

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-3783**

Appeal PA15-210-2

Ministry of the Environment and Climate Change

November 16, 2017

**Summary:** In February 2015, the appellant submitted an access request pursuant to the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the ministry of the Environment and Climate Change (the ministry). On March 26, 2015, the ministry issued a fee estimate and claimed an extension of time for responding to the request for an additional ninety (90) days. On April 24, 2015, the appellant submitted a fee waiver request to ministry. The ministry responded to the fee waiver request on February 9, 2016, where it denied the fee waiver request and issued a revised fee estimate and time extension for an additional thirty (30) days. The appellant appealed to this office on the basis that the ministry was in a “deemed refusal” for failure to provide a final decision regarding access to the records.

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 a final decision regarding access by November 22, 2017, without recourse to a further time extension.

Should affected third parties be identified during the ministry’s review of the records, the ministry is ordered to issue third party notices by November 24, 2017, and a final decision regarding access by December 27, 2017.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, ss. 26, 27, 28 and 29.

## **BACKGROUND:**

[1] In February 2015, the requester submitted a request to the Ministry of the Environment and Climate Change (the ministry) pursuant to the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following:

All memos and emails regarding the Ministry monitoring of the Carmeuse Lime Ingersol/Beachville Quarry & Lafarge Woodstock Quarry/Federal White Cement (Zorra) air shed, including analysis, 2013- Present. Also raw data from August, 2013, August, 2014 and September, 2014.

[2] On March 26, 2015, the ministry advised that the estimated fee for access to the requested records was \$988.00, and pursuant to section 27 of the *Act*, the time limit for responding to the request was extended for an additional ninety (90) days. The ministry advised that the additional time was required due to the "extremely large volume of materials to be reviewed and prepared for disclosure."

[3] On April 24, 2015, the requester submitted a request to the ministry to waive the fees. On the same day, the requestor filed an appeal with the Office of the Information and Privacy Commissioner of Ontario (IPC), stating that the fee estimate provided by the ministry was excessive. Appeal File PA15-210 was opened and ultimately resolved through the mediation process. Through the processing of appeal PA15-210, the ministry issued a decision denying access to the request for a waiver of the fee, pursuant to section 57(4)(c) of the *Act*. The ministry also issued a revised and reduced fee estimate, and the time extension required to respond to the request was reduced to an additional 30 days, after it received the requested deposit.

[4] On June 24, 2016, appeal PA15-210 was closed as the issue of the fee estimate and fee waiver was resolved. It should be noted a final decision regarding access had not been issued and, the appellant advised that the deposit of \$494.00 based on the original fee estimate was paid to the ministry in 2015.

[5] On March 10, 2017, the appellant filed a subsequent appeal with the IPC, stating the ministry had failed to provide a final decision regarding access to the records in accordance with section 26 of the *Act*. Upon review of the appeal, it appeared that the ministry was in a deemed refusal situation pursuant to section 29(4) of the *Act*. Appeal File PA15-210-2 was opened to address this matter.

[6] On May 4, 2017, this office sent a Notice of Inquiry to the ministry stating that the appellant claims it was in a "deemed refusal" by not issuing a decision letter within the time period set out in section 26 of the *Act*. The ministry was advised that it should issue a final decision immediately, if it had not already done so, and that if a settlement was not reached by May 18, 2017, the analyst would be in a position to issue an order requiring the ministry to provide a decision letter to the appellant.

[7] During the period of May 4, 2017 to July 6, 2017, the analyst previously assigned to this file, Rita Najm, contacted the Assistant Freedom of Information Coordinator (the Coordinator) for the ministry on several occasions in an attempt to informally resolve the appeal. On June 7, 2017, the Coordinator advised that through her initial review of the records, she determined that no third parties were affected by the request and that the ministry would be prepared to issue a decision by June 27, 2017. The Coordinator also advised that a secondary review of the records was taking place.

[8] On June 29, 2017, the ministry advised that it was not prepared to issue a final access decision, but hoped that its secondary review of the records would be completed by the end of the following week, July 7, 2017.

[9] On July 14, 2017, as a result of the departure of the assigned analyst, this appeal file was re-assigned to Natalie Rioux, the Intake Team Leader.

[10] Despite repeated efforts by the previous analyst and Ms. Rioux to settle this matter, the ministry has not issued a final decision.

## **DISCUSSION:**

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

[12] I find that the ministry is in a deemed refusal situation pursuant to section 29(4) of the *Act* as it has failed to issue an access decision pursuant to the statutory timelines set out in section 26 of the *Act*.

[13] With regard to the requirement for 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).

[14] 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.

[15] The ministry has indicated that a secondary review of the records is still underway. In this case, it is not clear if third parties may be affected by the disclosure of the requested records. The ministry has failed to identify and provide notice to third parties within thirty days after the request for records was received, or, where it has claimed an extension of time to respond under subsection 27(1), within that extended time limit, as per section 28(3) of the *Act*.

[16] Affected third parties cannot be denied the opportunity to make representations as to why records or part thereof should not be disclosed. As the ministry has thus far failed to determine whether third parties may be affected by the disclosure, and in order to ensure that there are no further delays in processing this request, I am ordering the ministry to issue third party notices and subsequently, a final decision regarding access.

[17] Alternatively, if the ministry determines that no third parties may be affected by the release of the records, I am ordering the ministry to issue a final decision regarding access.

**ORDER: - IF NO THIRD PARTIES ARE IDENTIFIED:**

1. 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 **November 24, 2017**.

**ORDER – IF THIRD PARTIES ARE IDENTIFIED:**

2. If third parties are identified and may be affected by the release of the records, I order the ministry to issue third party notices by **November 24, 2017**.
3. 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 **December 27, 2017**.
4. 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 **November 24, 2017**, if no third parties are affected by the request, or **December 27, 2017**, if third parties are affected. 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: \_\_\_\_\_  
Vanessa Macey  
Analyst

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November 16, 2017