

- |   |            |
|---|------------|
| • Search time approx. 35.5 hours @ \$30.00 per hour                             | \$1065.00  |
| • Photocopying approx 13,009 pages @ .20 cents per page                         | \$2,620.00 |
| • Retrieval of Inactive Records (Environmental Assessment and Approvals Branch) | \$60.00    |
| • Photocopying Retrieved Records (above)  | TBD        |
| • Preparation time 30 hours @ \$30.00/hr  | \$900.00   |

- |  |                   |
|--|-------------------|
| • Maps (over 1'1" x 17") 34 @ \$10.00 each | \$340.00          |
| • Delivery                                 | \$10.00           |
| • <b>Total</b>                             | <b>\$4,995.00</b> |
| • <b>Deposit Required (50%)</b>            | <b>\$2,497.50</b> |

In order to continue processing the request the Ministry asked the requester to provide a deposit of 50% of the fee. The Ministry indicated that once the deposit was received, the time for issuing a decision would be extended for an additional 60 days due to the extremely large volume of materials to be reviewed and prepared for disclosure.

The requester (now the appellant) appealed the decision indicating that she felt the fee should be waived pursuant to section 57(4) of the *Act* and file PA-030106-1 was opened. This appeal was later closed since the appellant had not made a fee waiver request directly to the Ministry.

On May 19, 2003, the Ministry responded to the appellant's request that the fee be waived. The Ministry decided to reduce the fee estimate by 50% to a total of \$2,497.50. A second option was also provided whereby the Ministry would allow the appellant to only view the records for a cost of \$2,375.00. The decision indicated that due to the volume of records to be searched for, narrowing the request would assist to further reduce the fees. The Ministry indicated that once the deposit was received, the time for issuing a decision would be extended for an additional 60 days.

On May 26, 2003, the Ministry's decision to partially waive the fee estimate was appealed and file PA-030106-2 was opened. The sole issue in that appeal was the appellant's position that the entire fee should be waived.

The Ministry wrote to the appellant on June 9, 2003, indicating that it would re-evaluate its decision on the fee waiver if she were to provide further details to support her request and, once again, indicated that by narrowing her request she could reduce the fee.

The appellant wrote to the Ministry on July 8, 2003, with additional details in support of her fee waiver request. In another letter dated July 11, 2003 the appellant indicated that she would be willing to narrow her request in the following ways:

- exclude the subject of morpholine from the list of chemicals requested;
- exclude draft versions of final documents;
- exclude Certificates of Approval which have not been exceeded or amended;
- receive records on CD-ROM as opposed to hard copy;
- remove duplicate copies; and
- further reduce the scope of her request if she was provided with a directory of files including abstracts.

On July 29, 2003, the Ministry provided the appellant with a revised interim decision that included a total fee estimate that had been further reduced to \$290.60 (25% of the actual cost), an

indication of the exemptions that may apply, and an indication that once the deposit was received, the time for issuing a decision would be extended for an additional 60 days. The Ministry identified the records as follows:

- Owen Sound District office had approximately 4000 pages;
- Environmental Assessment and Approvals Branch had approximately 130 pages;
- Environmental Monitoring and Reporting Branch had 9 pages;
- Environmental SWAT Team had 38 pages; and
- Investigation and Enforcement had 16 pages.

Appeal PA-030106-2 was closed on August 5, 2003 as the appellant was satisfied with the reduced fee estimate.

On August 7, 2003, the appellant submitted her deposit of \$145.30 to the Ministry, which represented 50% of the total fee estimate. At the same time, she questioned why the number of pages of records relating to the Environmental Assessment and Approvals Branch had been reduced from approximately 9,100 pages to 130 pages, and indicated that this portion of her request has remained unchanged.

The appellant and the Ministry corresponded on this issue between August and October 2003. The Ministry then wrote to the appellant on October 13, 2003 indicating that since it had reviewed her file and addressed her concerns, the appellant should re-state her request.

On November 6, 2003, the appellant wrote to this office indicating that although her deposit was submitted on August 7, 2003 and the 60 day time extension had expired, she had not received a final decision from the Ministry. In addition, she had not received a satisfactory response to her questions regarding the reduction in the number of records relating to the Environmental Assessment and Approvals Branch. As a result, file PA-030106-3 was opened.

On January 7, 2004, the Ministry issued another interim decision relating to the records that the appellant believes have been improperly excluded. The letter indicates that the fee estimate for the additional records is \$187.50 (25% of the actual cost). There was no time extension requested. The decision stated in part:

The Ministry has agreed to proceed with the search according to the original fee estimate provided to you in July of 2003. In addition, we have been asked to provide you with a second estimate of fees that will be applied beyond those in the initial estimate.

On January 14, 2004, the appellant submitted \$145.30 to the Ministry, which constituted the balance of the \$290.60 requested in its interim decision of July 29, 2003.

PA-030106-3 was closed on January 26, 2004 as the appellant was satisfied with the reduced fee estimate. However, as the Ministry had not issued final decisions with respect to the interim decisions of July 29, 2003 or January 7, 2004, PA-030106-4 was opened.

On January 28, 2004, this office sent a Notice of Inquiry to both the appellant and the Ministry stating that the Ministry was in a deemed refusal situation. The Notice also advised that if a decision was not issued by February 11, 2004, I would be in a position to issue an order requiring the Ministry to provide a decision letter to the appellant.

On February 11, 2004, the Ministry issued another interim decision. In this decision, the Ministry indicated that although no final decision had been made regarding access as the records had not yet been reviewed, sections 17(1)(a) and (c), 21(1)(f) and 19 of the *Act* will likely apply. The Ministry also indicated that some of the records were being transferred to Ontario Power Generation, pursuant to section 25(2) of the *Act*, as it recently became an institution covered by the *Act*.

The decision also referred to an interim fee estimate indicating that:

Interim Fees

We have received your initial deposit of \$145.30 representing 50% of the fee estimate based on the Ministry's understanding of your re-scoped request. You considered this re-scoping to be an excessive reduction of your request and therefore an additional fee estimate was provided but no fees were requested.

You submitted an additional cheque to the Ministry in the amount of \$145.30 which you stated in the accompanying letter received January 14, 2004 represented the "balance of the fees due (\$145.30) from your fee estimate of July 29<sup>th</sup>, 2003." The Ministry returned the cheque to you enclosed in our correspondence dated January 26, 2004.

**At this time we are requesting a deposit of \$48.75.** This represents the standard 50% deposit. As was agreed we are charging you 25% of total search time. 13 hours of additional search time is required to complete the search in the Owen Sound District Office. There will be additional search time associated with the Environmental Assessment and Approvals Branch that will be included in the final accounting. Please be reminded that there will be separate arrangements made with you regarding reproduction of the oversized maps.

Finally, the decision indicated that due to the large volume of records the time for responding to the request has been extended for an additional 45 days from the receipt of the appellant's deposit. The 45-day extension does not include additional time that may be required to provide notice to persons who may be affected by the disclosure of the records, pursuant to section 28(1) of the *Act*.

## **DISCUSSION:**

The matter before me is to determine whether the issuance of the Ministry's interim decision dated February 11, 2004, removes it from being in a deemed refusal situation in relation to its interim decisions dated July 29, 2003 and January 7, 2004.

The processing of this request has been a long and drawn out process to date. Both the appellant and the Ministry claim that the other is responsible for the delays and confusion. What is important at this juncture is to bring some clarity and finality to the process so that the parties can proceed to deal with any substantive issues that may result from final access decisions being issued.

To date, the appellant has been issued an interim decision on July 29, 2003 for which she has paid a deposit and has not received a final decision. On January 9, 2004, she received another interim decision for records she believes were not included in the July 29th interim decision, and for which she still has not received a final decision. I believe that the issuance of a further interim decision on February 11, 2004, does nothing to bring clarity or finality to this matter.

In my view, the Ministry should have proceeded with the appellant's request, based upon its interim decision dated July 29, 2003, when it received her deposit of \$145.30 on August 7, 2003, even though she believed that the scope of the request had been inappropriately reduced. Had this been done, the final decision would have been due on October 7, 2003, following the 60 day time extension, with the exception of any records where notice to affected persons was required pursuant to section 28(1) of the *Act*. In addition, there would have been no need to transfer part of the request to Ontario Power Generation.

The Ministry's interim decision, dated January 9, 2004, was meant to address the part of her request that the appellant believed had been inappropriately reduced. The decision indicates that the fee estimate for the additional records is a total of \$187.50, excluding the cost of maps. The Ministry did not request a fee deposit or time extension, but asked the appellant to provide written acceptance of the interim decision before proceeding to process this part of her request.

The appellant wrote to the Ministry on January 14, 2004 enclosing an additional \$145.30. At that point, rather than clearly accepting the Ministry's interim decision, the appellant voiced her displeasure over the series of events that brought her to this point. However, the Mediator's Report, which was issued to the appellant and the Ministry on January 26, 2004, confirmed that the appellant accepted the Ministry's fee estimate.

In my view, the Ministry should have continued to process this part of the appellants request and issued a final decision when it received the Mediator's Report confirming that the appellant accepted the Ministry's fee estimate, with the exception of any records where notice to affected persons was required pursuant to section 28(1) of the *Act*.

I therefore find that the interim decision issued on February 11, 2004 does not remove the Ministry from being in a deemed refusal situation.

**ORDER:**

1. I order the Ministry to issue a final decision letter regarding access to the records identified in the interim decision letters dated July 29, 2003 and January 7, 2004 in accordance with the *Act* and without recourse to a time extension, transferring the request and/or records to another institution, or additional fees, no later than **February 27, 2004**.
2. The Ministry shall disclose the records to the appellant, where its decision is to grant access and notice pursuant to section 28(1) of the *Act* is not required, within three days after payment of the balance of the fee has been received.
3. For those records where notice pursuant to section 28(1) of the *Act* is required for some records, the notice shall be issued no later than **February 27, 2004** with a return date for submissions of **March 18, 2004**.
4. I order the Ministry to issue a final decision on the records where notice pursuant to section 28(1) of the *Act* is required shall be issued no later than **March 22, 2004**.
5. The Ministry shall disclose the records to the appellant, where its decision is to grant access and notice pursuant to section 28(1) of the *Act* is required, within three days after payment of the balance of the fee has been received.
6. In order to verify compliance with Provisions 1 and 4 of this Order, I order the Ministry to provide me with a copy of the decision letters referred to in Provisions 1 and 4 within seven days of issuance. These 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: \_\_\_\_\_  
Robert Binstock  
Registrar

February 20, 2004  
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