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

# ORDER PO-2634

## Appeal PA07-229

## Ministry of Natural Resources

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## NATURE OF APPEAL:

The Ministry of Natural Resources (the Ministry) received three requests under the *Freedom of Information and Protection of Privacy Act* (the *Act*) on February 19, 2007. The requested records relate to export allocations for softwood lumber products under the 2006 "Softwood Lumber Agreement" between Canada and the United States.

On March 6, 2007 an interim access decision and fee estimate was issued by the Ministry in response to all three requests. In that decision, the Ministry stated that, due to the expected large number of responsive records, the fee estimate was $55,729.40. In addition, the Ministry stated that if the requester wanted to receive the records on CD ROM the photocopying costs would be eliminated and the fee estimate would be reduced to $32,682.00.

Following discussions between the Ministry and the requester, the requester wrote to the Ministry on March 16, 2007 and stated:

> Having received your March 6, 2007 reply letter and discussed a few times the nature of the large fee estimate for the three FOI requests A-2007-12 to 14 with [named person], I am now submitting a scaled back three-part request that I hope will eliminate much of that estimate.

The narrowed request was for the following information:

> Part I: For the period April 1, 2006 to December 15, 2006, please provide with respect specifically to export allocation for softwood lumber products under the Softwood Lumber Agreement, 2006:
>
> Communications exchanged with federal authorities (including the Ministers and Departments of Foreign Affairs and International Trade and the Export and Import Controls Bureau) on the process for setting said export allocations, methodologies for setting export allocations, and on the respective roles and responsibilities of provincial and federal authorities in that determination.
>
> Part II: For the period April 1, 2006 to December 15, 2006, please provide with respect specifically to export allocation for softwood lumber products under the Softwood Lumber Agreement, 2006:
>
> Internal communications with respect to what the respective roles and responsibilities of provincial and federal authorities could or would be and ultimately was in determining the export allocation methodology for softwood lumber products.
>
> Part III: For the more limited period December 1-15, 2006, with respect specifically to export allocation for softwood lumber products under the Softwood Lumber Agreement, 2006, and the process and methodology, including specifically cut-off dates, for determining same, please provide:

a) representations made to, or meetings held with the Ministry, the Minister, the Minister's office within that time frame by softwood lumber industry or other stakeholders or their representatives, and resulting communications the Ministry or Minister and his office exchanged with softwood lumber industry or other stakeholders or their representatives.

b) internal Ministry and Minister's office communications and meetings.

In concluding remarks, the requester states:

> Please note that I am prepared to discuss this narrower application further before any new fee estimate is issued so that it can save on payments to be made or work at your end.

Following the receipt of this revised request there were some discussions between the Ministry and the requester. The precise nature of those discussions is in dispute. The Ministry states that the discussions were an attempt to clarify the nature and scope of the request and that the request was not clarified until April 5, 2007. The requester denies that there were any attempts to further clarify or narrow the request in the time period between March 16, 2007 and April 5, 2007. The requester states that those discussions:

> … were with respect to ensuring that my requests had been properly received, that they were being pursued, and to make sure that there were no outstanding questions by the Ministry with respect to my requests.

The Ministry issued a revised interim access decision letter and fee estimate on April 17, 2007. The letter states:

> Our preliminary estimate for your revised and narrowed request is that there are approximately 42190 pages of records, which include briefing notes, correspondence, emails, meeting notes etc. As previously indicated in our initial fee estimate letter to you of March 6, 2007 we expect the following exemptions may apply to some of this information:
>
> Section 12 – Cabinet Records
> Section 13 – Advice to Government
> Section 15 – Relations with other governments
> Section 17 – Third Party Information
> Section 18 – Economic interests of government
> Section 19 – Solicitor-client privilege
> Section 21 – Personal information
>
> Section 57 of the *Act*, requires the charging of fees in connection with requests for access to government held information. The estimated fee for the records that may be released is $13,618.00 calculated as follows:

| | |
|---|---|
| Search time (53 hours x $30.00 per hour) | $1,590.00 |
| Record Preparation (8975 pages @ $.40 per page) | $3,590.00 |
| Photocopies (42,190 pages x $0.20 per page) | $8,438.00 |
| **Total** | **$13,618.00** |

> Alternatively, access to the records can be provided on CD-ROM at a cost of $80.00 for the estimated 8 CD Rom disks required to contain the records, thereby limiting the photocopy cost. This will reduce the fee associated with processing your request to **$5,260.00**.

The Ministry requested a deposit of 50% of the fee.

The requester objected to the fee estimate and discussions ensued between the requester and the Ministry in which the requester attempted to persuade the Ministry that the fee estimate was unreasonable. The Ministry states that the request was placed on hold while it awaited payment of the deposit.

The requester states that on April 20, 2007, he paid the deposit. However, the Ministry indicates that it did not receive the deposit until April 30, 2007.

By letter dated May 16, 2007, the Ministry wrote to the requester, seeking to extend the time for responding to the request and stating as follows:

> The time to process your request has been extended in accordance with section 27 of the *Act* for an additional 390 days to June 10, 2008.
>
> The reason for the extension is that the request is for a large number of records, and necessitates a search through a large number of records. Meeting the time limit would unreasonably interfere with the operations of the institution.

The requester (now the appellant) appealed the time extension. In his notice of appeal to this office, the appellant states:

> …I respectfully request that you investigate the Ministry's time extension and issue an order reducing the time extension to no more than an additional 30 days from the time that the Ministry has had already. In the alternative, I would ask that I have the option of getting my money back, as I was made to pay the deposit without being fully informed of the length of time that the Ministry intended to take to process my request.

In the circumstances set out above, this office moved the appeal directly to the adjudication stage of the appeal process.

I commenced the adjudication of this appeal by issuing a Notice of Inquiry to the Ministry. The Notice of Inquiry outlined the background and issues in the appeal and invited the Ministry to provide representations. I then received representations from the Ministry. The Ministry also provided this office with an affidavit sworn by the Assistant Freedom of Information and Privacy Coordinator for the Ministry. I then issued a Notice of Inquiry to the appellant, inviting him to make representations on the facts and issues set out in the notice. Complete copies of the Ministry's representations and affidavit were provided to the appellant along with the Notice of Inquiry. The appellant responded with representations. I determined that the appellant's representations raised issues to which the Ministry was entitled to reply. Accordingly, I invited the Ministry to submit reply representations and provided a complete copy of the appellant's representations to the Ministry. I then received reply representations from the Ministry.

## DISCUSSION:

The issues raised by this appeal are as follows:

> Was the Ministry's request for a time extension submitted within the time period required by the *Act*?
>
> If the Ministry's time extension was not submitted within the time period required by the *Act*, is the Ministry in a deemed refusal position for failing to respond to the appellant's request within the appropriate time?
>
> If the Ministry's time extension was submitted within the time period required by the *Act*, is the time extension reasonable in the circumstances of this appeal?

As noted below, I asked the parties to comment on Orders 81 and M-555 and their application in this inquiry. In the discussion below, I will address these decisions. Under the heading, "Time Extensions and Interim Access Decisions," I will also consider the approach taken in these decisions to the question of when section 27 time extensions should be claimed in the context of an interim access decision. Under the heading, "Remedy", I will consider and formulate the appropriate remedy in this case.

### WAS THE MINISTRY'S TIME EXTENSION REQUEST SUBMITTED WITHIN THE TIME FRAME CONTEMPLATED BY THE *ACT*? IF NOT, IS THE MINISTRY IN A "DEEMED REFUSAL" SITUATION?

In Order 81, former Commissioner Linden set guidelines for the issuance of final and interim access decisions, fee estimates and time extensions. These guidelines were reviewed, considered and ultimately reaffirmed in Order M-555. The parties were asked to comment on Orders 81 and M-555 in the context of this appeal.

The issues and arguments to be addressed here relate to sections 24, 26 and 27 of the *Act*. Section 24 states, in part:

> 24(1) A person seeking access to a record shall,
>
> > (a) make a request in writing to the institution that the person believes has custody or control of the record;
> >
> > (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record; and
> >
> > (c) at the time of making the request, pay the fee prescribed by the regulations for that purpose.
>
> …
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

Section 26 sets out the time for responding to the request and section 27 sets out the circumstances under which a time extension can be claimed. These sections state:

> 26. 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.
>
> 27(1) A head may extend the time limit set out in section 26 for a period of time that is reasonable in the circumstances, where,
>
> > (a) the request is for a large number of records or necessitates a search through a large number of records and meeting the time limit would unreasonably interfere with the operations of the institution; or

> (b) consultations with a person outside the institution are necessary to comply with the request and cannot reasonably be completed within the time limit.
>
> (2) Where a head extends the time limit under subsection (1), the head shall give the person who made the request written notice of the extension setting out,
>
> (a) the length of the extension;
>
> (b) the reason for the extension; and
>
> (c) that the person who made the request may ask the Commissioner to review the extension.

As noted above, one of the issues before me is whether the Ministry issued its time extension within the time required under the *Act*. If it did not, then it may be in a deemed refusal position.

The Ministry relies on the guidelines set out in Order 81 and reaffirmed in Order M-555, relating to time extensions. The appellant's representations also refer to these guidelines.

Order 81 describes the interim access decision and fee estimate procedures as follows, beginning with a discussion of the time extension provisions found in section 27:

> Section 27 is not applicable to a situation where the institution is experiencing a problem because a record is unduly expensive to produce for inspection by the head in making a decision. This is true whether the undue expense is caused by either the size of the record, the number of records or the physical location of the record within the institution.
>
> What should the head do in these situations? In my view, the Act allows the head to provide the requester with a fees estimate pursuant to subsection 57(2) of the Act. This estimate should be accompanied by an "interim" notice pursuant to section 26. This "interim" notice should give the requester an indication of whether he or she is likely to be given access to the requested records, together with a reasonable estimate of any proposed fees. In my view, a requester must be provided with sufficient information to make an informed decision regarding payment of fees, and it is the responsibility of the head to take whatever steps are necessary to ensure that the fees estimate is based on a reasonable understanding of the costs involved in providing access. Anything less, in my view, would compromise and undermine the underlying principles of the Act.
>
> How can a head be satisfied that the fees estimate is reasonable without actually inspecting all of the requested records? Familiarity with the scope of the request can be achieved in either of two ways: (1) the head can seek the advice of an employee of the institution who is familiar with the type and contents of the

requested records; or (2) the head can base the estimate on a representative (as opposed to a random) sample of the records. …

… Because the head has not yet seen all of the requested records, any final decision on access would be premature, and can only properly be made once all of the records are retrieved and reviewed. However, in my view, if no indication is made at the time a fees estimate is presented that access to the record may not be granted, it is reasonable for a requester to infer that the records will be released in their entirety upon payment of the required fees.

"Interim" section 26 decisions are not binding on the head and, therefore, cannot be appealed to the Commissioner.

…

Regardless of whether the head has issued an "interim" section 26 notice (based on a representative sample or consultations) or a regular section 26 notice (based on inspection of the actual requested record), *if the notice is accompanied by a fees estimate, the issuance of the fees estimate has the effect of suspending the 30 day time limit imposed by section 26. If the institution sends a fees estimate to the requester on day 14, for example, day 15 is deemed to be the day after the institution receives the required deposit from the requester or issues a decision to waive fees pursuant to a request for waiver.* If the requester appeals the issue of fees, the running of the 30 day period is suspended. It begins to run again on the day after the appeal is resolved, either by Order of the Commissioner or mediated settlement between the parties.

As soon as the question of fees is resolved and the 30 day time limit is reactivated, the institution must retrieve and review all of the requested records for the purposes of determining whether access can be given. If the records are to be disclosed, section 26(b) requires the head to "...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..." within the balance of the 30 day time limit.

…

The 30 day time limit referred to in my discussions is subject to the extension provisions of sections 27 and 28 of the Act, in the usual manner.

[Emphasis added.]

In Order M-555, I reaffirmed the approach taken in Order 81. On the question of when a time extension may be claimed under section 27, I stated:

> In my view, Order 81 also stands for the proposition that, once the question of fees is settled and any requested deposit has been paid, if the institution finds that it faces one of the situations described in section 20 [of the *Municipal Freedom of Information and Protection of Privacy Act*, the equivalent of section 27 of the *Act*], it may claim a time extension at that point (subject to the requester's right to appeal that time extension in the usual way). I agree with this interpretation, which is set out in the summary of steps for responding to a request found on page 13 of Order 81, and particularly step 5, which states:
>
> > receipt of deposit or decision to waive fees reactivates the 30-day time limit, *subject to extensions under sections 27 and 28* [the provincial Act's equivalents of sections 20 and 21 of the Act], and ...
> >
> > - if an "interim" section 26 [the … equivalent of section 19 of the Act] notice was sent, head reviews all of the records covered by the request and issues a final decision under section 26. (Emphasis added.)

In other words, these orders indicate that once the deposit has been paid, the 30-day time period for responding under the *Act* is reactivated and, if it wishes to do so, the institution must issue a time extension under section 27 before the expiry of the 30 days. (See also Orders M-439, M-1777.)

In order to determine whether the time extension was rendered within 30 days, I must first determine the starting point for this time frame. As noted above, there is a dispute between the parties on this issue.

The appellant takes the position that the revised request was dated March 16, 2007 and that there were no discussions following that date relating to clarification of the request. As a result, the appellant submits that the time period for responding to the request ran from March 16. In the alternative, the appellant states that even if there were discussions regarding the clarification of the request following the delivery of the March 16 letter, the time period for responding to the request should run from March 16. He relies on Order P-214 to support his alternative position. In Order P-214, former Commissioner Tom Wright made a distinction between the "clarification" of a request under section 24(2) and the "narrowing" of a request, and the impact of this distinction on the applicable start date for calculating the time for response under section 26. He stated:

> I do note that the institution has referred to the telephone conversation with the appellant of November 5, 1990 as "the discussion which clarified the request". As this telephone call merely narrowed the scope of the original request (which

> had provided the institution with sufficient detail regarding the nature of the records being requested), in my view the thirty day time limit must be calculated from the date the original request was first received by the institution.

Section 24(2) is the starting point for the concept of "clarification" and the fact that the 30-day time limit only begins to run once necessary clarification of the request has taken place. Section 24(1)(b) requires that the request "provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record." Section 24(2) states:

> If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

The mandatory section 24(2) requires the institution to undertake the process of clarifying a request that is not sufficiently detailed, and until the request is "clarified", the 30-day time limit for responding does not begin (see Order 81).

Thus the character of any discussions that take place concerning the scope of a previously-submitted request is crucial for determining the date it is considered to have been submitted. I agree with former Commissioner Wright that unilateral narrowing by a requester, subsequent to filing an initial request, is not "clarification" for the purposes of section 24(2), and in such a case, the 30-day time limit begins to run on the date the request was first received by the institution.

The Ministry states that there were discussions following the delivery of the revised request that were about the clarification of the request. It is the Ministry's position that the request was not clarified until April 5, 2007 and that therefore the time limit for responding to the request should run from April 5, 2007. The Ministry makes the following representations on this point:

> On March 16/07, the Ministry received a letter from the Requester indicating a desire to clarify and/or narrow the request in order to reduce the fees and search time. The request was put on hold until it was determined whether the request could be clarified or narrowed, and whether this would ultimately result in reduced fees. The program areas were contacted to ascertain if narrowing/clarification would reduce the search time and the amount of records. The Requester was often unavailable during the period from March 16 to April 5 when discussions took place regarding clarification/narrowing of request due to personal issues. For example:
>
> March 13: During a conversation with the Information and Privacy Unit, the requester indicated that he would reformulate his request.
>
> March 16: The Requester indicated by fax that he would like to discuss the request informally before receiving a formal response. Due to personal reasons, the Requester indicated he would not be easily contacted.

> March 28: The Requester indicated he was more available and wants to continue with discussions about clarifying/narrowing the request.
>
> April 4: Discussion took place with the Requester and the I&P Unit staff re further narrowing the request.
>
> As the result of the efforts of the Information and Privacy Unit, and the Program areas, on April 5 the request was subsequently narrowed and clarified which resulted in a lower fee estimate. At this point the request was no longer on hold.

The appellant argues that the Ministry's request for a time extension was made more than a full month after the 30-day period for responding to the request had expired and denies that any discussions that followed March 16 related to the clarification of the request. In particular, the appellant states:

> If Order M-555 and Order 81 are accepted, once the fee estimate has been received by the requester (pursuant to subsection 57(3) of the Act), the 30-day limit is suspended until a deposit is received (pursuant to subsection 7(1) of Regulation 460). However, as submitted below, the suspension of time that is triggered by the issuance of an interim decision and receipt of the deposit does not apply to this case since, in this case, the 30-day time limit for requesting an extension of time had expired on April 16, 2007, i.e. the day before the interim decision and fee estimate were issued. [Emphasis in original.]
>
> …
>
> I did make phone calls with Ministry representatives subsequent to March 16, 2007. These were follow-up phone calls, during which I did my best to communicate with the Ministry employees with respect to ensuring that my requests had been properly received, that they were being pursued, and to make sure that there were no outstanding questions by the Ministry with respect to my requests. I am dismayed to find my attempts to create a helpful dialogue characterized as "clarification" and used as a justification to reinitiate the 30-day time period to respond to my requests. This is very much against the spirit of the Act.
>
> My requests have been the same since March 16th. Furthermore, even if the wording was clarified, Order P-214 has held that any "clarification" does not change the original day of a request where the clarification merely narrows the scope of the original request. As in Order P-214, any of my unreciprocated attempts to dialogue after March 16th were done in the spirit of cooperation and with the intent of helping Ministry employees to narrow their search parameters when responding to my three specifically worded requests. There is absolutely no merit to the Ministry attempt to re-initiate the 30-day time period on April 5th.

In its reply representations, the Ministry states:

> The appellant appears to rely upon Order P-214 on the grounds that a clarification does not change the start date for the thirty day period where the clarification amounts to a mere narrowing of a request and that it was not truly a clarification but mere attempt to assist the unit in the "spirit of co operation request". However, if you examine [the] affidavit [submitted with the Ministry's initial representations], the original request was extremely broadly worded. The Ministry's Freedom of Information and Protection of Privacy Unit attempted to work with the requester to clarify the request to establish the records/types of records which he was actually seeking, to reduce his fees and the number and type of records requested.
>
> The March 16th letter indicated a desire to clarify the request…. The clarification was required as it was not clear what records the appellant was actually seeking. From the outset, the unit worked closely with the International Trade Specialist, the MNR employee who is the most knowledgeable with respect to the softwood lumber file. However, the FIPPA unit and the employee had considerable difficulty in comprehending what the appellant was seeking. It [was] only after communicating repeatedly with the requester, that the unit was able to clarify the extremely broad and all encompassing request for record[s] to its present form. Due to issues of the appellant's availability, despite efforts of the unit to contact him, the request was not reformulated to a comprehensible form till April 5th.

I have carefully reviewed the parties' representations and the other documentation provided to this office. My analysis of how to measure the relevant time frame differs significantly from the approach advocated by either of the parties to this appeal.

To begin with, I am of the view that the appellant's request of February 19, 2007 continues to be the foundation of the request and of this appeal. It was broad in scope but I am not satisfied that anyone took steps to "clarify" it. To begin with, I have not been advised that the Ministry contacted the appellant under section 24(2) in respect of the February 19 request to assist him in re-formulation. As well, having reviewed the February 19 request and the amendment of March 16, 2007, it is clear that the amended request does, in fact, represent a "narrowing" of the original request rather than a clarification under section 24(2) (see the discussion of Order P-214, above). There is, moreover, no evidence before me that the February 19 request was withdrawn, or that a new $5.00 request fee (or, in the case of the three new requests here, $15.00) was paid. In my view, therefore, the start date for the 30-day time limit in this case was February 19, 2007.

The question then becomes whether the time extension was issued within 30 days after February 19, subject to events that "stop the clock" on the 30-day limit. As noted previously, the Ministry issued an interim access decision and fee estimate in response to the February 19 request on March 6, 2007, having used up 15 days of the 30-day response time. Pursuant to Orders 81 and M-555, the issuance of the fee estimate "stopped the clock" on the 30-day response time imposed under section 26, pending the payment of a deposit by the appellant. I accept the Ministry's

evidence that it received the deposit on April 30, 2007, as this is consistent with the April 25 postmark on the envelope, a copy of which was provided to me by the Ministry. The Ministry issued its time extension claim on May 16, 2007, and based on my calculations, this was day 31. Using February 19 as the start date, therefore, I conclude that the Ministry was one day late issuing its time extension claim.

In Order MO-1777, Intake Analyst Lucy Costa discussed the implications of attempting to claim a time extension under section 20 of the *Municipal Freedom of Information and Protection of Privacy Act* (the equivalent of section 27 of the *Act*) after the 30-day response time has expired. She stated:

> Barring exceptional circumstances, which are not present here, when assessing the time and resources it will need to properly respond to a request, an institution must decide and provide written notice within the initial 30-day time limit for responding to the request, the length of any time extension it will need pursuant to section 20 of the [*Municipal Freedom of Information and Protection of Privacy Act*] (Orders P-234, M-439 and M-581, MO-1748).

I agree, and I also find that there are also no exceptional circumstances here. In my view, changes to the scope of a request are a common occurrence. The particular changes made in this case cannot be described as "exceptional." As well, I do not consider the fact that the request is apparently voluminous to be "exceptional". The whole point of interim access decisions and a substantial purpose behind the time extension and fee provisions of the *Act* is to address that situation, and I would not conclude that a circumstance actually addressed in the legislation is "exceptional". Accordingly, the consequence of the Ministry being late is that it may not claim the requested extension.

Although it may seem inappropriate, and possibly even harsh, to state that barring exceptional circumstances, the consequence of being one day late is that a section 27 time extension may not be claimed, it is entirely consistent with the time-driven approach to responding to access requests established in sections 24 though 29 of the *Act*. In order to have meaningful time limits for taking steps in an access request, it is sometimes necessary to take a "bright line" approach to the establishment of such limits, as the legislature itself has done. In my view, the requirement that a decision to claim a time extension be communicated to the requester within the original time frame for responding to a request (30 days) is consistent with sections 26 and 27, and with the legislative scheme in sections 24 through 29. In order to be effective, the expiry of a time limit must have consequences.

Having said that, however, I also recognize that I cannot order the Ministry to issue a final access decision in this case, on what it claims to be 42,000 pages of records, without allowing it time to do so. I will address this problem under the heading, "Remedy," below.

To return to the analysis of time frames in this appeal, I have already stated that the parties take a different view of the history of the matter than the one I have just outlined, apparently viewing the March 16 request as the start date for the 30-day time limit. While I disagree with this

approach for the reasons outlined earlier, I have decided to analyze the matter in the alternative, treating March 16 as the inception date. If March 16 is taken as the date of a new request, I have concluded that the Ministry's new interim access decision and fee estimate dated April 17, 2007 was two days late and, based on the same analysis, the time extension issued on May 16, 2007 was over a month late.

In reaching this conclusion, I have considered the arguments of the parties set out above as to the discussions that took place after the March 16 request was filed, and the debate as to whether these discussions mean that the request was "clarified" as of April 5. For the reasons that follow, I find that the March 16 request was not "clarified" on April 5 or at any other time. Most significantly, I am not persuaded that the March 16 request required "clarification" under section 24(2). Given the very specific language of this request, I find that it meets the requirements of section 24(1)(b) since it would enable Ministry staff, upon a reasonable effort, to locate responsive records. Clarification under section 24(2) was therefore not required.

I have also considered the appellant's comment concerning further discussions with the Ministry (at the end of his March 16 letter), and the evidence and argument provided by the Ministry about telephone calls and attempts to contact the appellant between March 16 and April 5. Based on the description provided by the Ministry and the comments made by the appellant, reproduced above, I prefer the position taken by the appellant, that the discussions did not relate to or produce a "clarification." In my view, that assessment is supported by the evidence. In particular, I note that the Ministry's decision letter of April 17 recites the entire text of the March 16 letter verbatim, and responds to it, without reference to any clarification, re-interpretation or other change to the scope of the request. On the contrary, the letter is a straightforward response to the March 16 request, as submitted.

Therefore, if the March 16 request is treated as a new one, the time for a response under section 26 expired on April 15, 2007, two days before the Ministry's April 17 interim access decision and fee estimate were issued. In this analysis, the consequences of being two days late are that the Ministry is in a "deemed refusal" under section 29(4). As noted in Order PO-2595, issuing an interim access decision (such as the one sent by the Ministry on April 17, 2007) does not cure a deemed refusal. As well, the Ministry should have claimed its time extension no later than April 15, 2007, the due date for its access decision under section 26, and the Ministry was therefore over a month late when it claimed its time extension on May 16, 2007. Applying the approach in Order MO-1777, the Ministry was therefore barred from claiming this time extension.

To reiterate, I have analyzed the history of this appeal in two different ways: (1) treating February 19, 2007 as the request date, and (2) in the alternative, treating March 16, 2007 as the request date. Under both analyses, bearing in mind the stoppage of the 30-day clock where a fee estimate is issued (as applicable), I have concluded that the Ministry did not issue its time extension within 30 days after the request. In my view, the appropriate remedy for this failure is that the Ministry is barred from claiming the 390-day time extension in its May 16 letter.

In either case, the Ministry is also now in deemed refusal. As noted above, the time for response to the February 19 request would be May 15, 2007 because of the timely issuance of an interim access decision and the fact that the deposit was paid on April 30, with 15 days still to run on the 30-day clock. If the March 16 request is seen as the inception of the matter, the deemed refusal has been ongoing since April 15, 2007. Subject to the further discussion below, I will therefore order the Ministry to make a final access decision.

In the circumstances, it is not necessary for me to deal with the third issue identified above, namely, whether the claimed extension under section 27 is reasonable in the circumstances.

I now turn to a further issue raised by the appellant.

**TIME EXTENSIONS AND INTERIM ACCESS DECISIONS**

In his appeal letter, the appellant objects to the fact that he only learned of the proposed 390-day time extension after he had paid a substantial deposit. He states:

> In a letter dated April 17, 2007, [the Ministry] proposed a fee estimate of $5,260.00 in order to respond to [my] requests. However, [in the Ministry's] April 17 letter, [the Co-ordinator] makes no mention of an extension pursuant to section 27…..
>
> The April 17 letter also estimates that there would be approximately 42,190 pages of records responsive to my FOI application, taken as a whole. Given the narrow date ranges and the specific focus of the three parts of my application, I found it unbelievable that there could be so many pages that were truly responsive and relevant to my application. … Under protest of the grossly exaggerated volume of pages, I paid the $2360 deposit right away disclaiming that the full amount would be necessary….
>
> It was not until May 24, 2007 that I learned the Ministry would take the position that it would take an additional **390 days** to process my FOI application. … [Emphasis in original.]
>
> …
>
> I was made to pay a deposit in the sum of $2,630 without having been fully informed of the length of time that the Ministry intended to take to process my request.

In essence, the appellant is objecting to the result of the Ministry not claiming the time extension in its interim access decision, *i.e.*, the appellant paid the deposit *before* the Ministry informed him that it would need 390 days to process the request. In doing so, however, the Ministry was following the previous jurisprudence of this office. Order 81, reaffirmed in Order M-555, states clearly that "[s]ection 27 is *not applicable* to a situation where the institution is experiencing a

problem because a record is unduly expensive to produce for inspection by the head in making a decision." (Emphasis added.) Instead, Order 81 proposes the interim access decision/fee estimate approach. In the context of discussing the issuance of a final access decision where an interim one was issued previously, Order 81 goes on to state that "[t]he 30 day time limit referred to in my discussions is subject to the extension provisions of sections 27 and 28 of the Act, in the usual manner."

As noted previously, Order M-555 addresses this issue as follows:

> In my view, Order 81 also stands for the proposition that, *once the question of fees is settled and any requested deposit has been paid*, if the institution finds that it faces one of the situations described in section 20 [of the *Municipal Freedom of Information and Protection of Privacy Act*, the equivalent of section 27 of the *Act*], it may claim a time extension at that point (subject to the requester's right to appeal that time extension in the usual way). [Emphasis added.]

Read together, this jurisprudence indicates that in interim access decision situations, section 27 claims should only be made once the deposit has been paid and a final decision is being formulated.

In the Notice of Inquiry, I outlined the approach taken in these two orders in relation to when the time extensions should be claimed, as canvassed above. I specifically asked the parties the following question: "Should the findings referred to above in these orders be followed and applied in the circumstances of this appeal?" I did not receive submissions that directly address when a time extension claim should be made in the context of an interim access decision.

In my view, the appellant makes a good point in this regard. The length of time it will take to receive an access decision (and any records that are being released) could well be a factor in a requester's decision about paying a requested deposit and continuing to pursue access. For this reason, I have decided that institutions should be encouraged to identify that they will require a section 27 time extension, and the reasons for taking that position, as early as possible in the request process, and in the event of an interim access decision, this could be communicated in the interim decision letter. Since it is not certain when the deposit would be paid and the clock re-activated, it will not be possible to name a date by which the access decision would be given; rather, the estimate must be given by number of days, as the Ministry eventually did in this case.

On the other hand, since institutions have the entire 30-day response period to claim a time extension, and the clock is stopped by issuing the interim decision, I am not in a position to insist that the time extension be claimed in the interim access decision, but in my view this would be a good practice to adopt because it assists the requester in making an informed decision about whether to pay the deposit. Addressing the time extension issue in the interim access decision also appears to be the most practical approach for the institution, given that in formulating the fee estimate that accompanies the interim access decision, the institution would also have occasion to consider how much time it will likely require to process the request. In reaching this

conclusion, I also note that time extensions may be appealed to this office regardless of when they are claimed by an institution.

This approach will apply to future interim access decisions, and in that context, will provide more flexibility regarding the timing of a section 27 time extension claim than the approach taken in Orders 81 and M-555.

**REMEDY**

I have found, above, that the Ministry was late in claiming the time extension whether the inception date of the request is February 19 or March 16. This raises the question of what remedy to impose as it is clearly impractical to order that a final access decision be produced instantly in respect of what the Ministry claims to be 42,000 pages of responsive records. Even if this estimate is high, as the appellant contends, it is still apparent that it will take more than a few days to formulate a final access decision.

In considering the question of remedy, I believe the foregoing discussion of the appropriate time to claim a time extension is relevant. The Ministry obeyed the direction in Orders 81 and M-555 that section 27 time extension claims should not be included in interim access decisions. I have now revised the aspect of that process that previously asked institutions to delay section 27 claims until after the deposit had been received. In this case, absent the former rule articulated in Orders 81 and M-555, the Ministry might well have claimed its time extension earlier than it did. I note in passing that the appellant has been highly critical of the Ministry in this regard, but as stated above, the Ministry was trying to comply with earlier decisions of this office.

As well, there was a significant amount of confusion regarding time lines in this case, as evidenced by the analysis, above, of when the response was due and whether there had been a deemed refusal. In that regard, it is significant that I decided to adopt an entirely different time line analysis than the approach proposed by either of the parties to this appeal. Therefore, in my view, it would be unfair to the Ministry to require an immediate final access decision on all the records. If the Ministry is correct that there are 42,000 pages, it would also be impossible to comply with such an order. This would not be a sound remedy.

In his reply representations, the appellant summarizes the relief he seeks, primarily that his appeal be allowed and the time extension disallowed. Significantly, however, he also asks that the Ministry be required to substantiate the 42,000 page claim "by immediately providing an index of documents."

In my view, there is merit in this requested relief. This would permit the appellant to review the index and decide that some of the records should be excluded from the scope of the request. In that event, the fee would be reduced. In order to complete this request as efficiently as possible, I believe this would be a sensible first step. Accordingly, I will require the Ministry to send such an index to the appellant and myself no later than **February 13, 2008**.

As a second step, I will order the appellant to indicate to the Ministry, on or before **February 28, 2008**, if he wishes to reduce the scope of his request, with specific reference to the index.

As a third step, I will order the Ministry to issue a final access decision. The difficult issue in that regard is how much time to allow. On the one hand, the Ministry relies on 42,000 pages in its arguments relating to the 390-day extension, but the appellant disputes this. Among other arguments, the appellant points to and disputes the Ministry's constant references to the complexity of the softwood lumber issue and the significant number of stakeholders involved. Given the specific nature of the revised request and its limited reference to stakeholders, I agree with the appellant that the request is likely narrower than the interpretation the Ministry is giving to it. As well, the number of records may be reduced, and possibly significantly reduced, after the appellant receives the index.

I have also taken into account the Ministry's statement that, as of the date of its reply representations, the softwood lumber issue had been the subject of twelve access-to-information requests. The work done to locate records that are responsive to those requests should assist the Ministry in preparing its response to this request.

Taking these factors into account, I conclude that the fairest solution would be to require a final access decision to be issued on or before **May 30, 2008**, subject to notification requirements. I will also remain seized of this matter to address any issues or conflicts that may arise while these provisions are carried out.

On a further remedy-related topic, the appellant's representations ask that, whatever other findings are made in the order, I direct the Ministry to deal with any records it has identified as responsive without further delay. Absent any indication of the extent of such records, or whether they would be subject to exemption claims, I am not in a position to fashion a specific order provision to address this concern, and have therefore decided not to do this. However, if the Ministry is able to provide access to any of the records, I would encourage it to do so.

**DEPOSIT**

As previously noted the appellant's position is that if this office finds that the 390-day time extension is reasonable and that no partial release should be granted, he would like the deposit that he paid under protest returned. The Ministry has indicated that it is willing to return the deposit to the appellant, and I commend it for taking this position.

Although I have not upheld the 390-day time extension in this appeal, the appellant may still wish to reconsider his position regarding this request. If that is the case, without ordering it to do so, I ask that the Ministry consider returning the appellant's deposit, if the appellant indicates a willingness to withdraw the request. If the appellant decides to withdraw the request, he should do so within one week from the date of this order.

## ORDER:

1. If the appellant wishes to withdraw his request, he may do so by advising the Ministry, and this office, in writing, no later than **January 16, 2008**.

2. If the appellant does not withdraw his request, I order the Ministry to prepare an index of responsive records, following the model in IPC Practices No. 1 (enclosed with the Ministry's copy of this order) and to send the index to the appellant and this office no later than **February 13, 2008**. The index need not contain the columns, "Release Yes/No" or "Section(s) Applied".

3. If the appellant, after receiving the index, wishes to reduce the scope of the request, he may do so by advising the Ministry and this office, in writing, no later than **February 28, 2008**.

4. Whether or not the appellant reduces the scope of the request pursuant to provision 3, I order the Ministry to produce a final access decision in relation to all three requests and send the decision to the appellant and myself no later than **May 30, 2008**, subject to the provisions of sections 28 and 29, and without recourse to a time extension under section 27. If the request is reduced in scope pursuant to provision 3, or if the cost of completing the request is lower than the original estimate for any other reason, I order the Ministry to adjust its fee, to advise the requester of the adjustment as part of its final access decision, and to pay any refund that may be required.

5. If applicable, the Ministry may require the appellant to pay any outstanding fees prior to granting access to any records to be disclosed under its final access decision.

6. I remain seized of this matter to address any issues or conflicts that may arise while these provisions are carried out.

Original Signed by: January 9, 2008
John Higgins
Senior Adjudicator