



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

# INTERIM ORDER M-775

Appeal M\_9500660

City of Orillia



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## NATURE OF THE APPEAL:

This interim order disposes of a preliminary matter raised by the City of Orillia (the City) in an appeal brought under the Municipal Freedom of Information and Protection of Privacy Act (the Act). In this case, the City alleges that the appeal was made outside the mandatory 30 day time limit, and I, therefore, lack the jurisdiction to review its decision.

## BACKGROUND:

The City received a request, dated August 22, 1995, for the following information:

- the terms of the agreement between the city and the former fire chief (the fire chief) under which the fire chief agreed to leave the City's fire department,
- the sum of money and other benefits awarded to the fire chief as a result of this agreement,
- the cost of legal fees charged to the City to arrive at an agreement with the fire chief and the cost of the fire chief's legal fees if these fees were assumed by the City as part of the agreement,
- the letter of complaint which may have led to the fire chief's departure.

The City sent a letter to the appellant, dated September 22, 1995, in which it denied access to records responsive to points one, two and the second part of point three. The City indicated that it was relying on the exemptions in sections 6(1)(b) (closed meeting), 11(c) (economic and other interests) and 14(1) (invasion of privacy) to deny access to this information. The City provided the appellant with information regarding the cost of its legal fees related to the agreement. With respect to the fourth point, the City refused to confirm or deny the existence of such a record pursuant to section 8(3) of the Act.

On October 21, 1995, the appellant mailed a letter to the Commissioner's office in which it indicated that it was appealing all aspects of the City's decision, with the exception of the first part of point three. The postmark on the envelope indicates that the letter was mailed on the same date. However, the letter was not received by this office until October 31, 1995.

This office sent a Confirmation of Appeal to the parties to the appeal. The first paragraph of the Confirmation notice sent to the City states:

This is to confirm to you that pursuant to section 39 of [the Act], an appeal from a decision made by your institution was filed by [the appellant], on October 31, 1995.

In response to the Confirmation of Appeal, the City advised this office that it was of the view that the appeal was not filed within the 30 day period referred to in section 39(2) of the Act, and accordingly, the Commissioner (or his delegate) had no jurisdiction to review the City's

decision. At that time the City advised this office that it was closing the file pertaining to this access request.

A supervisor at the Commissioner's office contacted the City to advise that an appeal file would be opened and that the City could raise the timeliness of the appeal as an issue. Accordingly, a file was opened and the appeal was processed according to the normal procedures established by this office.

In the interests of proceeding with the issues in an appeal in an expeditious and timely manner, the usual practice of the Commissioner's office is to require that all information necessary for a full and proper determination of the issues in the appeal, including the records, be forwarded to this office. This information is necessary in order to facilitate mediation of the issues on appeal. Failing a mediated resolution, the information is required so that it can be placed before a decision maker during an inquiry.

The City did not send any records to this office during the mediation stage of the appeal, nor did it confirm to the Commissioner whether any records, in fact, exist. The file was moved forward into inquiry, and a Notice of Inquiry was sent to the parties which addressed all of the issues on appeal, including the preliminary matter regarding the timeliness of the appeal. The parties to this appeal are the City, the appellant and the fire chief. Representations were received from all three parties.

In its representations, the City did not refer to section 8(3) which permits an institution to refuse to confirm or deny the existence of a record to which section 8 (primarily law enforcement records) applies. Rather, it made submissions on the application of section 14(5), which provides that an institution may refuse to confirm or deny the existence of a record if disclosure of the record would constitute an unjustified invasion of personal privacy. As this raised a new issue, a supplemental Notice of Inquiry was sent to the parties. Further representations were received from the City and the fire chief.

The appellant and the fire chief both provided brief submissions on the preliminary issue, that is, the timeliness of the appeal and my jurisdiction to review the City's decision, as well as on the substantive issues in this appeal.

The City submitted representations on both the preliminary issue and the exemptions claimed by it in its decision letter. However, it has taken the position that it will not respond to the Commission's request that it forward the records at issue in this appeal to the decision maker for the purposes of disposing of the issues in this appeal, until the preliminary matter is disposed of. Similarly, the City has refused to confirm or deny the existence of records pertaining to point four (above) to this office.

In this case, it is not possible to determine all of the issues in appeal without this information. In my view, this matter has already been unduly delayed by the City's refusal to comply with the procedures established by this office in processing appeals. Despite the fact that this is a departure from the Commission's normal practice, in the interests of moving this matter forward, I will deal with the preliminary issue in this interim order.

## **DISCUSSION:**

## JURISDICTION TO REVIEW THE CITY'S DECISION

Both the City and the fire chief maintain that the Commissioner is limited to the powers prescribed by the Act, and that section 39(2) of the Act should be interpreted literally.

Section 39(2) of the Act states:

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.

Counsel for the fire chief submits that "[t]he statutory language in respect of timing is **not** permissive." He adds that "there is no legislated discretion on the part of the [Commissioner] to permit an extension of the thirty-day time limit".

The City indicates that the last day for appeal to the Commissioner's office was October 22, 1995, and that the Confirmation of Appeal states that the appeal was filed on October 31, 1995. The City submits that the mandatory wording of section 39(2) does not allow for the appeal to be filed beyond the October 22 date.

The appellant simply states that the City's decision letter was dated September 22, 1995 and its letter appealing this decision was mailed October 21, within the 30 day time period.

The City does not appear to dispute that the date of the appellant's letter and postmarked envelope places the writing and mailing of the letter of appeal within the 30 day time limit. Rather, the City is clearly basing its position on the wording of a form letter (the Confirmation of Appeal) sent by this office. In this letter, "filing" merely means "received" by this office.

In Order 155, former Commissioner Sidney B. Linden made the following observations regarding the wording of section 50(2) of the provincial Freedom of Information and Protection of Privacy Act, which is identical to section 39(2) of the Act:

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 institution, and to provide for the protection of personal privacy.

In view of these circumstances, Commissioner Linden states that the Act should be interpreted:

... 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 my view, the approach taken in Order 155 and the reasoning behind it is equally applicable in the current appeal.

In interpreting the appeal requirements of the statute, we must look to the language of the statute.

Section 39(2) provides that the appeal must be made "within thirty days after the notice was given ...". Therefore, the time period begins to run after the institution's decision is received by the requester. In this appeal, there is no independent evidence other than the assertion of the institution, of the date on which notice was given.

The question of when the period ends is somewhat more ambiguous. The language of the provision does not require that the appeal be "filed" or "registered" with this office. Rather, an appeal is "made", and there is no further explicit guidance in the Act. It is thus arguable that an appeal is "made" by mailing the appeal within thirty days of receipt of the decision by the requester.

In view of the evidence which shows that an appeal mailed to this office can take a considerable time to arrive, and there is no deemed mailing date provision in the statute, the purpose of the statute to provide an independent review of government decisions could be frustrated by a requirement that the effective date for an appeal is the date of receipt by the Commissioner's office. Therefore, it is my view that the effective date for making an appeal is the date of mailing by the requester.

Even if I accept that the decision was delivered to the requester on September 22, it is clear that the letter of appeal was mailed within thirty days after receipt by the requester. Accordingly, in the circumstances of this appeal, I find that I have jurisdiction to review the City's decision.

As I indicated above, without the necessary documentation and/or other information referred to above, I am unable to proceed with the substantive issues in this appeal. Accordingly, I will order the City to produce any and all records which are responsive to this request. In the event that some records may not exist, I will also require the City to provide confirmation regarding the existence of such records, with explanation, in affidavit form.

## **ORDER:**

1. The City's preliminary objections to the issues in this appeal are dismissed.
2. I order the City to provide copies of any and all records which are responsive to the request as worded above, by sending these copies to the Appeals Officer assigned to this file no later than **June 11, 1996**.
3. In the event that some of the requested records may or may not exist I order the City to provide an affidavit sworn by the individual at the City who has knowledge of the matter

to which the requested records relate. The affidavit is to include the fact that any particular record does or does not exist and any evidence to support this fact.

4. If the affidavit referred to in Provision 3 is required, I order the City to provide it to me by **June 11, 1996**. This should be forwarded to my attention, c/o Information and Privacy Commissioner, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.

Original signed by: \_\_\_\_\_  
Laurel Cropley  
Inquiry Officer

\_\_\_\_\_ May 28, 1996