



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

# ORDER PO-1734

Appeal PA-990416-1

Ministry of Health and Long Term Care



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## **NATURE OF THE APPEAL:**

The appellant sent a request under the Freedom of Information and Protection of Privacy Act (the Act), by regular mail to the Ministry of Health and Long Term Care (the Ministry). The request was dated October 1, 1999, and sought access to certain records regarding applications to the Ontario Health Insurance Plan (OHIP) in relation to genetic testing.

According to the requester:

We telephoned [a named employee] at the Ministry on October 28, 1999, to inquire about the status of [the] request. [The named employee] confirmed that [the requester's] letter had arrived during the week ending October 8, 1999, but that she had not opened the envelope due to an unfortunate backlog in her office.

The requester subsequently received a letter from the Ministry, dated November 2, 1999, which stated, in part:

Your request under the Freedom of Information and Protection of Privacy Act (the Act), was opened by our office on November 2, 1999.

...

Allowing 30 days for processing, we anticipate a ministry decision by December 2, 1999, on the granting of access to any records responsive to your request.

The requester (now the appellant) appealed the Ministry's decision to this office, taking the position that the Ministry had failed to respond to the request within the time period contemplated by the Act.

I sent a Confirmation of Appeal/Notice of Inquiry to the Ministry and the appellant requesting representations on the issues in the appeal. Only the appellant submitted representations.

## **DISCUSSION:**

The Act contains several provisions which address the timing of an institution's response to a request. Sections 26, 27(1) and 29(4) of the Act read, in part:

26. Where a person requests access to a record, the head of the institution to which the request is made ... shall, subject to sections 27, 28 and 57, within thirty days after the request is received,
  - (a) give written notice to the person who made the request as to whether or not access to the record or a part thereof will be given;  
and

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- (b) if access is to be given, give the person who made the request access to the record or part thereof, and where necessary for the purpose cause the record to be produced.
- 27(1) A head may extend the time limit set out in section 26 for a period of time that is reasonable in the circumstances, where,
- (a) the request is for a large number of records or necessitates a search through a large number of records and meeting the time limit would unreasonably interfere with the operations of the institution; or
  - (b) consultations with a person outside the institution are necessary to comply with the request and cannot reasonably be completed within the time limit.
- 29(4) A head who fails to give notice required under section 26 . . . concerning a record shall be deemed to have given notice of refusal to give access to the record on the last day of the period during which notice should have been given.

The appellant submits that the Ministry's apparent policy of starting the 30-day statutory response period from the date on which an envelope is opened violates the Act. The appellant further submits:

... The facts are not in dispute: the Ministry failed to open mail that sat in the office for several weeks.

...

Allowing a ministry to start the 30-day notice period when mail is opened is tantamount to a unilateral amendment of the *Act*. No requester would ever know when the 30-day period had expired or when subsection 29(4) of the *Act* would apply. A ministry could extend the 30-day notice period *indefinitely* by adopting a strategy of understaffing their FOI office and creating a backlog. If the Ministry of Health is allowed to extend the decision deadline in this case, then *for how long* can the Ministry extend it in the next case?

I accept the appellant's position.

The facts of this appeal are clear. The Ministry received the request at some point during the week ending on October 8, 1999 and did not acknowledge receipt until it had opened the envelope containing the request on November 2, 1999. Assuming the request was not received until Friday, October 8, the 30-day response period ended on Monday, November 8, 1999, not December 2, 1999 as outlined in the Ministry's November 2 letter to the appellant. The Ministry did not request a time extension to process the  
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request under section 27(1). Therefore, the Ministry did not issue a decision letter to the appellant within 30 days of receiving the request as required by sections 26 and 29 of the Act.

The actions taken by the Ministry are indefensible and cannot be adopted as a strategy for dealing with workload pressures. A policy decision cannot supersede a legislated requirement. The 30-day period under section 26 begins upon receipt of an access request, not at some date in the future when the Ministry feels that workload capacity can accommodate the demands associated with responding to the request.

In Order P-751, Adjudicator Laurel Cropley stated:

... the Act requires that an institution apprise a requester of the reason for the delay in responding to the access request and the time at which the decision will be made. In my view, the key to these sections [26, 27 and 28(7)] is adequate and timely communication by an institution to a requester. At a minimum, the Ministry should advise the appellant of its position within a reasonable period of time. In this case, the appellant received no response from the Ministry within the statutory time frames and thus did not know what, if anything, the Ministry was doing to respond to his request.

The principles articulated by Adjudicator Cropley in Order P-751 are applicable here.

The Ministry's actions in dealing with the appellant's request were clearly in conflict with the express provisions of the Act. By taking this approach, the Ministry is undermining one of the fundamental principles of the Act, which is to provide timely access to information held by the government. As Senior Adjudicator David Goodis stated in Order PO-1663:

I understand that the request necessitated a search through a large number of records, and that this fact may have caused the delay in issuing the final decision. However, the Act contemplates that in such circumstances an institution may extend the 30 day time limit and, if so, must notify the requester of this decision. In the absence of a time extension under section 27, the passage of five months prior to the final decision constitutes an unacceptable delay on the part of the [Pension Commission of Ontario], and serves to frustrate one of the fundamental purposes of the Act, which is to provide timely access to information [see Order P-883, upheld on judicial review in Ontario (Minister of Consumer and Commercial Relations) v. Fineberg (December 21, 1995), Toronto Doc. 220/95 (Ont. Div. Ct.), leave to appeal refused [1996] O.J. No. 1838 (C.A.)].

The Act is clear. Institutions are required by both the letter and the spirit of the law to comply with the "Access Procedure" provisions in sections 24-30 of the Act, including the time period prescribed by section 26. These statutory obligations cannot be artificially manipulated by inappropriate actions such as intentionally delaying the opening of access requests.

Accordingly, the Ministry is deemed to have refused the request pursuant to section 29(4) of the Act.

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**ORDER:**

1. I order the Ministry to provide the appellant with a decision on access to the records responsive to his request of October 1, 1999 by **December 2, 1999**, without recourse to a time extension.
2. I order the Ministry to immediately desist from any practice of delaying the opening of correspondence appearing to contain requests for access under the Act and to henceforth comply with the statutory provisions contained in sections 26, 27 and 29 of the Act in responding to requests.
3. In order to verify compliance with Provision 1, I order the Ministry to provide me with a copy of the decision letter referred to in Provision 1 by **December 7, 1999**. 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

\_\_\_\_\_ November 30, 1999