



Information and Privacy  
Commissioner/Ontario

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

# ORDER 82

Appeal 890006

Ministry of Revenue



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August 2, 1989

VIA PRIORITY POST

Appellant

Dear Appellant:

Re: Order 82  
Ministry of Revenue  
Appeal No. 890006

This letter constitutes my Order in your appeal from the decision of the Ministry of Revenue (the "institution") regarding your request for information made under the Freedom of Information and Protection of Privacy Act, 1987 (the "Act").

The appeal file indicates that on December 13, 1988 you wrote to the institution asking for the following:

...all documents pertaining to the polls that have been tabled in the Legislature from January 1, 1985 to the present date, excluding the information on these polls that has already been tabled. This information would include: the complete analyses of the polling results, documents regulating or giving instructions to take polls, documents indicating the costs of taking these polls and the bills or instructions for billing.

I consider any document that contains public opinion on government policy over the last 3 years to come under the definition of polls: this would include surveys, consultants' reports, and any study conducted in combination with another group. In the latter instance, I request a breakdown of the percentage of questions allotted each party, and details of how costs to each

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were calculated.

Further to this, I request under section 24(3) and Section 24(4) of the Freedom of Information Act, all of the above documentation for a period of 2 years, commencing January 1, 1989. I would ask that the schedule you send me sets down the time required to provide me with each of the above mentioned documents after they are produced or received by your Ministry.

On December 20, 1988, the Ministry of Revenue responded to your request as follows:

Access cannot be provided as the records do not exist.

Please note that no schedule will be provided as continuing access is predicated on access having been granted in the first instance, see Section 24(3) of the Act.

On January 4, 1989, you wrote to me appealing the decision of the institution.

As you are aware, as soon as your appeal was received by my office, an Appeals Officer was assigned to investigate the circumstances of the appeal and attempt to mediate a settlement.

Settlement was not effected because both you and the institution retained your original positions with respect to the interpretation of subsections 24(3) and (4) of the Act.

Accordingly, an Appeals Officer's Report was prepared and sent to both parties on April 27, 1989, together with a Notice of Inquiry.

You and the institution were both asked to make representations to me concerning the subject matter of the appeal.

I have received and considered representations from both parties in reaching my decision.

The sole issue in this appeal is whether subsections 24(3) and (4) of the Freedom of Information and Protection of Privacy Act, 1987, require the institution to provide a schedule, showing dates on which the request shall be deemed to have been received again, when the original request has not been granted.

Subsections 24(3) and (4) of the Act provide as follows:

24.--(3) The applicant may indicate in the request that it shall, if granted, continue to have effect for a

specified period of up to two years.

(4) When a request that is to continue to have effect is granted, the institution shall provide the applicant with,

(a) a schedule showing dates in the specified period on which the request shall be deemed to have been received again, and explaining why those dates were chosen; and

(b) a statement that the applicant may ask the Commissioner to review the schedule.

In your letter of appeal you state:

I am appealing the refusal to provide a schedule for access to future documents when they become available... To state that no records are currently available with respect to polling, does not preclude the fact these records may exist in future. To request continuing access implies that while records may not exist at present, they will be made available if they occur within the specified time frame.

In your representations to me dated May 15, 1989, you argue that:

...this section [section 24] should be read in a generic manner, so that the words "if granted" in s. 24(3) relate to the type of document requested. ...with respect to a request for future records, I submit the future "request" does not depend on another "request" for an existing record.

I have read, with interest, the debates in the Legislative Assembly on the issue of continuing access (Hansard Official Report of Debates for June 8, 1987 and June 15, 1987), where you made similar arguments to those offered for consideration in this appeal. At that time you argued that the Act should include a section giving members of the legislature a special right to request access, on a continuing basis, to a classification of records. Your position appeared to contemplate that an institution would make a decision on whether to grant access to a particular "type" of requested record, whether or not this record existed at the time of the request, and, if the decision were to release, the institution would disclose all records of this "type" as they came into the institution's custody. Although I understand your position, it is clear to me that it was not accepted by the legislature at the time

the Freedom of Information and Protection of Privacy Act, 1987 was passed into law.

Section 10 of the Act provides a right of access "to a record or a part of a record in the custody or under the control of an institution". The wording and definitions contained in the Act

make it clear that this right of access is limited to recorded information that exists at the time that the request is received by the institution. The Act does not impose an obligation on an institution to make a decision with respect to a requester's right of access to records that do not exist at the time of the request.

Subsection 24(3) provides a requester with the right to have a request continue to have effect for up to two years. Subsection 24(4) sets out the obligations on the institution to provide a schedule for requests that are to have a continuing effect. The wording of these subsections is precise and unambiguous; the rights provided to the requester and the obligations imposed on the institution under these two subsections are conditional on access having been granted in the originating request.

After carefully considering your representations in this appeal, I find that they are not supported by the wording of the Act. The institution advised you that there were no records that would respond to your request. Because your request for access was not granted, you do not have a right under subsection 24(3) to request continuing access, and the institution has no statutory obligation under subsection 24(4) to provide you with a schedule for such continuing access.

Although the absence of any records at the present time which would respond to your request prohibits you from utilizing the provisions of subsection 24(3), I would remind you that there is nothing in the Act which precludes a requester from re-submitting a request to an institution, and it is certainly your option to do so.

I should also remind you of the provisions of subsection 24(5) of the Act, which comes into play once a schedule for continuing access has been provided. Subsection 24(5) reads as follows:

This Act applies as if a new request were being made on each of the dates shown in the schedule.

It is clear from the wording of this subsection that the decision of the institution with respect to the original request is not automatically applied to the records in the custody of the institution at the dates identified in the schedule. Rather, the Act requires the institution to treat each date on the schedule as

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generating a new request, and the head must apply the exemptions contained in the Act to all records identified at that time.

For the reasons outlined in this Order, I am upholding the decision of the head.

Yours truly,

Sidney B. Linden  
Commissioner

cc: The Honourable Bernard Grandmaître  
Minister of Revenue  
Mr. Fred Jones, FOI Co-ordinator