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

ORDER MO-1694

Appeal MA-030182-1

Waterloo Regional Police Services Board

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NATURE OF THE APPEAL:

The Waterloo Regional Police Services Board (the Police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for all information relating to an identified incident. The request letter, dated February 26, 2003, stated: "The request includes officer notes, all police records and all other information less the victim's statement for [the identified incident]".

The Police wrote to the requester on March 10, 2003, asking him to clarify certain information contained in the request letter, as the letter appeared to contain an inaccurate file number. On March 16, 2003, the requester replied with the correct file number.

The Police then responded to the request by letter dated April 4, 2003. The response letter read, in part:

> Access is granted to your personal information as contained in the records.
>
> A fee of $7.40 for processing costs must be paid prior to you picking up your request. Some information has been removed as it does not pertain to your request and relates to police codes, to officer's equipment identification numbers and to other investigations conducted by the officer.

The response letter also identified who the requester could contact at the Police if he had any questions, and the address at which the records could be picked up by the appellant. Furthermore, as required by section 22 of the *Act*, the Police identified that their decision could be appealed to this office. The decision also specified that the requester had 30 days to appeal the decision, and identified the address to which the appeal should be sent, as well as the documentation that should accompany any such appeal.

By letter dated May 17, 2003, the requester (now the appellant) appealed the Police's decision.

During the mediation stage of the process, the Police raised the preliminary issue that the appeal should not proceed because the appellant filed his appeal beyond the 30-day time period outlined in section 39(2) of the *Act*. As this issue could not be resolved through mediation, it was transferred to the inquiry stage of the process.

I sent a Notice of Inquiry to the Police, initially, asking the Police to provide me with representations on the issue. I received representations from the Police, and decided that it was not necessary for me to hear from the appellant in order to make a decision in the circumstances of this appeal.

DISCUSSION:

TIMING OF THE APPEAL

Was the appellant's appeal made within the 30 day time frame set out in section 39(2) of the *Act*?

Section 39(2) of the *Act* states:

> (2) An appeal … 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 Police submit that the appeal was filed late, beyond the 30 day limit set out in section 39(2) of the *Act*.

In the Notice of Inquiry sent to the Police, the Police were asked to identify the alleged lapse of time after the date when the appeal should have been filed. The Police state:

> The lapse of time is 13 days. The file was opened on March 17, 2003. The decision letter was prepared and mailed on April 4, 2003. Therefore, the institution complied with the 30-day requirement for responding to the request. The head's decision letter was dated April 4, 2003, which was a Friday. Since the requester lives in the Region, within the jurisdiction of the Police Service, it would be reasonable to assume that he received the letter on or about April 8, 2003, as that has been the norm in postal deliveries within this Region. As per our institution's policy with requests for personal information, the requester was asked to contact the Access to Information office to arrange an appointment to pick up this request. The requester chose to contact this office almost 18 days after the date of the decision letter, stating he would pick up his request on April 22, 2003. He did not show on April 22, 2003, but instead picked up his request on April 23, 2003, nineteen (19) days after the date of the decision letter. He filed his appeal on May 17, 2003. Therefore, the lapse of time from the 30-day period for filing is 13 days.

Previous orders have determined that the 30 day time period in section 39(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 (Orders M-775, PO-1916).

As identified above, I did not seek representations from the appellant. I therefore have no information from the appellant concerning the actual date he *received* the decision (which is the date the 30 day period begins to run), nor do I have information from the appellant regarding the date the appellant *sent* the appeal to this office, and whether or not the appeal letter was sent on the day it was dated. I note, however, that if I accept the chronology of events as set out by the

Police, the appeal would be less than 13 days late, as the Police acknowledge that the requester would not have received the decision on the date it was sent, but likely a few days after that date.

The reason I have not sought representations from the appellant is because, even if I accept all of the factual information provided by the Police concerning the timing of this appeal, I would nevertheless allow the appeal to proceed, for the reasons set out below. It is therefore not necessary for me to decide whether the appeal was filed late and, if so, exactly how many days late. It is sufficient to identify that, even if the appeal was filed late, based on the Police's representations, it was filed less than 13 days late.

Should this office allow the appeal to proceed, 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, which dealt with section 50(2) of the provincial *Freedom of Information and Protection of Privacy Act*, the provincial equivalent to section 39(2), 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 the 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 approach taken by former Commissioner Linden has been applied in a number of subsequent decisions of this office. (See, for example, Orders M-430, M-491, M-775, P-1402 and PO-1916). Furthermore, some of the orders suggest that it would be inequitable to allow an institution to impose a strict reading of the time limits in the *Act* if the institution itself is in breach of some of its obligations in its own handling of the matter. (See Orders M-430 and P-1402)

In this appeal, I sent a Notice of Inquiry to the Police, inviting them to make representations on the issues. I also asked the Police whether the alleged lapse of time was significant, and whether any prejudice to the Police or to any other person resulted from the alleged lapse. Furthermore, I asked the Police to indicate whether the Police's decision letter in this appeal was made in accordance with the requirements for a decision letter as set out in section 22 of the *Act*, and, if not, whether this affected the issues.

I also invited the Police to identify any other factors that are relevant to the issue set out above.

The Police's representations

The Police provided representations in response to the Notice of Inquiry. Their position on the time of the alleged lapse is set out above.

The Police initially identify that Order P-155, which establishes that the *Act* should be interpreted "liberally" in favour of access, was issued at an early stage in the development of the *Act*. The Police take the position that, as 13 years have passed since that Order was issued, the approach to interpreting the *Act* in favour of access should be revisited.

In support of their position that this appeal should not be allowed, the Police refer to a number of factors including:

- similar information has been requested by the appellant in the past, and the appellant was therefore aware of the request and appeal process and requirements;
- there is good evidence that any delays were not caused as a result of slow mail delivery or other similar factors;

- the 13-day lapse is a significant delay, and the Police and others, including other requesters, are prejudiced by the delay;
- there exists the possibility that the appellant's continued requests may be an "abuse of process" (although the Police identify that they have not specifically made this claim).

In response to my questions regarding whether the Police's decision letter of April 4, 2003 met the requirements for a decision letter as set out in section 22 of the *Act*, and, if not, whether this affected the issues, the Police responded as follows:

> The decision letter stated that the appellant was given access to the record. As is the usual practice of this service, when the requester specifies the part of the record he is requesting and he is given access to that part, it is deemed to be "full" access.
>
> In this case, police "900" codes were removed as it was not considered to be relevant to the request. In addition, the victim's statement was removed as the appellant specified he was not requesting her statement. The information about [other identifiable individuals] was removed because of the [identified agreement between the appellant and the victim] (of which we were aware from the previous requests) and the fact that the [identified individuals] reside with the victim. Their statements … are linked to the [the victim's] statement and were, therefore, removed. All other information was released in its entirety. Since access was not refused, we are of the opinion that [the Police] have complied with section 22 of the *Act*.

Findings

I find that, because the Police's decision letter of April 4, 2003 inaccurately reflects their actual decision, it would not be equitable in the circumstances of this appeal to allow the Police to impose a strict reading of the time limits in the *Act* for filing an appeal.

The request for records which resulted in this appeal was for information including "… officer notes, all police records and all other information less the victim's statement for [the identified incident]".

In response to the request for those records, the relevant portion of the Police's decision letter of April 4 states:

> Access is granted to your personal information as contained in the records.
>
> A fee of $7.40 for processing costs must be paid prior to you picking up your request. Some information has been removed as it does not pertain to your request and relates to police codes, to officer's equipment identification numbers and to other investigations conducted by the officer.

In the course of processing this appeal, the Police have provided this office with a copy of the records which were disclosed to the appellant, and the portions of the records which were not provided to him. The appellant has also provided this office with the portions of records to which he has been granted access.

Of the 37 pages of responsive records, which consist of occurrence reports (including numerous narrative portions) and officer's notebook entries, the appellant was granted full access to one page, and partial access to 34 pages. The severances to the records include names, addresses, substantial portions of the narratives of various individuals (including the appellant), and large portions of the police officer's notebook entries.

Section 22 of the *Act* identifies what should be included in a notice of refusal. Section 22(1)(b) reads:

> Notice of refusal to give access to a record or part under section 19 shall set out,
>
> (b) where there is such a record,
>
> (i) the specific provision of this Act under which access is refused,
>
> (ii) the reason the provision applies to the record,
>
> (ii) the name and position of the person responsible for making the decision, and
>
> (iv) that the person who made the request may appeal to the Commissioner for a review of the decision.

The Police take the position that the requester was given access to the specified part of the record that he requested, and was therefore granted full access. I do not agree. The requester clearly identified the records he was requesting, and specified that he was seeking all records relating to the identified incident "… less the victim's statement". Upon my review of the severances made to the records, I do not accept the Police's view that the appellant was granted "full access" to the records he was requesting. It is clear to me that large portions of responsive records were severed from the material provided to the appellant.

The Police's representations themselves identify that, in addition to removing the victim's statement, as well as information the Police considered "non-responsive" as identified in their decision letter, they also removed other information clearly related to the identified incident.

I do not accept the Police's position that these other extensive portions of the records were properly removed from the scope of the request for the reasons cited by the Police. If indeed the Police had decided to remove information from the scope of the request because of possible links

with the victim's statement, or due to other information of which the Police were aware, the requester should have been advised of that in the decision letter. There is no reference to this information being removed in the decision letter of April 4, 2003, nor does the decision letter refer to any specific provision of this *Act* under which access is refused, as is required by section 22 of the *Act*.

The decision letter does state that "some information has been removed as it does not pertain to your request and relates to police codes, to officer's equipment identification numbers and to other investigations conducted by the officer." However, in my view, on a plain reading of this portion of the response, the decision suggests that only information relating to Police codes, officer's equipment identification numbers, and other, unrelated information, was severed from the records. Leaving aside the issue of whether unilaterally severing "police codes" as non-responsive information is proper or not, in my view the decision letter identifies only those identified, discreet portions of the records as having been severed. It does not suggest that other substantial portions of the records were severed, nor the basis for any such severances.

Because the decision letter inaccurately reflects the actual decision made by the Police, it is only when the appellant attended at the Access to Information office and received access to the severed portions of the records that he would have been aware that large portions of responsive records had been severed.

In these circumstances it is my view that it would not be equitable to allow the Police to impose a strict reading of the time limits in the *Act* for filing an appeal. The decision letter relied on by the Police as the letter triggering the beginning of the 30-day time limit inaccurately reflects the actual access decision made by the Police. In addition, I am not persuaded by the Police's representations that the alleged delay in filing the appeal is significant, nor have the Police provided me with sufficient evidence to indicate that it or any other party would be prejudiced by proceeding.

Accordingly, I do not agree with the Police that the appeal should not proceed because the appellant filed his appeal beyond the 30-day time period outlined in section 39(2) of the *Act*, and I will allow the appeal to proceed. I will also require the Police to issue a proper decision letter to the appellant.

ORDER:

1. I decline the Police's request that I dismiss the appeal for being late.

2. I order the Police to issue a proper access decision to the appellant in accordance with Part I of the *Act*, treating the date of this order as the date of the request, and to provide me with a copy of the decision letter at the same time that it is provided to the appellant.

3. Upon receipt of the decision letter referred to in Provision 2, I will allow this appeal to proceed through this office's usual appeal process, without requiring a further appeal letter from the appellant.

Original signed by: October 1, 2003
Frank DeVries
Adjudicator