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

INTERIM ORDER PO-2039-I

Appeal PA-020124-1

Ministry of Natural Resources

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NATURE OF THE APPEAL:

The Ministry of Natural Resources (the Ministry) received two multi-part requests under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for a broad range of records relating to specified properties and charges against the appellant.

In response to the requests, the Ministry issued a fee estimate in the amount $3,249.90 for processing them, and stated that "[a]s we have not yet reviewed the records no final decision has been made regarding access".

The requester (now the appellant) appealed the amount of the Ministry's fee estimate.

In accordance with procedures established for sole issue fee estimate appeals, I sent a Notice of Inquiry to both the appellant and the Ministry advising that an oral inquiry, in the presence of both parties, would be held on August 22, 2002 to determine whether the Ministry's fee estimate decision was reasonable, and should therefore be upheld. The Notice of Inquiry identified the background and the issue raised in this appeal, identified that a mediator was assigned to the appeal, and indicated that, in the event the appeal was not resolved through mediation, the oral inquiry would proceed. The Notice of Inquiry also identified certain information that I would be seeking at the oral inquiry from the parties in regard to the issue raised by the appeal.

The Notice also specified that the oral inquiry will be taped and that parties are entitled to a copy of the tape upon request.

Prior to the oral inquiry, the Ministry issued a supplementary decision wherein it revised the fee estimate to $3,240.00. The Ministry also advised that certain responsive records do not exist, and cited sections 13, 14, 17 and 21 of the *Act* as exemptions that may apply to the records.

The oral inquiry commenced on August 22, 2002, with both parties present by teleconference. At the outset of the inquiry I read out an opening statement which included the following:

> . . . The hearing is taking place on August 22, 2002 at 2:00 p.m. via teleconference. The proceedings are being recorded by the IPC. No other recording devices are permitted. The parties may obtain copies of the tape recording of the teleconference by providing this office with a blank cassette or cassettes . . .

The appellant attended the inquiry, as did the Ministry's Freedom of Information Coordinator, her assistant, two employees from the Ministry's Fort Frances office and the Ministry's solicitor. Both the appellant and the Ministry's representatives provided oral representations on the issue of the fee estimate at the inquiry, in the presence of one another. However, the oral inquiry was not completed on the first day and is scheduled to reconvene on September 30, 2002. Prior to my adjourning the inquiry on August 22, 2002, the appellant requested a copy of a tape of the inquiry. The Ministry objected, and provided oral submissions in support of its objection. The appellant provided oral submissions on this issue in response.

ISSUE:

As noted, the Ministry objected to a copy of the tape of the oral inquiry proceedings on August 22, 2002 being provided to the appellant. The Ministry bases its objection on section 52(13) of the *Act*. The purpose of this interim order is to rule on the appellant's request and the Ministry's objection.

DISCUSSION:

Introduction

Section 52(13) of the *Act* reads:

> The person who requested access to the record, the head of the institution concerned and any affected party shall be given an opportunity to make representations to the Commissioner, but no person is entitled to be present during, to have access to or to comment on representations made to the Commissioner by any other person.

Submissions of the Parties

The Ministry objects "to the disclosure of the tape" and notes that section 52(13) of the *Act* specifically states that "... no person is entitled to be present during, to have access to or to comment on representations made to the Commissioner by any other person". The Ministry states that it had "explicitly consented" to the appellant's presence and that it "has not consented to his having access to our representations, of which the tape would be a form". The Ministry submits that the appellant "is not entitled [to the tape] under the *Act*". The Ministry also submits that "in the circumstances, the effect would just be to prolong this hearing and it is not necessary".

It should also be noted that, at the outset of the oral inquiry, the Ministry submitted that "under section 52(13) of the *Act*, the appellant has no right to be at this hearing". The Ministry stated that "in the spirit of openness, the Ministry will consent to his presence; however, on the condition that this consent may be withdrawn if his presence disrupts or interferes with the presentation of the representations". Since the Ministry did not, in fact, object to the appellant being present, or seek a ruling from me in this regard, it was not necessary for me to make a finding on this matter at the inquiry.

The appellant submits that when the Ministry allowed his presence at the hearing, the Ministry waived its right to rely on section 52(13) of the *Act*. The appellant further submits that because of the amount of information contained in the Ministry's representations, he cannot possibly remember everything that was said and he requires a tape of the inquiry in order to be able to participate in any attempt at mediation that may take place.

Analysis

A number of authorities support the view that, while section 52(13) indicates that parties are not "entitled" to have access to the representations of another party, the Commissioner nonetheless has discretion to direct that a party have such access.

In Order 164, former Commissioner Sidney B. Linden commented on the effect of section 52(13) as follows:

> … I agree that the words "no person is entitled" to see and comment upon another person's representations means that no person has the *right* to do so. In my view, the word "entitled", while not providing a right to access to the representations of another party, does not prohibit me from ordering such an exchange in a proper case. Subsection 52(13) does not state that under no circumstances may I make such an order; it merely provides that no party may insist upon access to the representations.
>
> … In my view, the authority to order the exchange of representations between the parties is included in the implied power to develop and implement rules and procedures for the parties to an appeal.
>
> … [I]n the context of this statutory scheme, disclosure [of representations] must stop short of disclosing the contents of the record at issue, and institutions must be able to advert to the contents of the records in their representations in confidence that such representations will not be disclosed.

This interpretation was cited with approval by Justice Gravely of the Divisional Court on a motion to stay an oral inquiry of this office in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [1998] O.J. No. 5015. The sole issue in that proposed inquiry was the reasonableness of the Ministry's search for records.

> It is argued on behalf of the applicant that being compelled to respond to the Commissioner's Notice of Enquiry and present its representations at the enquiry according to the Notice may render the Application nugatory and would lead to impingement of numbers of rights given by the Legislation.
>
> I am not satisfied there is a serious risk of that occurring. The oral inquiry is designed to find out what happened to the documents, not to have them disclosed. The presence of [two named Ministry staff] is suggestive only. They were not subpoenaed. I assume the enquiry will be conducted with due regard to the requirements of s. 52. I agree with the interpretation given to section 52(13) by Commissioner Linden, in Reference: order 164, Human Rights Commission. *Applied here, the relevant parties have no right to be present during representations of others but the Commissioner may choose to permit them to be or direct them to be present.* [emphasis added]

In Interim Order MO-1461-I, Assistant Commissioner Tom Mitchinson dealt with an objection to the exchange of written representations. He addressed the municipal equivalent to section 52(13), and stated:

> To the extent that the affected person's position appears to be based on the Commissioner's lack of authority to make a decision to share the representations of one party with another, I would draw the affected person's attention to the reasons of Mr. Justice Cosgrove in *Ontario (Solicitor General and Minister of Correctional Services) v. Ontario (Information and Privacy Commissioner)* (June 3, 1999), Toronto Doc. 103/98 (Ont. Div. Ct.) in an order granting the Commissioner's sealing order as asked. In refusing to extend the sealing order to the Ministry's non-confidential representations in that case (and four others heard at the same time), Mr. Justice Cosgrove said the following in regard to section 52(13), the provincial equivalent of section 41(13) of the Act:
>
> > I have engaged counsel in discussions on sections 52(13) and [55(1)] of the Act. I am, with respect, unable to agree that these sections (in the context of the whole legislation) support the proposition that it was intended that representations be excluded. I have concluded that the Act does not warrant the sealing of the representations.
> >
> > . . . . .
> >
> > This principle shall apply unless representations are otherwise ruled confidential by the Commissioner.
>
> It is clear that the Divisional Court does not consider that section 41(13) has the effect on the confidentiality of the representations in the matter before me as advanced in the affected person's representations, and that the court agreed that decisions on the confidentiality of representations should be made by the Commissioner.

In my view, it is clear from these rulings that, like former Commissioner Linden and Assistant Commissioner Mitchinson, the Divisional Court has taken the view that the Commissioner may direct that a party be present during another party's representations, or that one party be given access to another party's representations.

Practice Direction 8 in the IPC's *Code of Procedure* applies to reasonable search appeals and fee appeals. Section 8 of the Practice Direction deals with access to an audio tape of representations:

> The IPC will record the representations portion of the inquiry on audio tape. A party (or the party's representative) is entitled to a copy of the tape, which the IPC will provide on request if the party provides the IPC with a suitable blank

> tape. Persons other than the parties, their representatives and IPC staff will not be given access to the tape.

In this case, the Ministry consented to the appellant being present during the inquiry, and provided its representations with the full knowledge and understanding that the appellant was present. As such, the Ministry has already disclosed its representations to the appellant. The Ministry has failed to explain why I should withhold information from the appellant which he has already heard.

In addition, I would not be inclined to accept the Ministry's position, even if the appellant had not already been privy to the contents of the tape. The Ministry's representations simply address the issue of whether its fee estimate was reasonable, and do not reveal the contents of the records, or any other information that might reasonably be considered confidential in the circumstances. While some inquiries might involve evidence that ought to be ruled confidential as between the parties (see the criteria for withholding representations in Practice Direction 7 in the *Code of Procedure*), the Ministry has provided no basis for such a finding with respect to any of the representations taped in this oral inquiry on August 22, 2002.

Finally, I do not accept the Ministry's submission that providing the appellant with a copy of the tape will unnecessarily prolong the hearing. In my view, the tape will assist the appellant both in participating in mediation and in formulating his representations at the continuing inquiry. These interests of fairness, and facilitating mediation, clearly outweigh any prejudice that may be caused by the relatively minor delay in the proceedings. In any event, any such delay is far more likely to prejudice the appellant than the Ministry.

Conclusion

The appellant is entitled to receive a copy of the taped representations of August 22, 2002, and I dismiss the Ministry's objection.

PROCEDURE:

I intend to send a copy of the tape of the oral inquiry that was held on August 22, 2002 to the appellant no earlier than **September 13, 2002**.

Original signed by: September 5, 2002
Susan Ostapec
Acting Adjudicator