



***To the Editor:** This is an article from a series of monthly columns by Environmental Law Specialist Dianne Saxe, one of the top 25 environmental lawyers in the world. These articles are available for publishing at no charge, provided Dr. Saxe and Jackie Campbell are cited as the authors. Dr. Saxe can be contacted at (416) 962 5882 or [admin@envirolaw.com](mailto:admin@envirolaw.com). For more information, visit <http://envirolaw.com>.*

### **Freedom Of Information requests – important, but not always easy**

Some government institutions are becoming more open about sharing information with the public. For example, Ontario's Ministry of the Environment (MOE) recently posted all recent air, sewage and waste certificates of approval (permits) and renewable energy approvals on-line.

However, governments often resist releasing information. Freedom of information (FOI) laws provide individuals with a way to access information that governments control. Although the FOI request process may be cumbersome and time-consuming, it is worthwhile to persevere, as it may yield a wealth of information.

### **FOI laws at different government levels**

Canada's *Access to Information Act* applies to federal government institutions, and each province has its own FOI law(s), which operate in a similar manner. In Ontario, for example, there are separate laws for accessing information held by provincial institutions (e.g., ministries, agencies, boards, commissions and universities) and municipal ones (e.g., municipalities, conservation authorities, health boards).

### **The FOI request process**

To make an FOI request, send a written request along with an application fee to the government institution that likely has the records of interest. Records come in many forms, such as documents, computer files and photos. Include as much detail as possible about the records being sought, to ensure that the scope of the request is clear. Where more than one institution may have relevant information, it is wise to file FOI requests with each of these.

Generally, the institution must respond to the FOI request within 30 days, although this period may be extended. The process can also be delayed, for example, where the government must notify another party about the request, and that party objects to disclosure of the information.

If the request is denied, written reasons must be provided, but these usually do not include a detailed explanation. It is important to follow up with the government institution for additional details. The requester may appeal to the Information and Privacy Commissioner, who is appointed by the legislature but is independent of the government.

If the request is accepted, the government will provide an estimate of the fee to cover costs associated with locating, retrieving and copying the records. This can be high, for example if a lot of time is needed to review the documents or if hundreds of pages are involved. The requester may opt not to proceed, to narrow the scope of the search, or to request a review of the fee amount.

### **Exemptions to disclosure**

There needs to be a reasonable balance between information that is publicly available and that which should not be disclosed, but the distinction is not always clear. There are many categories of exemptions under FOI laws that limit disclosure of information. For example, mandatory exemptions in Ontario's *Freedom of Information and Protection of Privacy Act* (FIPPA) include Cabinet records and personal information about others. Discretionary exemptions permit the government organization to decide whether to disclose information, and include advice or recommendations provided to governments by public servants or consultants, law enforcement records, confidential third party information (e.g., trade secrets), and records that are subject to solicitor-client privilege.

However, where the compelling public interest favours disclosing a record, an "override" provision under FIPPA is triggered. This applies to many, but not all, exemption categories.

### **Recent Supreme Court decision**

A recent Supreme Court of Canada (SCC) decision, *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, considered whether exemptions that were not subject to this override provision breached the *Canadian Charter of Rights and Freedoms*. In that case, the Criminal Lawyers' Association (CLA) requested disclosure of a police investigation report and related documents concerning the conduct of officials in a murder case. The government Minister refused the request, claiming the solicitor-client and law enforcement privilege exemptions, without explaining how these applied. His decision was upheld by the Assistant Information and Privacy Commissioner. The CLA

argued that freedom of expression as guaranteed by the Charter would be breached unless the documents were released under the public interest override provision.

The SCC ruled that the Charter guarantee of freedom of expression does not extend to access to all information held by the government. Access to such documents is constitutionally protected only where necessary to permit meaningful discussion on matters of public importance, where access does not encroach on protected privileges (e.g., solicitor-client or law enforcement privilege) and where it does not impair the functioning of government institutions. Documents dealing with solicitor-client privilege continue to be exempted from disclosure. However, the court asked the Commissioner to reconsider the law enforcement exemption decision. It noted that the Minister had not provided reasons for denying the request, and had not disclosed any part of the “voluminous documents” the CLA sought, raising concerns that should have been investigated by the Commissioner.

The SCC decision is important because it recognizes a limited Charter right to access government information. This strengthens the FOI process, and reminds us of its complexity.

Dianne Saxe and Jackie Campbell  
July 16, 2010