

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3166

Appeal PA12-388

Ministry of Community Safety and Correctional Services

February 22, 2013

Summary: A 49-part request was submitted to the Ministry of Community Safety and Correctional Services for records relating to the actions of the Ontario Provincial Police in relation to specific Mohawk protests that occurred in June 2007 and April 2008. The ministry denied access to the records pursuant to section 65(5.2) of the *Freedom of Information and Protection of Privacy Act* (the *Act*). The decisions were appealed and put on hold pending the completion of the related prosecutions. Once the prosecutions had been completed, the adjudicator directed the ministry to issue new decision letters. The ministry failed to issue new decision letters as directed. This order relates to 13 of the requests for which the ministry failed to issue new decision letters as directed. The ministry is in a deemed refusal situation pursuant to section 29(4) of the *Act* with respect to 13 of the original 49 requests. In this decision, the ministry is ordered to issue final decision letters regarding the 13 outstanding requests without recourse to further time extensions.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 26, 29 and 65(5.2).

BACKGROUND:

[1] The appeal before me has a long and complex history involving three previous appeal files. It is therefore necessary for me to provide a more detailed account of the history of this matter than would otherwise be included.

[2] This is a deemed refusal appeal under the *Freedom of Information and Protection of Privacy Act* (the *Act*) with regard to 13 requests out of an original 49-part request made to the Ministry of Community Safety and Correctional Services (the ministry) on December 19, 2008 for records relating to the actions of the Ontario Provincial Police in relation to specific Mohawk protests that occurred in June 2007 and April 2008.

[3] On March 18, 2009, the ministry issued several decisions letters to the requester, constituting a partial response to the 49-part request. Citing section 65(5.2) of the *Act*, the ministry advised that "the records you have requested are not accessible under the *Act* at this time. You may wish to reapply once all proceedings in relation to the prosecutions have been completed." Section 65(5.2) of the *Act* states:

This Act does not apply to a record relating to a prosecution if all proceedings in respect of the prosecution have not been completed.

[4] The requester (now the appellant) appealed the ministry's decisions, and lack thereof, to the Office of the Information and Privacy Commissioner of Ontario (IPC).

[5] On April 22, 2009, the IPC opened appeal files PA09-124 and PA09-125 with respect to 17 of the requests. Appeal PA09-203 was opened on June 11, 2009 to address another 10 requests.

[6] The appeals were not resolved during mediation and moved to the adjudication stage of the appeals process in August and September of 2009. The appeals were placed "on hold" until the completion of the prosecutions.

[7] On January 4, 2011, the ministry's legal counsel advised that the final prosecution was complete. The ministry's letter stated that:

... the criminal trial of [the accused] has concluded. Accordingly, the Ministry of Community Safety and Correctional Services is withdrawing its claim that the records that are in dispute ... are excluded from the jurisdiction of the *Freedom of Information and Protection of Privacy Act* pursuant to subsection 65(5.2) of that Act.

[8] On January 20, 2011, the adjudicator wrote to the ministry and required it to issue access decisions with respect to the original 49-part request. The adjudicator further required the ministry to treat the date of January 20, 2011 as the date of the request for the purpose of calculating the 30-day period for responding with decision letters.

[9] In February and March of 2011, the ministry and the appellant exchanged correspondence regarding the outstanding decision letters. The ministry advised that it was placing the requests on hold pending receipt of clarification of the scope and specification of the requested records from the appellant. The appellant objected to the requests being placed on hold. The ministry then advised that it would be extending the time to issue decision letters to March 25, 2011. On March 30, 2011, the ministry advised that it would be giving notice to affected third parties regarding one of the requests.

[10] In the fall of 2011, the appellant contacted the ministry regarding the status of the outstanding decision letters. The ministry did not reply. The appellant contacted the ministry again in January and February of 2012, but decision letters were not issued. The appellant wrote to the ministry for the final time on June 10, 2012 to follow up regarding the outstanding decision letters. The appellant did not receive a reply.

[11] As no decisions had been issued by the ministry, an appeal was filed with the IPC on July 31, 2012.

[12] The IPC opened appeal file PA12-388 to address 17 of the original 49 requests. The other outstanding requests raised additional substantive issues or had been withdrawn. The IPC sent a Notice of Inquiry (notice) to the appellant and the ministry advising that the ministry was in a deemed refusal situation with respect to the 17 requests and stating that the ministry should immediately issue final decision letters to the appellant. The notice further advised that if final decision letters were not issued by September 4, 2012, I would be in a position to issue an order requiring the ministry to provide the appellant with final decision letters.

[13] The ministry responded to appeal file PA12-388 on August 30, 2012 by writing to the appellant and enclosing what it identified as the outstanding decision letters.

[14] Shortly thereafter, the appellant wrote to the IPC to advise that the decision letters that had been produced by the ministry pre-dated and were therefore not responsive to the adjudicator's directive of January 20, 2011.

[15] In an effort to clarify the issues surrounding the outstanding decisions, the IPC's Registrar and I arranged a conference call on October 25, 2012 with the ministry's Freedom of Information Co-ordinator and the ministry's Analyst assigned to this appeal. The ministry advised that it would need to verify whether it had in fact issued decision letters that were responsive to the adjudicator's directive of January 20, 2011.

[16] On November 5, 2012, the IPC and the ministry participated in a second conference call. The ministry confirmed that it had not issued decision letters that were responsive to the adjudicator's directive of January 20, 2011. It was agreed that the ministry would propose a timetable for issuing final decision letters regarding the 13

requests for which the ministry remained in a deemed refusal situation. Two of the 17 requests had been withdrawn and two had been streamed to mediation, leaving 13 requests for which decisions were outstanding.

[17] On November 16, 2012, the ministry wrote to the appellant and proposed a timetable providing that the 13 outstanding decision letters would be issued in batches by December 31, 2012, January 15, 2013, and February 15, 2013. The appellant and the IPC accepted the timetable as proposed by the ministry.

[18] Between December 20, 2012 and January 20, 2013, I made several unsuccessful attempts to speak with the ministry regarding this appeal and the missed deadlines for issuance of the first six of 13 outstanding decision letters. When I did speak with the ministry on January 21, 2013 I was advised that a revised timetable was being sent by mail.

[19] By letter to the appellant dated January 25, 2013, the ministry proposed a revised timetable for issuing the 13 outstanding decision letters due to the fact that some of the files are voluminous and require time consuming reviews for consistency. The timetable was changed to February 8, 2013, February 15, 2013 and February 22, 2013. The appellant and the IPC accepted the timetable as proposed by the ministry.

[20] On February 8, 2013, the first revised deadline that had been proposed by the ministry for the issuance of three decision letters was missed with no notice to the IPC or to the appellant. A call from the ministry reiterated that while the ministry was doing its best to issue decision letters, the reason for the delay included that some files are voluminous and require time consuming reviews for consistency. However, the ministry did not provide firm dates for when final access decisions will be issued.

DISCUSSION:

[21] Section 26 of the *Act* requires the ministry to issue a decision within 30 days of receipt of a request. If a decision is not issued within that time period, the ministry is in a "deemed refusal" situation pursuant to section 29(4) of the *Act*. That provision states:

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.

[22] I find that the ministry was in a deemed refusal situation pursuant to section 29(4) of the *Act* on February 20, 2011, as it has failed to issue final decisions letters as directed by the adjudicator on January 20, 2011.

[23] Even after being provided with a significant amount of additional time and two opportunities to propose its own timetables for issuing the 13 outstanding decision letters, the ministry has failed to do so. The ministry continues to be in a deemed refusal situation and has not provided firm dates when final access decisions will be issued.

ORDER:

1. I order the ministry to issue final decision letters with respect to the 13 outstanding requests to the appellant in accordance with the *Act* and without recourse to any further time extensions, as follows:
 - a. Not before **April 1, 2013** and no later than **April 8, 2013** regarding requests: CSCS-2008-03762, CSCS-2008-03765, CSCS-2008-03766;
 - b. Not before **April 8, 2013** and no later than **April 15, 2013** regarding requests: CSCS-2008-03768, CSCS-2008-03769, CSCS-2008-0377, CSCS-2008-0378, CSCS-2008-0379, CSCS-2008-0380, CSCS-2008-0381, CSCS-2008-0387, CSCS-2008-0388; and
 - c. Not before **April 15, 2013** and no later than **April 22, 2013** regarding request: CSCS-2008-0386.
2. In order to verify compliance with provision 1 of this order, I order the ministry to provide me with copies of the final decision letters referred to in provision 1 as follows:
 - a. Not before **April 1, 2013** and no later than **April 8, 2013** regarding requests: CSCS-2008-03762, CSCS-2008-03765, CSCS-2008-03766;
 - b. Not before **April 8, 2013** and no later than **April 15, 2013** regarding requests: CSCS-2008-03768, CSCS-2008-03769, CSCS-2008-0377, CSCS-2008-0378, CSCS-2008-0379, CSCS-2008-0380, CSCS-2008-0381, CSCS-2008-0387, CSCS-2008-0388; and
 - c. Not before **April 15, 2013** and no later than **April 22, 2013** regarding request: CSCS-2008-0386.

Original signed by: _____
Jessica Leinwand
Analyst

February 22, 2013 _____