



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

# INTERIM ORDER P-1498

Appeal P\_9700178

Ministry of the Solicitor General and Correctional Services



80 Bloor Street West,  
Suite 1700,  
Toronto, Ontario  
M5S 2V1

80, rue Bloor ouest  
Bureau 1700  
Toronto (Ontario)  
M5S 2V1

416-326-3333  
1-800-387-0073  
Fax/Télé: 416-325-9195  
TTY: 416-325-7539  
<http://www.ipc.on.ca>

## **BACKGROUND:**

The appellant, an officer with a Regional Police force (the Police), was the subject of allegations of misconduct. Under section 63(2) of the Police Service Act (the PSA), the Chief of Police asked the Ontario Provincial Police (the OPP) to investigate the matter. The OPP completed its investigation and submitted a report to the Police.

On December 9, 1996, the Ministry of the Solicitor General and Correctional Services (the Ministry) received the appellant's request under the Freedom of Information and Protection of Privacy Act (the Act) for all records relating to the investigation. The Ministry identified 101 pages of responsive records, plus a video tape of an interview which took place during the investigation. On January 21, 1997, the Ministry wrote to the Police, enclosing all responsive records originally produced by or provided to the Ministry by the Police. The Ministry asked the Police whether it had any concerns about releasing these records.

On February 5, 1997, the Ministry advised the appellant that it was denying access to the records, claiming that they fell within paragraphs 1 and 3 of section 65(6), and therefore outside the scope of the Act. The appellant appealed this decision.

Following unsuccessful mediation, this office sent a Notice of Inquiry to the Ministry and the appellant on May 2, 1997. The Police were also later provided with a copy of the Notice. The application of section 65(6) of the Act was the only issue on appeal.

## **NATURE OF THE APPEAL:**

On June 17, 1997, six days prior to an extended deadline for the receipt of representations, the Ministry issued a new decision letter. The Ministry withdrew its claim to the section 65(6) exclusion, and advised the appellant that it considered the request to be within the scope of the Act. The new decision letter went on to state that the Ministry had decided to exercise its discretion to transfer the request to the Police, in accordance with section 25(1) of the Act (later clarified to mean section 25(2)). In the Ministry's view, the records documented an internal PSA investigation undertaken by the OPP at the request of the Police, and the Police had a greater interest in the records as defined in section 25(3)(a) of the Act.

The appellant appealed this decision, objecting to the transfer of the request.

A Notice of Inquiry on the issue of transfer was sent to the appellant, the Ministry and the Police. Representations were received from all three parties.

## **JURISDICTIONAL ISSUES**

### **Jurisdiction to Review a Transfer Decision**

In considering the jurisdiction of the Commissioner to review a transfer decision, I have taken into account several sections of the Act.

When an institution receives a request, section 25(2) gives the head a discretionary power to decide to transfer the request to another institution, provided certain conditions are met. This and other relevant subsections of section 25 state:

- (2) Where an institution receives a request for access to a record and the head considers that another institution has a greater interest in the record, the head may transfer the request and, if necessary, the record to the other institution, within fifteen days after the request is received, in which case the head transferring the request shall give written notice of the transfer to the person who made the request.
- (3) For the purpose of subsection (2), another institution has a greater interest in a record than the institution that receives the request for access if,
  - (a) the record was originally produced in or for the other institution; or
  - (b) in the case of a record not originally produced in or for an institution, the other institution was the first institution to receive the record or a copy thereof.
- (4) Where a request is forwarded or transferred under subsection (1) or (2), the request shall be deemed to have been made to the institution to which it is forwarded or transferred on the day the institution to which the request was originally made received it.
- (5) In this section, “institution” includes an institution as defined in section 2 of the Municipal Freedom of Information and Protection of Privacy Act.

Section 50(1) gives a person requesting access to his or her personal information the right to appeal “any decision of a head” under the Act; and sections 54(1) and (3) require the Commissioner to make an order disposing of the issues raised in the appeal, and permit this order to contain terms and conditions she or he considers appropriate.

Finally, section 1 includes the important principle that decisions should be reviewed independently of government. As Inquiry Officer Laurel Cropley stated in Order M-1044, when dealing with a similar jurisdictional issue:

[Section 1] is an especially important factor in determining the scope of the review, in that the independent review and other provisions of the Act providing for a wide-ranging appeal, including the consideration of fresh evidence would appear to be inconsistent with a limited appeal on the record.

It is clear from a reading of these sections that the Commissioner’s jurisdiction is not limited to issues of law or to the applicability of claimed exemptions. As Inquiry Officer Cropley stated in Order M-1044:

It is the duty of the Commissioner to interpret the provisions of the Act and apply those interpretations to the facts. Her interpretations must be made in light of the purposes and scheme of the Act.

In my view, a decision under section 25(2) is properly characterized as “any decision of a head” under section 50(1) and therefore appealable to the Commissioner. The Commissioner or her delegate may review that decision in an inquiry, and make an order under section 54 which contains any terms and conditions she or he considers appropriate, subject to the Act.

Accordingly, I find that it is within my jurisdiction to review the Ministry’s decision to transfer the request.

### **Jurisdiction to Uphold a Late Transfer Decision**

I must now determine whether I have jurisdiction to uphold the Ministry’s decision to transfer the request, notwithstanding the failure to comply with the 15-day time limit set out in section 25(2) of the Act.

The 15-day time limit in section 25(2) is a statutory, procedural precondition to the exercise of a discretionary power. According to traditional administrative law and statutory interpretation principles, the consequences of a failure to comply with a procedural precondition vary, depending on whether the provision can be characterized as “mandatory” or “directory”. If “mandatory”, a breach would void the decision; if only “directory”, the decision would not be void. [Task v. Law Society (British Columbia) (1990), 71 D.L.R. (4th) 531 (B.C.S.C.); Montreal Street Railway v. Normandin (1917), 33 D.L.R. 195 (PC)]. The courts have found that the following factors should be considered:

- what is the nature of the particular procedural function?
- to whom is it directed?
- what purpose is the procedure intended to serve?
- what is the overall object of the statute?
- what prejudice would be caused by non-compliance?

[R.W. Macaulay, Practice and Procedure Before Administrative Tribunals (Thomson Canada Limited: Toronto, 1997), p.22-11; P.A. Côté, The Interpretation of Legislation in Canada (Les Editions Yvon Blais Inc.: Cowansville, 1991)].

In recent years, courts have moved away from neatly classify procedural preconditions in these two categories [British Columbia (Attorney-General) v. Canada (Attorney General) (1994), 114 D.L.R. (4th) 193 (S.C.C.)]. Instead, consideration is given to all of the factors listed above, and an effort is made to ascertain the legislative intent of the provision. I will follow this approach, and attempt to determine as best I can what the Ontario Legislature intended to be the consequences of a head’s failure to comply with the 15-day time limit imposed by section 25(2).

Section 25(2) allows an institution to relinquish its statutory obligations in favour of another institution which has a greater interest in the records, and presumably is in a better position to make a decision under the Act. In my view, the purpose behind this section is to enhance the

integrity of an initial access decision, by allowing the decision to be made by the institution most familiar with the records and the issues raised by the request.

In my view, strict adherence to the 15-day time limit could either benefit or prejudice a requester or an institution, depending on the circumstances.

From a requester's perspective, a transfer decision made beyond the time limit might delay the process, which could be prejudicial. One of the fundamental purposes of the Act is to ensure speedy and expeditious proceedings, and the fact that the Legislature included a relatively short time limit in section 25(2) implies an intention to ensure that a decision is made quickly. On the other hand, if a late transfer decision is not upheld, the requester (and any third parties) could be prejudiced since, in theory, the access decision will be made by the institution with the lesser ability to do so.

As far as institutions are concerned, if a late transfer decision is permitted, both the transferring and receiving institutions may benefit, since the transferring institution would be relieved of its statutory obligations, while the receiving institution would have more control over the access decision than would otherwise be the case if the transfer was not upheld. On the other hand, in some circumstances, the receiving institution may not wish to take on the statutory responsibilities which originally rested with the transferring institution.

In my view, the intent of section 25(2) would be frustrated if the 15-day time limit is strictly applied in all cases. Given the competing and conflicting interests at play, I find that the Legislature must have intended that the time period be strictly applied in some instances, and not in others, depending on the circumstances of a particular case. Similarly the Commissioner's role in reviewing a transfer decision made outside the time limit must take into account these same fact-specific considerations, and I find that the Commissioner has jurisdiction to determine whether or not the Ministry's late decision ought to be upheld in a particular case.

My decision that I have the authority to extend a time limit imposed by the Act is not without precedent. The Commissioner's office has a practice which permits institutions to rely on new discretionary exemptions not claimed in the original decision letter, provided they do so within 35 days of the date the parties are sent a Confirmation of Appeal. This practice, in effect, permits an institution to make a decision on access (albeit a supplementary decision) beyond the 30-day time limit set out in section 26 of the Act. This interpretation of section 26 has been applied in many decisions of this office, and was implicitly supported by the Ontario Court (General Division) Divisional Court in Ontario (Minister of Consumer and Commercial Relations) v. Fineberg (December 21, 1995), Toronto Doc. 220/95, leave to appeal refused [1996] O.J. No. 1838 (C.A.).

### **Factors to Consider**

In the Fineberg case referred to above, the Court made it clear that in applying the 35-day time limit practice, the Commissioner must consider the circumstances of each case and must not fetter discretion by blindly applying the 35-day rule in a mechanical fashion. In other words, the Commissioner must be open to permitting a party to be excepted from the rule, should the

circumstances warrant it. This is consistent with basic administrative law principles [e.g., Maple Lodge Farms Ltd. v. Canada (1982), 137 D.L.R. (3d) 558 at 561 (S.C.C.)].

The following factors may be useful in determining whether or not to uphold a transfer decision made beyond the 15-day time limit in a particular appeal:

- whether the transferring institution and/or the receiving institution have an interest in the records
- the reasons for the transfer
- the timing of the transfer
- the nature of the records
- prejudice to the parties

This list is intended to be instructive, but by no means exhaustive. Different fact situations may present other considerations, and not all of the factors listed above may be relevant in every case.

## **DISCUSSION:**

The representations submitted by the parties can be generally summarized as follows.

The appellant submits that discretion to transfer a request under section 25(2) must be exercised within 15 days of receipt of the request. Because more than six months passed between the time of the request and the transfer, the appellant contends that the Ministry did not have the statutory authority to make the transfer when it did. The appellant also maintains that the Ministry did not properly exercise its discretion when making the transfer, and that the circumstances surrounding the transfer in fact demonstrate bad faith.

The Ministry's position is that the transfer was both necessary and proper. The Ministry notes that the decision to transfer was made within 15 days of the Notice of Inquiry being issued to the Police, and maintains that receipt of the Notice led to discussions between the institutions which resulted in the decision to transfer. The Ministry states that in exercising its discretion to transfer, it took into account that the request was for the appellant's own personal information. In the Ministry's view, the records were the type that the Legislature had removed from the scope of the Act, and it was reasonable to expect that they would remain excluded whether they were being maintained by the employer (the Police), or the OPP acting as a delegate of the Police. The Ministry states it was aware that the Police believed they had a greater interest in the records, because they documented a PSA investigation of one of their employees. According to the Ministry, the role of the OPP was limited to conducting an independent investigation and reporting the results to the Police.

The Police submit that the decision to transfer the records was correct, because they have a greater interest in the records. The Police also explain that the transfer took place 15 days after the Police and the Ministry discussed what they saw as a potential anomaly between section 65(6) of the Act and the corresponding provision in the Municipal Freedom of Information and Protection of Privacy Act (section 52(3)), which covers the Police. The Police maintain that the Ministry acted in good faith and in a timely manner as soon as the issue of the transfer was brought to their attention, and that the appellant was provided with a decision letter by the Police

on the same day the transfer took place. The Police maintain that it would make no sense to force the OPP to now go back and deal with records under the Act which are excluded in the hands of the Police. The Police conclude that a narrow interpretation of section 25 of the Act would be improper in the circumstances.

### **Interest in the Records**

In my view, both the Ministry and the Police have an interest in all of the records. The interest of the Police stems from the fact that the investigation involved one of its employees. The Ministry, having been asked by the Police to conduct the investigation, has an interest in ensuring the integrity of the investigation through documentation of the process. My finding that the Ministry has at least some degree of interest in all of the records suggests that it is in a position to deal with the issues raised by the appellant and before me on appeal. Accordingly, I find that this is a factor weighing against upholding the transfer decision.

While I accept that the interest of the Police may be greater with respect to some or all of the records, that is not determinative. Whether or not to transfer a request under section 25(2) is discretionary. Even if the Police did have a greater interest in some or all of the records, the Ministry was under no obligation to transfer the request, and could have exercised its discretion not to make the transfer.

### **Reasons for the Transfer**

The Ministry submits that it initially concluded that all of the records fell within the scope of section 65(6), which excludes certain labour relations and employment-related records from the Act in particular circumstances. The Ministry states:

As the Ministry was of the opinion that the provisions of the Act did not apply to the requested records, the Ministry did not find it necessary to consider whether or not the transfer provisions of the Act contained in section 25(2) were applicable in the circumstances of the appellant's request.

The Ministry goes on to state that it transferred the request following discussions with the Police after both institutions had received a Notice of Inquiry regarding the application of section 65(6). Together they determined that the Legislature intended these records to be excluded from the scope of the Act and/or its municipal counterpart. However, in light of a number of decisions from the Commissioner's office interpreting these provisions, the two institutions concluded that the records would more clearly fall outside the jurisdiction of the municipal statute than the Act, and for this reason the Ministry reconsidered its decision, withdrew its reliance on section 65(6), and transferred the request to the Police.

A request made under Part II or Part III of the Act invokes the procedural provisions set out in sections 24 to 30, including the institution's duty to respond to the request in a timely fashion and the discretionary power to transfer a request within a specified time frame. The fact that an institution may decide at the end of this process that, in its opinion, a record is outside the scope

of the Act, does not relieve it of the obligation to adhere to these procedures, including any time limits. Therefore, the 15-day time limit in section 25(2) applies to any request made under the statute, regardless of any conclusion by the institution that the records fall outside the scope of the Act by virtue of section 65(6).

In my view, the Ministry's belief that the provisions of the Act did not apply and that it was unnecessary to initially consider section 25(2) was incorrect. The Ministry ought to have turned its mind to the transfer issue first, before considering the application of section 65(6). In other words, the Ministry should have considered allowing the institution it believed had the greater interest in the records to make a determination on the jurisdictional issue. The Ministry ought to have known that any jurisdictional decision it made under section 65(6) could be appealed to the Commissioner, in which case it would be too late for the Ministry to transfer the request to the Police.

Consequently, I do not find the Ministry's reasons for the transfer to be a persuasive factor in favour of extending the 15-day time limit in the circumstances of this appeal. Similarly, I do not find the institutions' focus on the relative application of section 65(6) and its municipal counterpart to be a persuasive factor. All of the procedural provisions of the Act, including the 15-day time limit in section 25(2), apply until such time as it is finally determined by the Commissioner that records fall outside the scope of the Act. It was simply not possible or appropriate for the Ministry to relieve itself of its statutory responsibilities on the basis of its view that section 65(6) applied.

### **Timing of the Transfer**

I note that the transfer decision was made some six months after the request, well beyond the 15-day time limit. The Ministry and the Police submit that the decision to transfer was made within 15 days from the day the Police received the Notice of Inquiry, and that it was this action which resulted in discussions between the institutions and the decision to transfer the request. While I accept that the receipt of the Notice of Inquiry by the Police may have prompted discussion between the two institutions, it is also important to note that the Ministry in fact consulted with the Police prior to responding to the appellant's request. In my view, that was the appropriate opportunity for the Ministry to turn its mind to the issue of transfer, and it failed to do so. It also provided the Police with the opportunity to suggest to the Ministry that they had a greater interest in the records; they apparently did not do so.

It was only at the inquiry stage of the appeal that the Ministry transferred the request, a relatively late stage in the overall access process. This late action by the Ministry caused a significant delay, since it was necessary to conduct a separate inquiry into the transfer issue. Had the transfer decision been made at an earlier stage in the process (e.g. at the time of the initial decision, or during mediation), this delay might have been avoided.

In my view, the delay caused by the Ministry in this instance was prejudicial to the appellant, which is particularly significant since the request involved the appellant's own personal information.

### **Nature of the Records**



The complexity or volume of records may be a relevant factor to consider in determining whether or not to uphold a late transfer decision. However, in this appeal, the records were not unduly complex or voluminous, consisting of approximately 100 pages of notes, memoranda and correspondence to and from the Ministry, the Police and the appellant.

In my view, the nature of the records is such that the interest of the Police could have been ascertained within a relatively short time period. The fact that the Ministry did not request a time extension to respond to the request under section 27 supports my view. I find that the Ministry, by its long silence, can be deemed to have exercised its discretion against transferring the request [Ontario (Minister of Consumer and Commercial Relations) v. Fineberg; General Accident Assurance Co., v. Ontario (Information and Privacy Commissioner) (March 8, 1994), Toronto Doc. 557/92 (Ont. Div. Ct.)].

### **Prejudice to the Ministry and to the Police**

As far as the Ministry is concerned, it has been involved in the access process from the outset, having identified the responsive records, communicated with the Police, and turned its mind to the application of various provisions of the Act. A decision not allowing the transfer would simply require the Ministry to complete the process of responding to the request and supporting any decision on appeal. In my view, this would not be prejudicial to the Ministry in the circumstances, and I find that this factor has limited application.

As for the Police, if the transfer is not allowed, they will be precluded from claiming that the records are excluded from jurisdiction on the basis of section 52(3) of the municipal statute. I find that this would be prejudicial to the Police, but that this factor also has limited application since, as I will refer to below, the Ministry is not precluded from continuing to rely on the comparable exclusionary provision in the provincial Act. The Police might also conclude that if they are not permitted to make representations on the main issues in the inquiry, they will be prejudiced by being excluded from a process in which they have an interest. However, I have decided to mitigate this factor by adding the Police as an affected party and allowing them to make representations at any subsequent stage of the process.

### **Conclusion**

In deciding the issue of whether or not the Ministry's late transfer decision ought to be permitted, I have carefully considered all of the circumstances and relevant factors, including the purpose of the provision and of the Act as a whole, the reasons for the transfer, the timing of the transfer, the nature of the records, and the relative prejudice to the parties. I find that this is not a case in which the 15-day time limit should be extended, particularly not by the length of time advocated by the Ministry and the Police. In my view, by not making a timely transfer decision, the Ministry is deemed to have waived its reliance on section 25(2), and its transfer decision is void.

The fact that the Ministry has withdrawn its reliance on section 65(6) is not determinative of the application of this section in the circumstances of this appeal. Because section 65(6) limits jurisdiction, I am required to consider its application. If the section applies, it has the effect of excluding records from the scope of the Act, regardless of whether the Ministry claims the section or not.

**ORDER:**

1. I find that Ministry is deemed to have waived its reliance on section 25(2) of the Act, and its decision to transfer the request is void.
2. I order the Ministry to make a new decision to the appellant by December 19, 1997, without recourse to a time extension.
3. I order the Ministry to provide me with a copy of the correspondence referred to in Provision 2 of this Interim order by December 24, 1997. This should be forwarded to my attention c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario M5S 2V1..

Original signed by: \_\_\_\_\_  
Tom Mitchinson  
Assistant Commissioner

\_\_\_\_\_ December 5, 1997