



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

ORDER PO-1916

Appeal PA-010159-2

Ministry of Tourism, Culture and Recreation



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NATURE OF THE APPEAL:

The Ministry of Citizenship, Culture and Recreation (the Ministry) received a request dated October 10, 2000 for access to information under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The requester sought records relating to “the practice of ‘underwater logging’ for the period 1995 to present.”

The Ministry identified records responsive to the request and, by letter dated December 27, 2000, advised the requester that, because the records may affect the interests of affected persons under sections 17(1) (third party commercial information) and 21 (personal privacy) of the *Act*, the Ministry would be notifying those persons to seek their views on disclosure before making a final decision.

By letter dated January 4, 2001, the Ministry notified a third party (the affected person) of the request, advising that the records may affect his or his organization’s interests under sections 17(1) and/or 21 of the *Act*. The Ministry also invited the affected person to provide submissions on whether or not these records should be disclosed to the requester.

By letter dated January 26, 2001, the affected person provided his submissions to the Ministry, in which he objected to disclosure of portions of a requested record, identified as Record 49 (the record).

By letters dated April 4, 2001, sent by regular mail, the Ministry advised the affected person and the requester that the Ministry had decided to disclose portions of the record, including certain portions the affected person had asked the Ministry to withhold. The Ministry also advised the affected person and the requester as follows:

Under section 28 of the [*Act*], you may request that this decision be reviewed by the Information and Privacy Commissioner/Ontario (IPC). If you wish to file an appeal of this decision, please send your letter of appeal to the IPC **within 30 days of the receipt of this decision letter . . .**

If you do not file an appeal with the IPC within 30 days, the records will be disclosed as indicated above. If you do file an appeal with the IPC, the IPC will review the matter and make a decision [emphasis in original].

The affected person advises this office that he received the Ministry’s April 4, 2001 letter “sometime after April 4th”, but does not recall the exact date, nor is he in possession of the envelope which contained the letter.

By letter dated April 17, 2001, the requester appealed the Ministry’s decision, and this office opened Appeal Number PA-010159-1. On the consent of the requester, this office later closed this file, on the basis that the appeal was premature.

The affected person then appealed to this office the Ministry’s decision to disclose portions of pages 6 to 9 of the record, and this office opened Appeal Number PA-010179-1. The affected person’s appeal letter was dated May 5, 2001, but the envelope containing this letter indicates that it was mailed on May 10, 2001.

On May 10, 2001, the Ministry wrote to the requester stating:

In our letter of April 4, 2001, pertaining to the release of the first 25 records, we advised you that we were delaying access to the further 25 records for a period of 30 days to allow the third parties an opportunity to appeal the Ministry's access decisions.

Upon checking with the Information/Privacy Commissioner's Office, the Ministry was advised that none of the third parties have filed an appeal. Therefore, the Ministry is issuing this decision letter concerning the further 25 records.

The Ministry went on to explain whether or not access was being granted to the 25 records, set out the applicable fees, and asked the requester to provide payment, after which it would forward the records in question to the requester. The requester then paid the requested fee.

Later, prior to the Ministry granting access to the records, this office notified the Ministry that it had received an appeal from the affected person concerning Record 49. On May 23, 2001, the Ministry wrote to the requester advising that this office had received an appeal respecting Record 49, and that therefore it was granting access to all of the records except for Record 49.

The requester then appealed the Ministry's decision to withhold Record 49 on the basis of the affected person's appeal, and this office opened Appeal Number PA-010159-2. In effect, the requester is asking this office to reject the affected person's appeal on the grounds that it was not made within the 30 day time frame set out in section 50(2) of the *Act*.

I sent a Notice of Inquiry to the Ministry and the requester explaining the issues in this appeal and inviting their representations. Only the Ministry responded. In the circumstances, I decided that it was not necessary for me to seek representations from the affected person.

ISSUES

TIMING OF THE APPEAL

Was the affected person's appeal made within the 30 day time frame set out in section 50(2) of the *Act*?

Sections 50(1) and (2) of the *Act* state:

- (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 submits:

. . . The response was not made within the 30-day time frame set out in section 50(2) of the *Act*.

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On May 11, 2001, [named individual], Program Advisor, received a call from the affected person. He indicated that he had only received the Ministry's correspondence about the intended release of his records about one week earlier. [The Program Advisor] confirmed with him that this was not as a direct result of not having received it by mail (i.e. due to a postal delay). The affected person stated that it was because he was not there to receive it until about a week earlier.

. . . [T]he Ministry does not have any control over circumstances whereby an individual might be absent from his address (i.e. on vacation, away on business, etc.). The history indicates . . . that there was a one-week timeframe during which he could have submitted his appeal within the 30-day timeframe.

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It appears, on surface, that it took 6 days for the affected person's letter to be processed by Canada Post but alternatively only 3 days for this Ministry to [receive] it (subsequent to the postmark of May 11/01 on the envelope). The Ministry can only assume that the letter was prepared (as dated on May 5/01) but was subsequently not mailed until a later date. Given that the Ministry received a copy of the letter of appeal within 3 days of the postmark, had the affected person mailed it on the same date as it was authored (May 5/01), the appeal could presumably have been received on May 8/01. The Ministry did not notify the requester with a final decision until May 10, 2001.

The Ministry believes that, given the foregoing information, the appeal could have been submitted within the 30-day timeframe . . .

The 30 day time period in section 50(2) begins to run on the date the individual *receives* the institution's decision, and ends on the date the person *sends* the appeal to this office (Order M-775).

The Ministry's decision was dated April 4, 2001. Although I specifically asked the Ministry to advise me on what date it sent the letter, the Ministry did not respond to this question. It may have been sent on the date it was prepared, or some days after. The affected person has indicated he does not recall the exact date when he received the Ministry's April 4 letter, but it appears from the Ministry's representations that he was absent from his place of business when the letter arrived.

I agree with the Ministry that its April 4 notice should be considered to have been “received” on the date it was delivered to the affected person’s address, and not on the date the affected person returned from his absence and obtained the letter. In my view, the Ministry should be considered to have discharged its notice obligations once its letter had been delivered to the relevant address. However, in the circumstances, it is unclear when exactly the Ministry’s letter arrived. The affected person is not in a position to know, having been absent at the time, and the Ministry’s submissions are not helpful on this point.

Regarding the date of the appeal, based on the postmark on the envelope, I find that it was sent by the appellant on May 10. The fact that the appellant *prepared* his letter six days earlier does not affect this finding, since the critical date is the date it was sent.

I am unable to determine whether or not the affected person’s appeal was made on time. It is possible that the Ministry’s April 4 letter was delivered before, on or after April 10, and thus the appeal may or may not have been made within 30 days. In the circumstances, it is not necessary for me to make a definitive finding on this point. I will allow the appeal, for the reasons set out below.

Should this office accept the affected person’s appeal, even if it was made late?

Previous orders have indicated that in certain circumstances this office may accept an appeal that is made late. For example, in Order P-155, former Commissioner Sidney B. Linden stated:

The *Act* itself is not clear as to the beginning and end of the time periods respecting appeal - it does not define when “the notice is given of the decision appealed from”, when the time begins to run from the date when the notice was given, nor does it “deem” a date after the mailing of the decision by which notice is presumed to have been given. The *Act* does not define the process of “filing” an appeal. The nature of the appeals system envisaged by the *Act* is informal. The policy of the *Act* as outlined in section 1 thereof is to promote access to information in the custody or under the control of government institutions, and to provide for the protection of personal privacy.

In view of these considerations, it is reasonable, at this stage in the development of the interpretation of the *Act*, to interpret the *Act* liberally in favour of access to the process, rather than strictly to deny access. This is especially true where the alleged lapse of time after the date when an appeal should have been filed is not significant, and where no prejudice has been shown by the institution or any other person affected by the alleged delay.

In the present case, the institution was requested to provide evidence of prejudice to its interests arising from any delay in filing the appeal. I have reviewed the representations of the institution, and the institution has not addressed this issue, and has provided no evidence of prejudice which would occur if I were to review the head’s decision.

In my view it is possible, on the basis of the evidence before me in this case, to find that the appellant mailed his letter of appeal within the 30 day period after receiving the head's decision and that even if the time limit was exceeded, it was exceeded by an insignificant amount of time. In this case, no prejudice resulting from the delay has either been alleged or shown by the institution. Therefore, I have no difficulty in concluding, on the facts of this particular case, that I have jurisdiction to review the head's decision and proceed with the appeal.

This question of my jurisdiction in cases of delay must be decided on a case by case basis on the circumstances in each particular case. If the delay in filing an appeal is substantial or if an institution, or any other affected person, can show some prejudice resulting from the delay, then I may interpret subsection 50(2) more strictly. I must also be mindful of the fact, in these cases, that an appellant, or his designate, may file a new request and start the process over again.

The Ministry submits:

The Ministry feels that the affected person had ample opportunity to submit his appeal.

This Ministry contacted 22 third parties relating to this request. Should the IPC choose to accept this appeal, it would, in this Ministry's view, set a dangerous precedent. In accepting this appeal, it places this Ministry in a position of prejudice in terms of the treatment of the other 21 third parties. While no other third parties have filed an appeal, consideration must be given to the fact of whether or not, if given 37 days, they would have also chosen to do so.

Accepting this appeal affects the Ministry's ability to ensure fairness, not only to the requester (who in the interim has paid all applicable fees for the remaining records) but also to the other 21 third parties that were contacted during the third party notice process.

In the context of the *Act*, the Ministry has an obligation to ensure a right of access to information while balancing the protection of privacy of personal and/or third party information.

In terms of this appeal, the Ministry has already been liberal in its interpretation of the 30-day timeframe in terms of being fair to the affected person. The requester is also entitled to fair treatment, and therefore this Ministry is asking the IPC not to accept this appeal.

As former Commissioner Linden indicated, the key to determining whether or not to allow a late appeal is to consider the relative prejudice to the parties should I decide against them.

From the perspective of the affected person, if I reject his appeal, the Ministry will be obligated to disclose the record to the requester, and the affected person will not have a chance to argue that the record is exempt. In this event, the affected person would lose the opportunity for an

independent review of the Ministry's decision. I find that the affected person would suffer a high degree of prejudice should I reject his appeal.

On the other hand, if I accept the appeal, neither the Ministry, the requester, nor the other affected persons will be significantly prejudiced.

If the affected person's appeal was late, it could not have been late by more than six days, a relatively insignificant amount of time.

I accept that if the appeal process goes ahead, the requester's right of access will either be delayed or ultimately denied if the record is found to be exempt. In the circumstances, in the absence of any indication that the appeal is frivolous or otherwise without merit, the necessary delay entailed by the appeal process under the *Act* cannot be considered prejudicial. Since the requester made no submissions, I have no other evidence before me of prejudice to him should I accept the appeal.

I do not accept the Ministry's submission that to allow the appeal would result in prejudice to it and the other affected persons, and would "set a dangerous precedent". Given the lack of evidence regarding the date the Ministry's notice letter was sent and received, it is not clear to me that *any* of the affected persons were given any more than the required 30 days to appeal. Thus, my accepting the appeal should have no detrimental effect on the Ministry's conduct in future cases.

I note that had the Ministry disclosed the record to the requester, prior to being notified of an appeal, it may well have acted within its rights under the *Act*. This underscores the importance of affected persons being vigilant and ensuring that appeals are made as quickly as possible after receiving notice of the institution's decision, to reduce the risk of such an occurrence.

ORDER:

I accept the affected person's appeal, and order that it proceed through this office's usual appeal process.

Original Signed By: _____ June 26, 2001 _____
David Goodis
Senior Adjudicator