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

ORDER P-856

Appeal P-9400678

Ministry of Economic Development and Trade

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NATURE OF THE APPEAL:

This is an appeal under the Freedom of Information and Protection of Privacy Act (the Act). On May 16, 1994 the Ministry of Consumer and Commercial Relations (MCCR) received a request for records relating to the negotiation of the operating agreement for the casino in Windsor, between the province and Windsor Casino Ltd. MCCR determined that the responsive records were in the custody of the Ministry of Economic Development and Trade (the Ministry). Accordingly, pursuant to section 25(1) of the Act, MCCR transferred the request to the Ministry. The transfer took place on May 27, 1994.

On June 15, 1994, the Ministry extended the time for making its decision by 45 days until July 29, 1994. The requester did not appeal this time extension decision.

On July 28, 1994, the Ministry issued its decision denying access to the information pursuant to sections 17(1)(a) and (c), 18(1)(c), (d) and (e), and 19 of the Act. Accompanying its decision letter was an index of the five categories of responsive records. The index indicates that the records consist of some 560 pages of materials. The decision letter was sent to the requester by facsimile transmission.

The requester appealed this decision to the Commissioner's office. The appeal was dated October 13, 1994 and received by this office on October 20, 1994.

When the Ministry was notified of the appeal, it raised a preliminary issue regarding the timing of the filing of the appeal. The Ministry took the position that the Commissioner's office does not have jurisdiction to review the head's decision, as the appeal was not filed within the 30-day period as prescribed by section 50(2) of the Act. In fact, the appeal was filed some two and one-half months after the date on which the decision was made.

A Notice of Inquiry was provided to the appellant and the Ministry. The sole issue raised in this notice was whether the Information and Privacy Commissioner or his delegate has jurisdiction to review the Ministry's decision. Representations were received from both the appellant and the Ministry.

DISCUSSION:

LATE FILING OF THE APPEAL

In its submissions, the Ministry argues that the Information and Privacy Commissioner or his delegate does not have jurisdiction to review the decision of the head, as the appeal was not filed within the 30-day period as required pursuant to section 50(2) of the Act. Section 50 states, in part:

> (1) A person who has made a request for,
>
> (a) access to a record under subsection 24(1);

> (b) access to personal information under subsection 48(1); or
>
> (c) correction of personal information under subsection 47(2),
>
> or a person who is given notice of a request under subsection 28(1) may appeal any decision of a head under this Act to the Commissioner.
>
> (2) An appeal under subsection (1) shall be made within thirty days after the notice was given of the decision appealed from by filing with the Commissioner written notice of appeal.
>
> ...

The Ministry states that in his initial request letter, the appellant expressed an intention to appeal any decisions denying access to the requested documents. The Ministry further submits that the contents of his correspondence indicates that the appellant is familiar with the Act, and, in particular, his entitlement to appeal the head's decision. Thus, the Ministry maintains that section 50(2) should be interpreted strictly. The Ministry goes on to state that the 30-day time limit is mandatory and that compliance with the time limit provides a necessary element of finality in the access to information process.

The appellant refers to the fact that the Ministry took 75 days to respond to his initial request and that he did not object to the time extension. Therefore, he claims that he should be afforded the same consideration with respect to the time for filing his appeal. It is true that, based on the dates given above, 75 days passed from the date of the appellant's request to the date of the issuance of the decision letter. However, both institutions, MCCR and the Ministry, complied with the timing provisions of the Act at each stage of the process.

In Order P-155 former Commissioner Sidney B. Linden expressed the principle that the Act should be interpreted liberally in favour of access to the process unless someone can show prejudice resulting from the delay. In that order, the former Commissioner held that where a delay in filing an appeal is substantial **or** the institution or any other affected person can show some prejudice resulting from delay, subsection 50(2) is to be interpreted more strictly.

The Ministry notes that in Order P-155, the date on which the letter of appeal was mailed was unclear. The former Commissioner found that if the 30-day period had been exceeded, the additional time was insignificant. It is the Ministry's position that the delay of more than two and one-half months in this case is substantial, especially since the appellant indicated in his request that he would appeal any decisions denying him access. The Ministry also points to the appellant's familiarity with the Act, evidenced it says by the contents of his correspondence, as an additional reason to construe the time limit in section 50(2) strictly.

The appellant has provided this office with a copy of an envelope postmarked September 28, 1994. It is addressed to this office but does not contain the street number. The appellant advises that he attempted to file his appeal at this time but that the materials were returned to him due to the incomplete mailing address. I note, however, that the filing of the appeal on September 28 would still result in the appeal having been filed some 30 days beyond the 30-day time period prescribed by section 50(2).

However, in my view, the Ministry's submission that the appellant is "knowledgable", is not a factor that relates to the issue of whether the delay was substantial. I would also note that the appellant claims that this is his first appeal under the provincial legislation.

I also find that the fact that the appellant's statement at the outset that he would appeal is not determinative of this issue. It could just as easily be said that because the Ministry anticipated that there would be an appeal, it is not prejudiced by the filing of the appeal at this time.

The Ministry argues that as a result of the requester's stated intention to appeal the head's decision, it was reasonable for the Ministry to expect that an appeal would be commenced in a timely fashion. It submits that it would be prejudiced in that Ministry personnel would now have to:

> ... spend a considerable period of time refamiliarizing themselves with the documents at issue in order to respond to the appeal. More than 500 pages of documents are at issue and the time which would be involved in reviewing the documents would be significant.

All the records, while consisting of numerous pages, have been identified and exemptions claimed for each. The Ministry has not indicated that it will have to conduct another search to locate the records or that they have been returned to their original files at the Ontario Casino Commission. It has not claimed that any of the circumstances that resulted in the creation of the records have changed such that the records will have to be reviewed in order that the head may perhaps reconsider his exercise of discretion in view of any recent developments. If the appeal proceeds at this time, the Ministry will only be required to forward the relevant documents to the Commissioner's office. At this stage, the Ministry does not have to prepare any submissions on the application of the exemptions it has claimed or create any new documentation for this office or the appeal.

Accordingly, I find that I have not been provided with sufficient evidence to conclude that the Ministry was prejudiced by the appellant's delay in appealing its decision.

I have also reviewed the Ministry's decision letter. In this letter, the Ministry did not advise the requester that, should he wish to appeal its decision, he should file an appeal within 30 days as required by section 50(2).

Pursuant to section 29(1)(b) of the Act, there are certain legislative requirements which an institution must include in its decision letter refusing access to a record. One such requirement is set out in section 29(1)(b)(iv) which states:

> Notice of refusal to give access to a record or a part thereof under section 26 shall set out,
>
> > where there is such a record,
> >
> > > that the person who made the request may appeal to the Commissioner for a review of the decision.

In Order M-430, I held that, in order that notification of the right to appeal be meaningful, it must include a reference to the 30-day appeal period established by section 39(2) of the Municipal Freedom of Information and Protection of Privacy Act (the equivalent of section 50(2) of the Act). This requirement is set out in the June 1992 IPC Practices publication of the Commissioner's office entitled "Drafting a Letter Refusing Access to a Record". This document was sent to all provincial and municipal institutions at the time of its publication, and it remains in effect to this day.

Thus, I find that the Ministry's decision letter is inadequate in that it failed to advise the requester of the time during which he must exercise his right to appeal. The notice of refusal does not meet the mandatory requirements of section 29(1)(b).

Because the requester was not advised by the Ministry of the timing of a potential appeal, I am of the view that a strict adherence to the 30-day period would now prejudice his rights. I find that the appellant cannot be required to adhere to a prescribed time limit when a decision refusing access is deficient in failing to advise him of the time limit.

I would also note that, should I decide not to proceed with this appeal at this time, the appellant may submit another request to the Ministry for access to the same records.

Based on the circumstances of this appeal as described above, I am of the view that I have the jurisdiction to consider the merits of this appeal despite the fact that it was filed some 54 days late.

ORDER:

1. I order the Ministry to forward to the Appeals Officer assigned to this file all records at issue in this appeal as identified in the index to its decision letter dated July 28, 1994, together with all other relevant documentation, as specified in the Confirmation of Appeal, dated October 31, 1994.

2. I order the Ministry to forward the documents referred to in Provision 1 within fifteen (15) days of the date of this order.

Original signed by: February 2, 1995
Anita Fineberg
Inquiry Officer