



Information and Privacy
Commissioner/Ontario

Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER 189

Appeal 900023

Ministry of Health



80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Télééc: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

August 1st, 1990

VIA PRIORITY POST

The Honourable Elinor Caplan
Minister of Health
10th Floor, Hepburn Block
80 Grosvenor Street
Toronto, Ontario
M7A 2C4

Dear Ms Caplan:

Re: Order 189
Appeal Number 900023
Ministry of Health

This letter constitutes my Order in this appeal of the decision of the Ministry of Health (the "institution"), to extend the time in which to respond to the appellant's request for information under the Freedom of Information and Protection of Privacy Act, 1987, as amended (the "Act").

On January 5, 1990, the undersigned was appointed Assistant Commissioner and received a delegation of the power to conduct inquiries and make Orders under the Act.

On November 23, 1989, the appellant wrote to the Ministry to request access to:

All records relating to [a named company] applications for listing of [a named drug] and [another named drug] in the January 1990 Ontario Formulary, including:

- _ all reviewers reports
- _ all minutes of meetings of the Drug Quality and Therapeutics Committee (DQTC)
- _ all internal memoranda of the Ministry and DQTC
- _ all communication between the Ministry and DQTC

[IPC Order 189/August 1, 1990]

On December 22, 1989, the institution's Freedom of Information and Privacy Co_ordinator responded to the appellant indicating that 76 records had been identified as responsive to the request. The letter went on to say:

Of those 76 documents, I am pleased to inform you that 62 are being disclosed to you now, with severances.

Due to the sensitive nature of the remaining 14 documents, this portion of the record cannot be dealt with within the 30_day timeframe. Therefore, under the authority of section 27 of the Freedom of Information and Protection of Privacy Act, 1987, the timeframe for responding to the remainder of your request has been extended 40 days to February 1, 1990.

The reason for this extension is to provide sufficient time for the Ministry to conduct consultations before making a decision on whether or not to grant access.

On January 11, 1990, the appellant appealed the institution's decision to extend the 30_day time limit to February 1, 1990 and the decision to sever the 62 records disclosed to him on December 22, 1989. Notice of the appeal was given to the institution and the appellant on January 12, 1990.

By agreement, this Order addresses only that part of the appeal relating to the time extension. The appeal relating to severances arising from the institution's decision on access will be dealt with separately in Appeal Number 900095.

On January 18, 1990, notices were sent to the appellant and to the institution advising that an inquiry was being conducted to review the decision to extend the time limit under subsection 27(1). Enclosed with this notice was a report prepared by an Appeals Officer from this office which is intended to assist the institution and the appellant in making representations concerning the subject matter of the appeal. The Appeals Officer's Report outlines the facts of the appeal and sets out questions which appear to the Appeals Officer, or any of the parties, to be relevant to the appeal. The Appeals Officer's Report indicates that the parties, in making their representations need not limit themselves to questions set out in the report. Representations have been received from the appellant and the institution and I have considered all representations in making this Order.

Despite the fact that the consultations were completed on January 23, 1990, and notice to an affected party was issued on that date, the appellant requested that the matter of the time extension proceed to inquiry.

The sole issue for me to determine is whether or not the extension of the time limit was reasonable in the circumstances.

Subsection 27(1)(b) of the Act states:

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,

...

(b) consultations that cannot reasonably be completed within the time limit are necessary to comply with the request.

In his representations the appellant submits that absent the institution's providing details as to the reason for the time extension, an assessment as to reasonableness cannot be made.

The institution submits that the issue of the time extension is moot but that in the alternative, consultations with Management Board of Cabinet, Freedom of Information and Privacy Branch were:

... necessary to establish that section 17 of the Act was not being contravened by providing notice to the affected third party. Notice would in itself provide the third party with knowledge of a competitive, commercial nature.

The representations conclude that:

... a time extension of 40 days is not unreasonable where a party outside the institution must be consulted and where the other 62 documents were disclosed, with severances, within the 30 day time period.

In Order 104 (Appeal Numbers 890079, 890080, 890081) dated October 19, 1989, Commissioner Sidney B. Linden stated that "it is my view that the intent of section 27(1)(b) of the Freedom of Information and Protection of Privacy Act, 1987, was to allow for external consultations".

One of the functions of the Freedom of Information and Privacy Branch of Management Board of Cabinet is that of consultant to institutions regarding the interpretation and application of the Act. Therefore, I accept that consultations with Management Board of Cabinet, Freedom of Information and Privacy Branch, were necessary to comply with the request. While it is true that Management Board of Cabinet can be considered to be "external" for purposes of subsection 27(1)(b), that alone is not determinative of the issue.

The topic of the consultations with respect to the appellant's request was a narrow one that did not necessitate the review of a large number of documents or the formulation of a lengthy opinion on the matter. Accordingly, it appears to me that an extension of time was unreasonable, in that the type of consultations required could have been completed within the normal 30 day time limit. I would add that in the situation where there is a perceived need for consultations with the Freedom of Information and Privacy Branch of Management Board of Cabinet as an advisor, I am of the view that it would be the exceptional case where an extension of time would be reasonable.

The appellant has also raised two procedural issues relating to the institution's notice of time extension, namely that the institution has not fulfilled its obligation to provide reasons for the extension of time or a description of the records for which the extension applies.

Subsection 27(2) of the Act provides:

- (2) Where a head extends the time limit under subsection (1), the head shall give the person who made the request written notice of the extension setting out,
 - (a) the length of the extension;
 - (b) the reason for the extension; and
 - (c) that the person who made the request may ask the Commissioner to review the extension.

With respect to the issue of reasons, the institution's notice referred to the 'sensitive nature' of the records and stated, "The reason for this extension is to provide sufficient time for the institution to conduct consultations before making a decision on whether or not to grant access".

Subsection 27(2)(b) requires that a reason for an extension be given. At issue here is the sufficiency of the institution's reasons. The institution's representations set out in more detail and with greater specificity the reason for the extension, such as who had to be consulted and the topic of consultation. In my view, the institution could have provided a more detailed reason to the appellant at the time the notice of time extension was given.

With respect to the issue of the description of the records, the institution's notice referred to "14 records". In my view, the requirement that a requester receive notice of a time extension carries with it the necessary inference that the notice include

some description of the records at issue. While in some time extension notices it may not be possible to identify the records at issue (for example, an extension may be necessary for the very purpose of identifying records responsive to the request), such was not the case here.

In Order 158 (Appeal Number 890266) dated April 9, 1990, Commissioner Linden in considering the requirements for giving reasons in the context of subsection 29(1)(b) of the Act, had the following to say about the interrelationship between reasons and description of the record:

A head is required to provide a requester with information about the circumstances which form the basis for the head's decision to deny access. The degree of particularity used in describing the record at issue will impact on the amount of detail required in giving reasons and vice versa (emphasis added).

Although Commissioner Linden was considering the requirement for giving reasons in the context of subsection 29(1)(b) I feel that his views also apply to subsection 27(2)(b). In the circumstances of this appeal I believe that the institution could have provided the appellant with a general description of the records at issue along with a more detailed reason for the time extension. However, given that I have found that the time

extension was not reasonable and that the appellant has received severed copies of the records at issue, there is no remedial order for me to make in the circumstances.

In summary, I find that the decision to extend the time in which to respond to the appellant's request was not reasonable in the circumstances.

Yours truly,

Tom A. Wright
Assistant Commissioner

cc: Appellant

Mr. Andrew Parr, FOI Co-ordinator

Ms Kimberly A. Bain, Manager