



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

Order 04-30

MINISTRY OF ATTORNEY GENERAL

David Loukidelis, Information and Privacy Commissioner
November 10, 2004

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Summary: The Ministry took 10 months to respond, and then only partially, to the applicant's request for access to what the Ministry describes as a "file box full of records". The Ministry failed to comply with its s. 6(1) duty to make every reasonable effort to respond to the request without delay and is ordered to respond completely.

Key Words: duty to assist – adequacy of search – 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.

1.0 INTRODUCTION

[1] On December 4, 2003, the applicant made a request to the Ministry of Public Safety and Solicitor General requesting records relating to the proposed Campbell River destination casino project.

[2] On February 5, 2004, the Ministry wrote to the applicant to advise that the applicant's request to the Ministry of Public Safety and Solicitor General had been partially transferred to the Ministry of Attorney General ("Ministry") on February 5, 2004. It advised the applicant that the *Freedom of Information and Protection of Privacy Act* ("Act") permitted the Ministry 30 days to respond to the request and that it would respond to the applicant on or before March 18, 2004.

[3] On March 18, 2004, the Ministry wrote to the applicant and advised that, due to what the Ministry said was the large number of records involved, it was granting itself an extension of time to respond to the request. It told the applicant that it was therefore now required to respond to the request by May 3, 2004. On April 30, 2004, the Ministry wrote to this Office and asked for a 60-day time extension for its response to the request because of the volume of records involved and because consultation with other public bodies would need to be undertaken. On May 5, 2004, the OIPC wrote to the Ministry advising that a further extension had been granted and that it was now required to respond to the applicant by July 28, 2004. On May 7, 2004, the Ministry wrote to the applicant advising that it had been granted an extension in time to respond to the request by the OIPC and that it was now required to respond to the applicant by July 28, 2004.

[4] The Ministry did not respond and, on August 6, 2004, the applicant wrote to the OIPC requesting a review of the Ministry's failure to respond to its request for records.

[5] On October 1, 2004, the Ministry provided a partial response to the applicant's access request.

2.0 ISSUE

[6] The issues to be decided here are as follows:

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

[7] **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 in the time required, in this case July 28, 2004. It nonetheless contends that it has fulfilled its s. 6(1) duty to make every reasonable effort to “respond without delay”.

[8] 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”:

4.05 Section 6(1) of the Act reads as follows:

- 6(1) The head of a public body must make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely.

...

4.07 A public body may, through inadvertence or because of events beyond its control, fail to meet the timeline set out in section 7 of the Act. In other words, a public body may make all reasonable efforts to respond without delay, such as immediately retrieving records, reviewing them and embarking on the necessary consultations with third parties or other public bodies, but still fail to meet its legislated deadline. For instance, a public body may do all that is within its power to process a request but fail, through inadvertence, to take an extension that it would have been otherwise entitled to under section 10 of the Act. Further, a public body may do all within its power to process a request, obtain a section 10 extension by reason of needing to consult with a third party or public body, but not receive such input until after the section 7 deadline has passed. In such cases, the public body who receives the request will have responded to that request without delay, in the sense of processing the request as quickly as it could, but nevertheless be in breach of its section 7 deadline. For those reasons, the Ministry submits that a breach of section 7 does not necessitate a finding that there has been a breach of section 6 of the Act.

[9] The Ministry then goes on to explain why it has met its s. 6(1) obligation in this case, even though, at the time it made this submission, the Ministry had not responded completely to the applicant's access request.

[10] I remain of the view that 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. This is what I said about the issue 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.

[11] I have no hesitation in this case, as well, in finding that the Ministry has breached its s. 6(1) duty to the applicant.

[12] In any case, even if I were prepared to accept the Ministry's position about compliance with s. 6(1), I do not think the submissions of the Ministry's counsel are enough to show that the Ministry "made every reasonable effort" to respond without delay. The Ministry has not submitted any affidavit evidence to support its contention that it made every reasonable effort to respond without delay and relies instead on assertions in written argument. There is, for one thing, some dispute about the facts asserted in argument, since the applicant denies that it has ever, as the Ministry's counsel alleges, refused to narrow the scope of its access request or to exclude from its scope any records originating with other public bodies. Moreover, the factual assertions found in para. 4.09 through 4.12 of the Ministry's initial submission are very general in nature and do not in my view support the Ministry's contention that it has made every reasonable effort to respond without delay. Accordingly, even if I assume for argument's sake that the Ministry's view of s. 6(1) is correct, I am satisfied the Ministry did not comply with s. 6(1).

[13] **3.2 Failure to Respond in Time** – The Ministry concedes that, despite its partial disclosure of records on the eve of the inquiry in this matter, it has failed to provide a complete response within the time required under s. 7. It says that, as of the date of its initial submission (October 12, 2004), it was in the process of completing its consultation with the Ministry of Finance respecting the possible application of s. 12 to portions of the remaining records. As of the date of the Ministry's initial submission, the Ministry had been told by the Ministry of Finance that it would take approximately one week for the Ministry of Finance to complete its review of records sent to it for consultation. At para. 4.19 of its initial submission, the Ministry "anticipates that it should be able to complete its response" within 18 working days after October 18, 2004, "being November 12, 2004, or perhaps sooner".

[14] Of course, I do not know what the state of affairs is at this time—I have no way of knowing whether or not the Ministry has responded completely by now. I would certainly expect that its consultations with the Ministry of Finance have been completed, judging by the Ministry's own estimate of the time needed to do that. The Ministry says that there is, as noted earlier, a "file box" of records involved, which is not a large number of records as these things go. Again, the Ministry says it would be reasonable for me to order it to respond by November 12, 2004, but since that is the day after tomorrow, and the day after a statutory holiday, I find myself in the odd position of giving the Ministry a little more notice of this order than its submission last month would entail.

4.0 CONCLUSION

[15] 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.

[16] Under s. 58 of the Act, I order the Ministry to respond completely to the applicant on or before November 16, 2004.

November 10, 2004

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia