



Order 02-54

MINISTRY OF HEALTH SERVICES

David Loukidelis, Information and Privacy Commissioner
November 5, 2002

Quicklaw Cite: [2002] B.C.I.P.C.D. No. 55
Document URL: <http://www.oipc.bc.ca/orders/Order02-54.pdf>
Office URL: <http://www.oipc.bc.ca>
ISSN 1198-6182

Summary: The Ministry extended the time for responding to the HEU's access request by 30 days, but did not seek permission for a further extension. The Ministry eventually provided a partial response, of some 534 pages, roughly six months after receiving the request. The Ministry says it still needs more time to consult another public body about some 139 pages of the remaining 336 pages of records. It asks to be given until January 29, 2003 to respond. Having failed to comply with its duty under s. 6(1) of the Act to respond completely within the required time, the Ministry is ordered to respond before November 30, 2002.

Key Words: duty to assist – respond without delay – respond openly, accurately and completely and without delay – time extension – duty to respond in 30 days.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, s. 6(1).

Authorities Considered: Ontario: Order PO-1890, [2001] O.I.P.C. No. 68.

Cases Considered: *Re Mountain and the Legal Services Society* (1983), 9 C.C.C. (3d) 300 (B.C.C.A.).

1.0 INTRODUCTION

[1] By a letter dated March 1, 2002, the Hospital Employees' Union ("HEU") applied to the Ministry of Health Services ("Ministry") for access to records "concerning the subject matters encompassed by Bill 29 of the previous legislative session, the *Health and Social Services Delivery Improvement Act*" ("HSSDIA"). The HEU's request, made under the *Freedom of Information and Protection of Privacy Act* ("Act"), went on to list 21 different subject areas covered by the request and specified six different categories of records covered by the request.

[2] The Ministry received the HEU's request on March 4, 2002. On April 9, 2002, the Ministry wrote to the HEU and said the following:

Due to volume of records and the need for outside consultation regarding your request, we are unable to respond to your request within the regular legislated time limit of 30 days. Therefore, we are extending the time limit in accordance with section 10(1)(b) and (c) of the Act. A copy of section 10 is attached.

Please note that the revised due date for responding to this request is May 3/02.

[3] The Ministry did not respond by the extended May 3, 2002 deadline. It did not, in fact, respond until well over four months later, on September 20, 2002. It disclosed some records to the HEU at that time, in the following terms:

Enclosed please find 534 pages of the requested records. Intermittent pages, which have no exceptions to disclosure under the Act, are being provided to you in their entirety. The Ministry is processing the other documents, which will be sent to you as soon as we are able.

[4] On September 23, 2002, the HEU requested a review, under Part 5 of the Act, of the Ministry's response. The HEU's request for review specified the Ministry's failure to "comply 'completely' with the union's requests for information within the time limits prescribed by the legislation."

[5] Before turning to the merits, I will address the HEU's insistence that the Ministry of Health Planning is also involved in this inquiry, a contention the Ministry rejects. The HEU's request for review named the Ministry of Health Planning and says it failed to respond to the HEU's request. At p. 1 of its initial submission, the HEU says the following:

As a preliminary matter, we should note that this inquiry concerns the default of two public bodies, including the Ministry of Planning [*sic*]. We note that the Information, Privacy & Records Branch of the two Ministries in question constitute a "shared corporate service", and all communications, compliances and involvement on the part of the Ministries has [*sic*] been provided on a shared basis.

[6] As the HEU's initial submission makes plain, however, its access request was addressed to the Honourable Colin Hansen as "Minister of Health Services" and it asked for "access to all records in the custody or control of your Ministry". That Ministry responded and nothing in the material before me suggests the Ministry of Health Planning ever responded to the HEU's request to the Ministry. The Notice of Written Inquiry and Portfolio Officer's Fact Report mention only the Ministry.

[7] The fact that the two ministries may share access and privacy resources does not turn the HEU's request to the Ministry for records in its custody or control into a request to the Ministry of Health Planning. That Ministry is not a party to this inquiry and the

HEU has not asked that it be added as a party by notice under s. 54(b) of the Act. This order therefore applies only to the Ministry of Health Services.

[8] Because the HEU's request for review did not settle in mediation, a written inquiry was held, under Part 5 of the Act, on October 23, 2002.

2.0 ISSUE

[9] The only issue here is whether the Ministry has complied with its obligation under s. 6(1) of the Act to respond to the applicant without delay and openly, accurately and completely and, if not, what remedy the applicant should be given. Previous decisions have established that the Ministry bears the burden of establishing that it has complied with its s. 6(1) duty.

3.0 DISCUSSION

[10] **3.1 Ministry's Compliance So Far** – In its initial submission, the HEU describes the records that the Ministry disclosed to it on September 20, 2002 as follows:

1. A copy of the Queen's Printer website version of Bill 29, the Health and Social Services Delivery Improvement Act.
2. "Table 1 – Provincial Government Health Expenditures by Use of Funds and Rank, 1999" (a one-page chart produced by the Canadian Institute for Health Information, showing categorized expenditures by each province).
3. Website printout of Ministry of Skills Development and Labour, "Backgrounder – Health and Social Services Delivery Improvement Act" dated January 25, 2002.
4. A series of pages produced by the Canadian Institute for Health Information, and apparently taken in whole or in part from that organization's website indicated as www.cihi.ca, regarding numbers and deployment of Registered Nurses in this and other provinces.
5. Single page: "Total Funded FTEs by Region, 2001/02."
6. A copy of the Queen's Printer website version of the Medicare Protection Act.
7. For some reason, copies of Labour Code certifications in the health sector (by far the largest single document in the package).
8. A copy of the Queen's Printer website version of the Employment Standards Regulation.
9. A copy of the Queen's Printer website version of the BC Labour Relations Code.
10. Two pages duplicated from document number 9, containing five sections of the Labour Relations Code.

[11] The HEU describes these records as "what might be called, in the vernacular, 'junk'" (p. 3, initial submission). I will not comment on this characterization. I note,

however, that many of the records do appear from the HEU's description to be publicly available records, including many copies of web pages and legislation.

[12] **3.2 Ministry's Handling of the Request** – The Ministry concedes that it ought to have sought permission from my office to extend the time for response, under s. 10(1) of the Act. It nonetheless asks me to give it until January 29, 2003 to complete its response. It says the processing of the HEU's request has involved “a significant amount of staff time” because of the volume of records requested “and the number of consultations that have been necessary” (para. 4.04, initial submission).

[13] The Ministry relies on an affidavit sworn by an Information and Privacy Analyst, with the Ministry of Public Safety and Solicitor General. At the relevant time, she was an Information and Privacy Officer with the Ministry. I have already mentioned how the Ministry extended the deadline for its response and when it actually partially responded. Other aspects of the processing of the HEU's request, described in the analyst's affidavit, can be summarized as follows:

- Upon receipt of the HEU's access request, the Ministry's Information and Privacy Branch asked the following areas within the Ministry to locate and retrieve responsive records: Regional Operations (now the Performance Management and Improvement Division), Legislation and Professional Regulation, the Deputy Minister's office and the Communications Branch.
- By an April 25, 2002 letter, the Ministry told the HEU that it was transferring part of the request to the Ministry of Attorney General.
- It was not until June 18, 2002 that Ministry staff outside the Ministry's Information and Privacy Branch provided records to that Branch, an elapse of almost three months between the time they were asked and their delivery of records to the Information and Privacy Branch.
- On June 20, 2002, Ministry staff, including an Assistant Deputy Minister, decided that a line-by-line review of the records was necessary and that consultations would have to be undertaken,
- On June 20, 2002, the Ministry clarified the HEU's request in two respects; by confirming that reference to the HSSDIA included regulations under that legislation and by clarifying that the HEU did not want “historical documents” pertaining to the Official Opposition of the day.
- On July 4, 2002, the Ministry levied a fee, estimated at \$576, for the access request, which the HEU paid on July 12, 2002.
- On July 4, 2002, some four months after the HEU made its request, the Ministry began consultations with the Ministry of Labour and Skills Development, the Ministry of Management Services, the Ministry of Attorney General and the Health Employers Association of British Columbia.
- On August 1, 2002, it was confirmed that the HEU had narrowed its request to exclude records released by the Ministry of Attorney General, the Ministry of Labour and Skills Development and the Ministry through the discovery process in

a lawsuit brought against the Province by the HEU and others respecting the constitutionality of the HSSDIA. It was also confirmed that the HEU did not seek disclosure of records over which solicitor client privilege was claimed under s. 14 of the Act.

- On September 20, 2002, the Ministry disclosed the above-described 534 pages of records to the HEU.
- Ministry of Attorney General staff have since told the Ministry that they have identified which records have been disclosed to the HEU and other plaintiffs in the lawsuit against the Province, such that the Ministry of Attorney General can now make a decision on disclosure of the remaining records under the Act.
- The Ministry completed its consultations with public bodies and parties by October 9, 2002, with the exception that its consultation with the Ministry of Management Services, on possible issues under s. 12(1) of the Act, is still not complete.
- Once its consultations with the Ministry of Management Services are complete, the Ministry should be able to complete its response to the HEU “within four to six weeks.”

[14] Although she did not say why or how it is so, the analyst deposed that the HEU’s request “has been much more complicated and time consuming than the vast majority of other requests” with which she has dealt (para. 20). The analyst also deposed that the processing of the HEU’s request was “particularly complicated” because it was not, initially at least, clear where many of the responsive records originated, thus requiring Ministry staff to determine where the documents came from (para. 23). This was necessary, she deposed, because the Ministry must identify parties or agencies with whom it should or must consult and this is possible only if Ministry staff understand the context in which records were created or supplied (para. 24). The analyst also deposed, at para. 29, that the Ministry determined, at some unspecified point during the processing of the request,

... that it was necessary to consult with the Ministry of Management Services with respect to approximately 139 pages of records, on the basis that section 12 might apply to those records. Such a consultation is required because that Ministry’s Information and Privacy office is the central government agency having expertise with respect to section 12 of the Act. That office provides advice on the application of section 12 to all Provincial Ministries and the Office of the Premier (including the Cabinet Operations office).

[15] According to the analyst’s affidavit (para. 31), the Ministry of Management Services has advised Ministry staff that, at least on October 17, 2002, the date on which her affidavit was sworn,

... it will take approximately 45 working days to complete the review of the records sent to them by the Ministry and to provide the requested advice concerning the application of section 12 to those records.

[16] She did not indicate why, if the Ministry's consultations with the Ministry of Management Services began on July 4, 2002, over three months before the inquiry, that the Ministry still requires 45 working days (*i.e.*, some nine weeks) to review 139 pages of records for possible s. 12(1) material.

[17] The analyst deposed that all of the approximately 336 pages of records that are within the scope of the request, but have not yet been disclosed, must be reviewed "on a line-by-line basis prior to a final decision being made by the Ministry's head concerning access" (para. 33). She also gave evidence to the effect that – although the relevant Assistant Deputy Minister within the Ministry told Ministry staff to make the request a "top priority" and the Ministry has at some point assigned an additional staff person to work on it for a three week period – the Ministry needs more time to process the request internally (paras. 35 and following).

[18] The analyst deposed that Nadeen Johansen, the access to information contact within the Performance Management and Improvement Branch of the Ministry, has spent approximately 60% of her time working solely on the request since the beginning of June (para. 36). It appears Nadeen Johansen has other duties, since she normally spends only 25-30% of her time on access to information matters.

[19] Last, she deposed that, although the Ministry considered doing a phased release for the remaining records, it has decided not to do so because of the amount of severing "that is expected to be done and the fact that the Ministry is waiting to receive more input from the Ministry of Management Services" (para. 39).

[20] **3.2 The Appropriate Remedy** – The Ministry acknowledges that, under s. 58(3)(a) of the Act, I have the authority to order it to perform its duty to respond completely. It notes that, in Ontario, the approach in such situations has been for the Information and Privacy Commissioner or her delegate to order the institution to respond by a specified date. The Ministry cites Order PO-1890, [2001] O.I.P.C. No. 68, as an example. It acknowledges, at para. 4.07 of its initial submission, that "this is an appropriate remedy in a situation where a public body has failed, in whole or in part, to respond to requests within the time required by the Act."

[21] The Ministry goes on to argue as follows, however, in its initial submission:

4.08 In deciding the issue of remedy, the Ministry submits that it is appropriate for the Commissioner to consider the consequences of an order that would effectively force the Ministry to provide a response to the Applicant prior to the completion of its section 12 consultations with the Ministry of Management Services and prior to its being able to complete its own internal review of the requested records. For instance, a rushed decision by the head on the application of section 12 or a decision made without the proper information could potentially result in a wrong decision by the head about the application of section 12, a mandatory exception. The Ministry submits that such a result would undermine the intent of the Legislature that information subject to section 12 of the Act must not be disclosed. Similarly, a rushed decision could result in the head not being in

a position to make a fully informed decision concerning the application of other exceptions under the Act.

...

4.10 The Ministry submits that it would be reasonable under the present circumstances to provide it with sufficient time to complete its consultation with the Ministry of Management Services concerning the application of section 12 to the requested records and to complete its review of the remaining records.

[22] For its part, the HEU argues (at p. 1 of its reply submission) that it would not be appropriate for me to exercise my “remedial discretion to frustrate the intention of the Legislature, by relaxing the statutory regime clearly intended to compel time limits in the disclosure process”. At p. 3 of its reply submission, it says the following:

If the real source of the problem, in whole or part, is not deliberate obstruction but rather inadequate stable staffing resources in the Ministry, as is hinted in paragraph 37 [of the analyst’s affidavit], then that is no defence to the Ministry’s failure to comply with section 6(1). The fact that a public agency’s resources are limited does not excuse it from compliance with a mandatory statutory obligation.

...

[23] The HEU relies on *Re Mountain and the Legal Services Society* (1983), 9 C.C.C. (3d) 300 (B.C.C.A.). That case involved the failure of British Columbia’s legal aid plan to provide legal services for an individual who appeared to meet the criteria for coverage. The Legal Services Society, which administered the legal aid plan, argued that it did not receive enough funding to meet its full obligations. Lambert J.A. said the following, at pp. 309-310:

It has not been suggested that there are no funds available for use by the society in carrying out its statutory duty to make legal services available to Richard Mountain. If a case were to come to court on the basis of evidence that the society could not carry out its statutory duty because its funds were exhausted, then, in such a case, there would be a question as to whether it would be appropriate to issue an order in the nature of mandamus. But that is not this case. The possibility that funds may not be provided to the society to enable it to carry out its statutory duties does not repeal the statute or revoke the duties.

[24] I acknowledge the Ministry’s concession that, with hindsight, it should have sought permission from this Office, under s. 10(1), to further extend the time to respond to the HEU’s request. I am not prepared, however, at this time to effectively permit the Ministry to continue to dictate its own pace of compliance with the Act, including because of its concern, now professed, that it should not be “rushed” into possibly making errors in its decision. The Ministry is out of time for providing a complete response and has, as it acknowledges, breached its s. 6(1) obligation in that respect.

[25] The appropriate remedy here is, as the Ministry concedes, an order under s. 58(3)(a) of the Act, requiring the Ministry to respond completely to the HEU by a specified date. Especially in the absence of any concrete evidence from Ministry of

Management Services staff to support the assertion that this is a particularly complex request in terms of the s. 12(1) implications, or that it is not possible for them to put this matter at the top of the list and expeditiously review only some 139 pages of records, I am at a loss to understand how it would take something like nine working weeks from October 17, 2002 for Ministry of Management Services staff to complete their review and communicate with the Ministry. This is particularly so in light of the evidence that consultations with staff of the Ministry of Management Services staff began some 3½ months before the inquiry was held.

[26] Further, while access decisions under the Act should be made diligently, in the absence of any supporting evidence I do not give any real weight to the Ministry's claim that, if it is ordered to respond any sooner than January 29, 2003, the consequence could be that s. 12(1) material is inadvertently and inappropriately disclosed to the applicant. There is some irony in the Ministry's present expression of concern about a "rushed decision", again noting that consultations with the Ministry of Management Services began on July 4, 2002, some 3½ months before the inquiry was held.

[27] Moreover, as a general observation, it is not clear to me why the processing of the HEU's request has taken so long. As I noted earlier, the analyst deposed that this is a particularly complicated matter and that it involves a large volume of records. But the evidence before me suggests the volume of records involved is not that large, as requests go. Nor does the Ministry's evidence provide details to support its claim that this is a complex request. One reason for the Ministry's delay in responding may be the fact that it took Ministry staff outside the Ministry's Information and Privacy Branch almost three months to find and deliver possibly responsive records to the Information and Privacy Branch. No explanation was given for this considerable delay.

[28] Nor is any persuasive reason given as to why the Ministry could not have released records as it processed them. As I noted earlier, the analyst deposed that the Ministry decided not to do this. But I am not clear why the amount of severing that is expected to be done has prevented the Ministry from reviewing, severing and disclosing the roughly 336 pages of records that the Ministry of Management Services has not been consulted on. It is not clear why that exercise had to await the Ministry of Management Services' views about the 139 pages of records in its hands.

[29] I assign no blame whatsoever to individuals involved in processing the HEU's request, acknowledging that the processing of access to information requests is a professional occupation that involves training, judgement and attention to detail. Viewed from an institutional perspective, however, the fact remains that the Ministry is in breach of its statutory obligations for no reason that I can find to be justified on the evidence before me. Whatever the causes of the Ministry's failure to comply with its statutory duty to respond completely on time, it is necessary to give relief that is appropriate in the circumstances of this case. In deciding what order is appropriate, I have considered all of the circumstances, including the fact that eight months have elapsed since the HEU made its request, the fact that a relatively small number of records remain to be reviewed by the Ministry of Management Services, and the fact that only

approximately 336 pages in total remain to be processed in order to completely respond to the HEU's access request.

[30] Although I have decided that the Ministry should be ordered to respond sooner than January 29, 2003, as it proposes, I do not think this is a case in which the Ministry should be ordered to respond immediately, including because the Ministry is still consulting the Ministry of Management Services on possible s. 12(1) issues. Certainly, I expect the Ministry of Management Services to do whatever it can to ensure the Ministry responds as quickly as possible within the time set by my order.

4.0 CONCLUSION

[31] Under ss. 58(3)(a) and 58(4) of the Act, I order the Ministry to respond completely to the HEU's access request before November 30, 2002. As a further condition under s. 58(4) of the Act, I require the Ministry to deliver to me a copy of its response letter concurrently with its delivery to the HEU. For clarity, I do not want the Ministry to deliver to me a copy of any records disclosed to the HEU with the Ministry's response.

[32] The Ministry may apply to me respecting any issues that arise regarding its compliance with this order.

November 5, 2002

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia