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

ORDER M-939

Appeal M_9700019

The Corporation of the City of Sault Ste. Marie

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NATURE OF THE APPEAL:

The Corporation of the City of Sault Ste. Marie (the City) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for information about the cost to the City of the appointment of a named individual (the affected person) as a "special advisor" to its Chief Administrative Officer for a six-month period. The City identified a responsive record and provided the appellant with access to parts of it. Access to the remaining parts of the record, entitled "Letter of Agreement, Temporary Employment, Sault Ste. Marie", was denied under section 14(1) of the Act.

The decision letter accompanying the severed record was provided to the appellant on May 21, 1996. The letter advised the appellant of his right to appeal the decision to the Commissioner's office, but failed to make reference to the requirement in section 39(2) of the Act that the appeal must be filed within 30 days of the date of the decision.

The appellant filed an appeal of this decision with this office on January 16, 1997, some seven months later. When advised by this office that an appeal had been filed, the City raised the issue of whether the Commissioner's office has jurisdiction to process an appeal which was filed more than 30 days after the date of its decision.

As this is a question which goes directly to the ability of the Commissioner's office to proceed with the appeal, a Notice of Inquiry soliciting the views of the City, the appellant and the affected person (the "special advisor") was provided to the parties. Submissions were received from the City and the affected person. I will first address the question of the jurisdiction of this office to hear an appeal which has been filed more than 30 days after the date of the decision.

DISCUSSION:

JURISDICTION TO HEAR THE APPEAL

The City submits that section 39(2) of the Act requires that an appeal be made within 30 days of the date of the decision which is the subject of the appeal. This section 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.

The City argues that because the appeal was filed by the appellant long after the time prescribed by the Act for filing an appeal had passed, the Commissioner's office has no jurisdiction to hear the appeal. The City relies on a decision of former Commissioner Sidney B. Linden in Order 155 where he made the following comments with respect to this issue:

> 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) [which is the equivalent provision in the provincial Act to section 39(2)] more strictly. [emphasis added]

The City submits that the seven-month delay in filing the appeal in this case was substantial. In addition, it argues that because the former Commissioner used the word "or", neither it nor the affected person is required to show both substantial delay and some significant degree of prejudice. Rather, the City argues that they are only required to demonstrate that one of these circumstances is present.

In Order M-430, Inquiry Officer Anita Fineberg addressed a similar situation in the following manner:

> Pursuant to section 22(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 22(1)(b)(iv) which states:
>
> > Notice of refusal to give access to a record or part under section 19 shall set out,
> >
> > (b) where there is such a record,
> >
> > (iv) that the person who made the request may appeal to the Commissioner for a review of the decision.
>
> In my view, 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). 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.
>
> Accordingly, I have concluded that the Town's decision letter was inadequate in that it failed to advise the requester of both his right to appeal and the time during which he must exercise that right. The notice of refusal thus fails to meet the mandatory requirements of section 22(1)(b).
> ...
>
> Because the requester was not advised by the Town of his right to appeal or the timing of a potential appeal, a strict adherence to the 30-day period would now prejudice his rights.

The City submits that there is no legislative requirement on an institution to advise a requester of the 30-day time period for filing an appeal. Rather, this requirement arises from an IPC Practices which "cannot overrule the clear requirements in the legislation ... as a basis for extending the 30 day appeal period".

The appellant has not provided any submissions in response to the Notice of Inquiry. Though he is under no obligation to do so, an explanation for his delay in filing the appeal may have been helpful to me in deciding this matter.

As noted above in the quote from Order 155, former Commissioner Linden found that the question of jurisdiction in cases of delay must be addressed on a case by case basis on the circumstances of each individual situation. In the present appeal, I find that the delay in filing the appeal, nearly seven months, was substantial. I have not, however, been provided with sufficient evidence to substantiate any prejudice either to the City or the affected person.

In addition, in my view, the decision letter from the City which advised the appellant of his right to appeal was deficient. It failed to apprise the appellant of the statutory requirement in section 39(2) that he file his appeal within 30 days.

In the present situation, there was no ongoing discussion between the institution and the requester during the time between the decision and the appeal, as was the case in Interim Order M-819. Nor was the time delay insignificant, as was the case in Order 155. Finally, I am unable to find that the appellant's rights to appeal the City's access decision will be prejudiced by a strict adherence to the 30-day time period set out in section 39(2) of the Act, as was the case in Order P-856. The appellant is not precluded from filing another request with the City and appealing that decision, if he so chooses, within the proper time frame.

Taking into account all of these circumstances, I have concluded that, despite the deficiency in the decision letter, the appellant is precluded from proceeding with this appeal because of the seven-month delay in filing his appeal. Accordingly, I find that I do not have jurisdiction to entertain this appeal and I decline to do so.

ORDER:

I dismiss the appeal without prejudice to the appellant's right to file another request with the City and a subsequent appeal, if he so chooses.

Original signed by: May 16, 1997
Donald Hale
Inquiry Officer