

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER PO-3000

Appeal PA11-431

Ministry of Labour

October 4, 2011

Summary: On August 12, 2011, the Ministry of Labour (the ministry) issued an interim decision and fee estimate to the requester, more than 30 days after receiving the request. The ministry is of the view the interim decision and fee estimate was issued within the 30 day timeframe imposed by the *Freedom of Information and Protection of Privacy Act* (the *Act*), as it had to clarify the request prior to issuing the decision. The order states that the request was clear and the efforts of the ministry are not consistent with the clarification envisioned by section 24(2) of the *Act*. As such, the ministry is found to be in a deemed refusal situation pursuant to section 29(4) of the *Act*, and is ordered to issue a final access decision within one week of the date of this order, without any further time extension.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as am., ss. 24, 26, and 29.

Orders and Investigation Reports Considered: Orders PO-2634, P-81.

BACKGROUND:

[1] On June 20, 2011, the Ministry of Labour (the ministry) received a request pursuant to the *Freedom of Information and Protection of Privacy Act*, (the *Act*) dated June 17, 2011.

[2] The request was for access to the following information:

Our firm is requesting information relating to the amendments made to the *Regulation respecting Asbestos on Construction Projects and in Buildings and Repair Operations* – made under the *Occupational Health and Safety Act*, which took effect in November 2005.

Specifically, we request the following information:

1. Any discussion papers, consultation papers, or policy papers prepared by the Ministry of Labour, in relation to amendments to this Regulation.
2. Any and all stakeholder or other party submissions and responses to any such discussion papers, consultation papers, policy option papers, or draft proposed amendments to the Regulation, received by the Ministry in relation to the amendments to this Regulation.
3. Any and all copies of empirical data or factual information used by the Ministry of Labour, in the Ministry's formulation of the amendments to the Regulation, including, but not limited to,
 - a) information on the incidence or prevalence of asbestos-related disease in Ontario;
 - b) information on exposures to asbestos in Ontario workplaces;
 - c) information on exposure risk associated with non-friable asbestos containing materials;
 - d) information on costs associated with compliance with the Regulation respecting Asbestos on Construction Projects and in Buildings and Repair Operations, from the period 1985 to 2004;
 - e) projections or estimates relating to expected reductions in asbestos exposure or asbestos disease risk resulting from the amendments to the Regulation that took effect in November 2005.
4. Any analysis of the potential costs and benefits that might be associated with the amendments to the Regulation, including but not limited to, potential compliance-related costs for municipal governments, hospitals, educational institutions, and the Government of Ontario.

[3] On August 12, 2011, the ministry wrote to the requester to provide him with a fee estimate and interim decision for processing the request. This decision also indicated that if the requester pays the deposit, it will be necessary for the ministry to extend the time for issuing a final access decision, pursuant to section 27(1) of the *Act*. The ministry did not specify how long the time extension would be.

[4] On August 23, 2011, the ministry received the requester's fee deposit, indicating he wished to proceed with the request.

[5] On the same day, the ministry wrote to the requester indicating that, under section 27(1) of the *Act*, it was extending the time for issuing a final access decision by an additional 60 days to October 21, 2011. The reason given for doing so was that the request would necessitate a search through a large number of records and the ministry currently has a number of other requests it is processing that also involved a large number of records.

[6] On September 8, 2011, the requester (now the appellant) appealed the ministry's time extension decision. Appeal PA11-431 was opened.

[7] This appeal was assigned to me to determine if the time extension decision was issued within the timeframe mandated under the *Act*.

[8] I spoke with an analyst at the ministry on September 15, 2011, and indicated that it appeared as though the ministry was in a deemed refusal situation as it had not issued its fee estimate and interim decision within the 30 days mandated under section 26 of the *Act*.

[9] The analyst submitted that the ministry had attempted to clarify the request with the appellant on July 13, 2011. After speaking with the appellant, the ministry indicated that it was in a position to proceed with the request as it was originally submitted. From the information provided to me by the parties to this appeal, it appears that this was the only time the ministry spoke to the appellant regarding a clarification of the request.

[10] In the ministry's view the issuance of the August 12, 2011 fee estimate and interim decision, "stopped the clock" on the 30th day of the timeline contemplated in section 26 of the *Act*. It is the ministry's position therefore that the time extension decision was issued within the 30 day timeframe imposed by the *Act*.

[11] The appellant submits that his request was clear, and that no changes were made to it when the ministry contacted him on July 13th, 2011.

[12] During the time period of September 16 to the 20th, 2011, I attempted to assist the parties in reaching a mutually agreeable date for the issuance of a final access

decision. It was not possible to informally resolve this matter and as a result, on September 22, 2011, this office sent a notice of inquiry to both the appellant and the ministry stating that the ministry is in a deemed refusal position. The notice also advised that if a decision was not issued by September 29, 2011, I would be in a position to issue an order requiring the ministry to provide a decision letter to the appellant.

[13] On September 27, 2011, the Freedom of Information Coordinator (FOIC) for the ministry contacted me to communicate that she felt the ministry's analyst in charge of the request had not been given an opportunity to provide all the relevant documents that show the ministry's efforts to understand the request in order to adequately identify the responsive records.

[14] In order to ensure that I had a full understanding of the sequence of events leading up to the appellant's filing of this appeal, I allowed the FOIC an opportunity to provide me with information that would show that a clarification was sought pursuant to section 24(2) of the *Act*. The FOIC was given until September 30, 2011 to provide the additional information.

[15] On September 30, 2011, the FOIC sent an email to me that reiterated the ministry's view that the request of June 20, 2011, did not provide sufficient detail to enable an experienced employee of the ministry, upon a reasonable effort, to identify the records. The ministry submits it was only in a position to move forward with the request on July 13, 2011. The ministry also provided numerous attachments of internal emails that show that the analyst was in discussion with the program area responsible for the responsive records. These discussions focused on determining what records were responsive and vacation and staffing issues that appeared would impede a timely response to the appellant's request.

[16] The threshold issue raised by this appeal therefore is whether the request required clarification and if so, was the request properly clarified? If the answer is negative, then the institution may be in a deemed refusal situation.

DISCUSSION:

[17] The issues raised by this appeal relate to sections 24, 26 and 29 of the *Act*.

[18] 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).

[19] Section 26 sets out the time for responding to the request as follows:

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.

[20] Section 29(4) sets out the parameters for a deemed refusal situation as follows:

29(4) 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.

[21] The first issue before me is whether the request required clarification and if it was properly clarified?

[22] 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).

[23] 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).

[24] Senior Adjudicator John Higgins stated in Order PO-2634 that,

... 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.

[25] I adopt this approach for the purpose of this matter. The ministry has communicated that it made considerable efforts at the outset of receiving the appellant's request to understand what records would be responsive. The program area of the ministry responsible for the records was understaffed and the ministry had difficulty initially determining which records would be responsive to his request. The ministry states that clarification of the request was attempted with the appellant on July 13, 2011; 24 days after receiving the request and consulting with its program area. As a result of this contact with the appellant, the ministry proceeded with processing the request in its original form. The request was not changed or clarified.

[26] While I appreciate the efforts taken by the ministry to respond to the request in a timely manner given its staffing issues, I do not agree that these efforts constituted a "clarification" of the request pursuant to section 24(2) of the *Act*. I am not satisfied that anyone at the ministry took any steps to clarify the request itself, but rather the ministry had difficulty determining what records were responsive due to the lack of knowledgeable staff available to assist with processing the request.

[27] Based on the information received from the ministry and my review of the request, as it stands, reproduced in the first part of this order, I find it to be clear and not in need of clarification. The clarity of the request is supported by the fact the ministry produced an index of responsive records that it attached to its fee estimate and interim decision based on the request as it was submitted, with no clarification.

[28] Accordingly, the fee estimate and interim decision and time extension decision claimed by the ministry were issued more than 30 days after receiving the request, which I have found not to have required clarification. I find that the ministry is therefore in a deemed refusal position pursuant to section 29(4) of the *Act*.

ORDER:

1. I order the ministry to issue a final access decision to the appellant regarding access to the records in accordance with the *Act* without recourse to any further time extensions, no later than Tuesday, **October 11, 2011**.

2. In order to verify compliance with Provision 1 of this order, I order the ministry to provide me with a copy of the decision letter referred to in Provision 1 no later than Tuesday, October 11, 2011. This should be forwarded to my attention, c/o Information and Privacy Commissioner/Ontario, 2 Bloor Street East, Suite 1400, Toronto, Ontario, M4W 1A8.

Original Signed By:

October 4, 2011

Suzanne Brocklehurst
Analyst