



OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
— for —
British Columbia

Order F06-04

MINISTRY OF TOURISM, SPORTS & THE ARTS

David Loukidelis, Information and Privacy Commissioner
April 13, 2006

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Summary: The Ministry, which conceded that it has not responded in time to the applicant's access to information request, is ordered to respond by a specific date.

Key Words: duty to assist—respond without delay—respond openly, accurately and completely—every reasonable effort—timeliness—time extension.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 6(1), 7.

Authorities Considered: B.C.: Order 02-38, [2002] B.C.I.P.C.D. No. 38; Order 04-30, [2003] B.C.I.P.C.D. No. 31.

1.0 INTRODUCTION

[1] On September 30, 2005, what was then the Ministry of Water, Land and Air Protection received an access to information request under the *Freedom of Information and Protection of Privacy Act* ("Act") from the Western Canada Wilderness Committee ("WCWC") for certain records. On October 11, 2005, that Ministry transferred the request under s. 11 of the Act to the Ministry of Tourism, Sport and the Arts ("Ministry"). On October 21, 2005, the Ministry acknowledged the request in a letter to WCWC and provided the WCWC with a fee estimate of \$720.00.

[2] On November 2, 2005, WCWC wrote to the Ministry and requested a fee waiver, a request the Ministry granted in a letter dated November 16, 2005. The same letter told WCWC that the revised date for response to the access request was now December 7, 2005. On December 5, 2005, the Ministry sent WCWC a letter advising that an additional 30 days were being taken under s. 10(1)(b) because a large volume of records

was covered by the request. This made the due date for response to the request January 23, 2006.

[3] By a letter dated January 19, 2006, the Ministry told WCWC that a second time extension was being taken under s. 10(1)(c) of the Act because of consultation that was required with other public bodies (the Ministries of Environment, Economic Development and Finance were mentioned). This letter said that the response date would now be March 16, 2006. (This date was not correct and, in a letter dated January 24, 2006, the Ministry confirmed that the actual revised response date was March 6, 2006.)

[4] On January 30, 2006, this Office received a January 24, 2006 letter from WCWC, complaining that the Ministry did not have the authority to grant itself a further (second) extension without permission from this Office under s. 10 of the Act. This objection was well founded.

[5] On February 8, 2006, WCWC sent a request for review by this Office of the Ministry's deemed refusal, under s. 53(3) of the Act, of access to the requested records:

(3) The failure of the head of a public body to respond in time to a request for access to a record is to be treated as a decision to refuse access to the record, but the time limit in subsection (2) (a) for delivering a request for review does not apply.

An inquiry was then held under Part 5 of the Act.

2.0 ISSUE

The issues to be decided here are these:

1. Did the Ministry make every reasonable effort to respond without delay as required by s. 6(1) of the Act?
2. Has the Ministry failed to respond in accordance with the requirements of s. 7 of the Act?

3.0 DISCUSSION

[6] **3.1 Duty to Respond Without Delay**—The Ministry concedes that it failed to comply with its obligation under s. 7 of the Act to respond to the applicant's request within the Act's time requirements. It also concedes that it should have sought permission from this Office to extend the response time further. It says that it believes that, given the "time required to conduct consultation with other Ministries", it would have "been entitled to a further time extension under s. 10.

[7] The Ministry acknowledges that, in earlier decisions, I have said that a public body that fails to respond when required under s. 7 cannot be found to have fulfilled its

s. 6(1) obligation to make every reasonable effort to respond without delay. Nonetheless, the Ministry says the s. 6(1) issue “requires a consideration of circumstances that will not necessarily be relevant to the s. 7 issue” and makes this submission:

[9] The Public Body is aware that the Commissioner has previously decided that if a public body responds after the section 7 deadline, it must therefore necessarily have breached its section 6 obligations. Respectfully, the Public Body does not agree with the Commissioner on this point, and submits that a determination of the section 6 issue requires a consideration of all the circumstances, including some that are not relevant to make a decision on the s. 7 issue. The Public Body does not agree or admit that there has been a breach of s. 6 in the processing of the request. However, the Public Body believes that the views of the Commissioner on this point have been made clear in past orders, and therefore the Public Body will not be making submissions on the s. 6 issue.

[8] This is not the first time a Ministry has expressed its disagreement with my decisions on this point. As I have said a number of times, a public body that has failed to respond within the time required under s. 7 has not fulfilled its s. 6(1) duty to make every reasonable effort to respond without delay.

[9] This is what I said about late responses in Order 02-38, [2002] B.C.I.P.C.D. No. 38:

[22] Both public bodies breached the Act’s requirement to respond to the applicant’s request in the time required under s. 7(1) (subject to either s. 10(1) or ss. 23 and 24). It is simply not tenable to say that a public body that is in breach of the Act by having responded late can still be found to have fulfilled its statutory duty to respond to an applicant “without delay”. As I indicated in Order 01-47, [2001] B.C.I.P.C.D. No. 49, at para. 28, the s. 6(1) duty to respond without delay requires a public body to make every reasonable effort to respond before the time required under s. 7(1). A public body in breach of the latter duty cannot be found to have fulfilled the former.

[23] I do not question the diligence or good faith of those who processed the applicant’s request, but their inability to respond as required by law cannot – whether or not it was due to an excess of demand over the resources available to respond – wipe away the fact that the responses were late. I therefore find that both public bodies have failed to discharge their duty under s. 6(1) to respond to the applicant without delay. Since they have responded, however, I can do no more in this case (there is no fee that I could have ordered to be waived or refunded under s. 58(3)(c)). Any issue arising from the deemed decisions to refuse access, under s. 53(3), also falls away in light of the eventual responses. In both instances, I can only say that these public bodies, and all others, should ensure that

adequate resources are available so that their access to information staff can process requests in compliance with the law.¹

[10] I find that the Ministry has not fulfilled its s. 6(1) duty to the applicant.

[11] **3.2 Failure to Respond in Time**—Again, the Ministry concedes that it has failed to respond within the time required under s. 7. It expects that consultations with other Ministries relating to issues under ss. 12, 13 and 17 of the Act will take until April 25, 2006 and asks that it be given until May 12, 2006 to consider the results of its consultation and make a decision on release of records.

[12] As for the request's complexity, the Ministry relies on the March 29, 2006 affidavit of Danine Leduc:

[9] This was a particularly complicated request because of the nature of the information: many agencies were involved in contributing material to many of the records, there was a significant volume of draft versions of records without "version control" such that it was difficult to determine the chronology of the records, there were references to draft legislation and some financial information, there were joint Treasury Board Submissions, and several other public bodies to be consulted with. Consultations with other Public Bodies are necessary in order to fully understand the records requested and to make recommendations concerning the application other Act. In addition, staff changes in my branch resulted in a change in the Analyst processing this file, further complicating the processing of the Request.

[13] The Ministry is, in effect, at the mercy of other Ministries, from which it is awaiting a response on the consultation. The April 25, 2006 date for completion of consultations is an estimate from the Ministry. It does not to my knowledge bind the other Ministries.

[14] The Ministry contends that the consultation is lengthy because of the number of records involved, but it has not said how many records are actually involved at this stage. The fee estimate it gave WCWC last autumn indicated that some 2,400 pages of records responded to the request, but I do not know if this is now the actual number. Nor do I know how many records are involved in the consultation with others, as opposed to the processing of the request overall.

[15] If the Ministry responds on the requested date of May 12, 2006, its response will occur some seven and a half months after WCWC made its request. In all of the circumstances, I consider it appropriate to order the Ministry to respond before May 1, 2006.

¹ See also, for example, Order 04-30, [2004] B.C.I.P.C.D. No. 31.

4.0 CONCLUSION

[16] Having found that the Ministry failed to meet its s. 6(1) duty, no order is necessary respecting the Ministry's breach of that duty.

[17] Under s. 58 of the Act, I order the Ministry to respond completely to the applicant on or before May 1, 2006.

April 13, 2006

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia