

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER PO-3632

Appeal PA16-186

Ministry of the Environment and Climate Change

July 15, 2016

**Summary:** On April 4, 2016, the Ministry of the Environment and Climate Change (the ministry) issued an interim decision and fee estimate to the requester, more than 30 days after receiving the request. The ministry sought to narrow the scope of the request received on or about September 30, 2015, given the large number of responsive records. The ministry also indicated that the majority of the records will require third party notice and that the third parties had not yet been notified. The order states that the ministry is found to be in a deemed refusal situation pursuant to section 29(4) of the *Act*. The ministry is ordered to issue third party notices by July 26, 2016, and a final decision regarding access by August 31, 2016, without any recourse to a further time extension.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, ss. 24, 26, 27, 28 and 29.

### **ORDERS AND INVESTIGATION REPORTS CONSIDERED: ORDERS MO-1777, PO-2595**

#### **BACKGROUND:**

[1] On September 30, 2015, the requester mailed a request to the Ministry of the Environment and Climate Change (the ministry) for access to the following records [under the *Freedom of Information and Protection of Privacy Act* (the *Act*)]:

All records that reference "roadsweeping materials", and/or "road sweepings and/or "street sweepings". I am specifically requesting records that include any of these terms in:

a) draft or final form in policies, guidance documents, memoranda, correspondence and reports produced and/or within the possession of the Ministry between January 1, 2010 and September 22, 2015; and

b) draft or final approvals issued by the Ministry since January 1, 1990.

[2] Based on the information before me, the ministry contacted the requester on December 7, 2015 to discuss a possible narrowing of the request.

[3] After several discussions between the requester and an analyst at the ministry between December 7<sup>th</sup> and December 11<sup>th</sup>, 2015, the requester agreed to narrow the scope of the request.

[4] On February 9, 2016, the ministry advised the requester that the terms used in its request were too limited and would limit the search for relevant records responsive to the request. The ministry asked the requester to provide additional information to help the ministry with its search.

[5] On February 11, 2016, the ministry wrote to the requester and acknowledged receipt of the narrowed request. The request was revised as follows:

Records that reference: "road sweep" and/or "roadsweep" and/or "roadsweeping material(s)" and/or "road sweeping material(s)" and/or "road sweeping(s)" and/or "street sweeping(s)" in the following requested records:

Property records search: All records that reference the above key words for the timeframe of 2003 to present (February 9, 2016) that relate to property records. Note: this search will be based on an electronic search only of the key words noted above in our property related databases for the following regional areas – Toronto District Office, Barrie District Office, York Durham District Office, Halton Peel District Office, Central Regional Office and London District Office, Owen Sound Area Office, Sarnia District Office, Windsor Area Office and Southwest Regional Office.

All records that reference the above key words for the timeframe of January 1, 1990 to present (February 9, 2016) for all draft or final approvals to include ECAs, CofAs (exclude supporting documents). Note: this search will be based on an electronic search only of the key words noted above in our property related databases. Environmental Approvals Branch to perform this search.

Program areas and any other offices that may have records (including but not limited to Minister's Office, Communications Branch, Standards Development Branch, Halton Peel District Office (lead).

All records that reference the above key words for the timeframe of January 1, 2010 and February 9, 2016 for all drafts or final forms in policies, guidance documents, memorandum, correspondence and reports produced and/or within the possession of the Ministry. Note: this search will be based on an electronic search only of the key words noted above in any database, email, or other electronic search available.

[6] On March 18, 2016, the requester (now the appellant) filed an appeal, alleging that the ministry was in a deemed refusal situation as it did not issue a decision in accordance with section 26 of the *Act*. Appeal PA16-186 was opened.

[7] This appeal was assigned to me to determine if the ministry was in a deemed refusal situation with respect to this request.

[8] On March 24, 2016, this office sent a Notice of Inquiry to the ministry stating that the ministry was in a deemed refusal situation for failing to issue an access decision within the 30 days mandated by section 26 of the *Act*. The Notice advised the ministry that if a final decision was not issued by April 11, 2016, I would be in a position to issue an order requiring the ministry to provide a decision letter to the appellant.

[9] On April 4, 2016, the ministry issued an interim decision, providing the appellant with a fee estimate and indicating that, under section 27 of the *Act*, it was extending the time for issuing a final access decision by an additional 180 days after receipt of the appellant's deposit. The reason given for doing so was the large volume of records to be reviewed and prepared for disclosure. The ministry's interim decision also indicated that, under section 17(1) of the *Act*, it would be required to notify third parties of the request.

[10] On April 6, 2016, I spoke with an analyst at the ministry and indicated that the ministry had not issued its fee estimate and time extension decision within the 30 days mandated under section 26 of the *Act*.

[11] The analyst explained that the search for records responsive to this request had been difficult and involved multiple program areas. The analyst also submitted that there are over 7000 pages of records responsive to the request, many of which contain third party information.

[12] During the time period of April 6, 2016 and May 25, 2016, I attempted to assist the parties in reaching a mutually agreeable date for the issuance of a final access decision. An informal settlement was not possible.

[13] On May 25, 2016, the ministry reiterated that a majority of the records will

require third party notice. The ministry also advised that it had not yet received a deposit from the appellant for the records.

[14] On May 31, 2016, the ministry advised that it was still in the process of identifying the total number of third parties. The ministry informed me that it anticipated to have all third party notices sent out by June 10, 2016.

[15] During the time period of June 13<sup>th</sup> to June 21<sup>st</sup>, 2016, I contacted the ministry and left the analyst several messages requesting an update on the third party notices.

[16] To this day, the ministry has not provided me with any confirmation as to whether or not it has notified the affected third parties of the request, nor has it committed to a date for issuing its final access decision.

### **DISCUSSION:**

[17] The issues raised by this appeal relate to sections 24, 26, 27, 28 and 29 of the *Act*.

[18] Former 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, in Order MO-1777.

[19] 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.”

[20] The ministry received the appellant’s request on or about September 30, 2015. Based on the information before me, the ministry did not contact the appellant until December 7, 2015, more than 60 days after receiving the request. The ministry’s stated reason for contacting the appellant on December 7, 2015, was to narrow the scope of the request given the large number of responsive records.

[21] There is nothing before me to indicate that the ministry found that the request was not sufficiently detailed, or required “clarification” under section 24(1)(b) of the *Act*. The ministry’s delay in processing the request was due to internal search issues. In my view, the ministry’s actions did not constitute a clarification of the request pursuant to section 24(2) of the *Act*, which would have, in effect, “stopped the clock” with regard to the 30-day time limit for responding to a request.

[22] Even if I determined that the ministry had made attempts to clarify the request in December, 2015; it would not change the fact that the clarification took place outside of the 30-day time limit for responding to a request pursuant to section 26 of the *Act*.

[23] In addition, the ministry acknowledged that it received the appellant's narrowed request on February 11, 2016, and did not issue a decision to the appellant or extend the time for its decision pursuant to section 27 of the *Act* within the 30-day statutory requirement. As noted by former Intake Analyst, Huppman in Order PO-2595, "...a deemed refusal is not cured by issuing an interim access decision and fee estimate".

[24] Therefore, I find the ministry to be in a deemed refusal situation pursuant to section 29(4) of the *Act*.

[25] In reference to the third party notification, Section 28(1) of the *Act* states that:

28. (1) Before a head grants a request for access to a record,

(a) that the head has reason to believe might contain information referred to in subsection 17 (1) that affects the interest of a person other than the person requesting information; or

(b) that is personal information that the head has reason to believe might constitute an unjustified invasion of personal privacy for the purposes of clause 21 (1) (f),

the head shall give written notice in accordance with subsection (2) to the person to whom the information relates. R.S.O. 1990, c. F.31, s. 28 (1).

***Contents of notice***

(2) The notice shall contain,

(a) a statement that the head intends to release a record or part thereof that may affect the interests of the person;

(b) a description of the contents of the record or part thereof that relate to the person; and

(c) a statement that the person may, subject to subsection (5.1), within twenty days after the notice is given, make representations to the head as to why the record or part thereof should not be disclosed. R.S.O. 1990, c. F.31, s. 28 (2); 2016, c. 5, Sched. 10, s. 2 (1).

**Time for notice**

(3) The notice referred to in subsection (1) shall be given within thirty days after the request for access is received or, where there has been an extension of a time limit under subsection 27 (1), within that extended time limit. R.S.O. 1990, c. F.31, s. 28 (3).

[26] As per Section 28(3) of the *Act*, the head must issue a notice to persons whose interests might be affected by the disclosure of the requested records upon receipt of the request.

[27] Although the ministry failed to provide notice to third parties within thirty days after the request for access was received, affected third parties cannot be denied the opportunity to make representations as to why records or part thereof should not be disclosed.

[28] To ensure that there are no further delays in processing this request, I am ordering the ministry to issue the third party notices and subsequently, a final decision regarding access.

#### **ORDER:**

1. I order the ministry to issue third party notices by **July 26, 2016**.
2. I order the ministry to issue a final decision to the appellant regarding access to the records in accordance with the *Act* without recourse to any further time extension, no later than **August 31, 2016**.
3. 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 **August 31, 2016**. 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: \_\_\_\_\_

Rita Najm  
Analyst

July 15, 2016 \_\_\_\_\_