

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3114

Appeal PA11-329

Legal Aid Ontario

September 28, 2012

Summary: This appeal addresses a request to Legal Aid Ontario (LAO) for general records as well as records relating to the appellant. It determines that the withheld portions of records fall within the scope of the confidentiality provision at section 90(1) of the *Legal Aid Services Act* and, in accordance with section 67(2) 7.0.1 of the *Freedom of Information and Protection of Privacy Act*, the *Act* is not the controlling statute for protecting the confidentiality of this information. In addition, the LAO's search for records is found to be reasonable, except for one record which the LAO is ordered to search for.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, ss. 24, 51, 67(1) and 67(2) 7.0.1; *Legal Aid Services Act*, ss. 2, 89(1), 89(2), 89(3), 90(1), 90(2) and 96.

Orders and Investigation Reports Considered: Orders PO-26, PO-2083, PO-2187, PO-2994, MO-2143-F and MO-2226.

OVERVIEW:

[1] Legal Aid Ontario (the LAO) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a list of 19 categories of records. The listed records included records relating to the appellant and his case, as well as various manuals, policies, guidelines and other documents.

[2] The LAO responded to the request by issuing a decision letter which identified the request and then stated:

I am enclosing information responsive to your request, in electronic form on USB [Universal Serial Bus], with exceptions as set out below. An index of records is enclosed.

[3] Attached to the decision letter was a six-page index prepared by the LAO. It identified the different types of records which were searched for, and listed the various responsive documents under each heading. It listed approximately 1300 pages of responsive records, as well as 4 additional "folders" of responsive documents. The index also identified the five specific documents which were redacted.

[4] The LAO's decision letter also indicated that no records responsive to certain items in the request were located. It stated:

With respect to [item 5], which we assume refers to [a named lawyer], there is no record responsive to this request.

With respect to [items 2 and 8], there are no records responsive to these requests.

[5] Finally, the LAO's decision letter indicated that access to small portions of five records was denied on the basis of sections 89 and 90 of the *Legal Aid Services Act* (the *LASA*). The decision stated:

Please be aware that it is the position of Legal Aid Ontario that ss. 89 and 90 of [the *LASA*], by legislation, prevail over the *Freedom of Information and Protection of Privacy Act*: see s. 103 of [the *LASA*] and s. 67(2) of the *Freedom of Information and Protection of Privacy Act*.

[6] The decision also set out details about the nature of the information contained in the specific portions of the records which were withheld.

[7] The LAO subsequently sent the appellant a supplementary decision letter in which it identified that an additional 21-page record was located, and provided a copy of it to the appellant.

[8] The appellant appealed the decision of the LAO to deny access to the withheld portions of the records, and also took the position that additional responsive records exist. This raised the issue of whether the LAO's search for records was reasonable.

[9] During the intake stage of this appeal, this office decided to stream the appeal to the inquiry stage of the process, where an adjudicator conducts an inquiry under the *Act*. Also during this time, the LAO sent a further supplementary decision letter to the appellant, identifying that 62 pages of additional responsive records had been located. The LAO provided a complete copy of those 62 pages of records to the appellant.

[10] To begin my inquiry, I sent a Notice of Inquiry to the LAO, and received representations in response. I then sent the Notice of Inquiry, along with a complete copy of the representations of the LAO, to the appellant, who also provided representations to me.

RECORDS:

[11] The withheld portions of the records consist of portions of five pages of records which include meeting notes (both typed and handwritten), information relating to meetings, and references to individual legal aid applicants other than the appellant.

PRELIMINARY ISSUES:

[12] In his representations, the appellant raises two issues concerning the processing of this appeal which I will address as preliminary issues.

1) The appellant's request that this file receive "special handling"

[13] The first preliminary issue the appellant raises is his request that this file receive "special handling" and proceed in a "modulated context" because of "the complexity of issues that are specific to the nature of the LAO lack of public transparency." He also asks for this appeal to proceed in this "modulated fashion" because of his concerns that the inquiry process, as evidenced by the Notice of Inquiry sent to him, has shown "bias, ... deliberately excluding issues presented in September and October 2011 communication from [the appellant] to the IPC." The appellant attaches to his representations a number of attachments, including those from September and October of 2011, in support of his position.

[14] I have carefully considered the appellant's position, and have reviewed the material provided by him in detail. I note that the Notice of Inquiry sent to the parties identified two distinct issues: access to the withheld portions of five pages of records, and whether the LAO's search for responsive records was reasonable. These issues are addressed below.

[15] The appellants' correspondence from September and October of 2011 raise a number of additional matters. Some of them relate specifically to the issue of the searches conducted for responsive records, and I have referred to those portions in my discussion of the reasonableness of the LAO's searches, below. The appellant also

raises questions about the decision by this office not to proceed with the mediation in this appeal. I also address this issue below.

[16] On my review of the remaining matters referred to by the appellant in his September and October, 2011 correspondence, I am not satisfied that these matters are sufficiently compelling to identify them as issues and to address them in this order. Other than the issues I address below, I note that the additional matters raised by the appellant fall within one of three broad categories: 1) complaints and questions to the LAO about the processing of his request; 2) complaints and questions to this office about the processing of this appeal at the intake stage, and allegations about the actions of specific IPC staff; and 3) questions about why certain documents do not exist, and demands for explanations to these questions.

[17] I note that these three additional categories of "remaining matters" are raised in the correspondence of September and October, and include various responses, decisions and explanations from both the LAO and this office. Although the appellant is clearly unhappy with some of the responses he has received, I am not satisfied that these additional matters are sufficiently compelling to be addressed in this order. I find that the appellant's complaints about certain named staff and allegations about their actions are not directly relevant to the issues in this appeal, and I decline to identify them as additional issues in this order. Furthermore, unless the questions raised by the appellant concerning explanations about records are addressed below under the "reasonable search" issue, I find the appellant's additional questions are not relevant to this appeal. In the circumstances, I am not satisfied that the appellant has provided sufficiently compelling evidence to decide that this appeal file requires "special handling" and am satisfied that the issues that are relevant to his appeal of the LAO's decision can be fully addressed in this order.

2) Concerns about the lack of mediation in this appeal

[18] The appellant identifies his concern that this file did not proceed through the mediation stage of the appeals process, and that this has resulted in prejudice to him. He states that mediation could have assisted in providing more information about the processes used by the LAO and could have filled what he describes as a "knowledge gap" that he maintains exists regarding the actions of the LAO.

[19] I have considered the position taken by the appellant, and note that section 51 of the *Act* states:

The Commissioner may authorize a mediator to investigate the circumstances of any appeal and to try to effect a settlement of the matter under appeal.

[20] Previous orders have reviewed this section of the *Act*. In Order MO-2226, Senior Adjudicator Higgins addressed this same section found in the *Municipal Freedom of Information and Protection of Privacy Act* (section 40), and considered whether mediation is mandated by the *Act*. He stated:

While it is generally desirable to participate in mediation, it is not mandatory for parties to do so In this regard, the decision to proceed with mediation is a discretionary decision of the Commissioner. Former Assistant Commissioner Tom Mitchinson made the following comments about the mediation process in Order PO-2187:

As the language of [section 51] makes clear, mediation is entirely an optional step in the appeal process, which can be invoked by this office at its sole discretion. The Commissioner may authorize a mediator to investigate the circumstances of any appeal and to try to effect a settlement of the matter under appeal.

While the purpose of mediation is "to try to effect a settlement", by definition mediation is a voluntary and open-ended means of dispute resolution. No particular process, form of investigation, consultation, or substantive outcome is mandated. ...

The Act does not mandate that the mediation stage of the inquiry take any particular form, involve any specified level of contact with the parties, be of a certain duration or necessarily enjoy a particular level of success. A mediator may engage in substantial investigation and negotiation efforts, or may determine based on very limited activity that further efforts would not prove fruitful. No party is entitled to insist on a specific level of mediation or to control when an appeal should proceed to adjudication. As the plain wording of section [52(1)] of the *Act* indicates, the jurisdiction and authority to proceed to conduct an inquiry in the circumstances provided in paragraphs (a) and (b) lies within the Commissioner's discretion.

[21] Adjudicator Higgins then confirmed that participation in mediation is not mandatory, that the Commissioner cannot insist on any particular level of participation or outcome in mediation, and that the decision to proceed to the adjudication stage of the appeal process is a discretionary one made by this office, in light of the circumstances of an appeal.

[22] I adopt the approach taken by Adjudicator Higgins and former Assistant Commissioner Mitchinson.

[23] In this appeal, a decision was made by the commissioner at the intake stage of this appeal that mediation would not be productive in this case, and that the appeal would proceed to the inquiry stage of the process. After proceeding to the inquiry stage, I sent a Notice of Inquiry to the parties inviting representations on the issues. In the Notice of Inquiry I sent to the appellant, I also specifically stated

The appellant is invited to address the issues, as well as any additional issues he believes are relevant in this appeal.

[24] The appellant provided representations on a number of issues and matters he wanted to raise in this appeal, and they are addressed in this order. In the circumstances and in light of the information set out above, I will not address the appellant's concerns about the lack of mediation further.

ISSUES:

- A. Does the redacted information fall within the confidentiality provisions in sections 89 and/or 90 of the *Legal Aid Services Act* such that the confidentiality sections in that act prevail over the *Freedom of Information and Protection of Privacy Act*?
- B. Did the LAO conduct a reasonable search for records?

DISCUSSION:

Issue A: Does the redacted information fall within the confidentiality provisions in sections 89 and/or 90 of the *Legal Aid Services Act* such that the confidentiality sections in that act prevail over the *Freedom of Information and Protection of Privacy Act*?

Introduction

[25] As identified above, the LAO has withheld portions of five pages of records from the appellant on the basis that they fall within the confidentiality provisions in sections 89 and/or 90 of the *Legal Aid Services Act (LASA)*. The LAO also refers to section 67 of the *Act* in support of its position that the confidentiality provisions of *LASA* apply.

[26] For the purposes of the analysis that follows, it is helpful to set out the wording of the relevant portions of section 67 of the *Act* and sections 89 and 90 of *LASA*.

[27] Section 67(1) of the *Freedom of Information and Protection of Privacy Act* sets out that the *Act* prevails over a confidentiality provision in any other Ontario statute, unless section 67(2) or the other statute specifically provides otherwise. The relevant portions of section 67 of the *Act* read:

67(1) This *Act* prevails over a confidentiality provision in any other Act unless subsection (2) or the other Act specifically provides otherwise.

(2) The following confidentiality provisions prevail over this *Act*:

7.0.1 Sections 89, 90 and 92 of the *Legal Aid Services Act, 1998*.

[28] Section 89 of *LASA* states:

89. (1) All legal communications between the Corporation [LAO], an officer or employee of the Corporation, an area director or member of an area committee and an applicant for legal aid services are privileged in the same manner and to the same extent as solicitor-client communications.

(2) All legal communications between a lawyer, student or service-provider at a clinic, student legal aid services society or other entity funded by the Corporation, or any other member, officer or employee of a clinic, student legal aid services society or other entity funded by the Corporation and an applicant for legal aid services are privileged in the same manner and to the same extent as solicitor-client communications.

(3) Disclosure of privileged information to the Corporation that is required under this Act does not negate or constitute a waiver of privilege.

[29] Section 90(1) of *LASA* provides:

90. (1) A member of the board of directors, an officer or employee of the Corporation, an area director, a member of an area committee, a lawyer, a service-provider or a member, officer, director or employee of a clinic, student legal aid services society or other entity funded by the Corporation shall not disclose or permit to be disclosed any information or material furnished to or received by him or her in the course of his or her duties or in the provision of legal aid services.

[30] Section 90(1) is, however, subject to the exception at section 90(2) of *LASA*, which sets out that:

A person referred to in subsection (1) may disclose information or allow it to be disclosed in the performance of his or her duties or in the provision of legal aid services or with the consent of the applicant or if authorized by the Corporation.

[31] Section 96(1) of *LASA* makes it an offence for any person to intentionally contravene or fail to comply with section 90.

The LAO's representations

[32] The LAO takes the position that the withheld portions of the five pages of records fall within the confidentiality provisions in sections 89 and/or 90 of the *LASA*. It states that these records contain:

- the three most recent applications that had been approved along with the associated minutes,
- the redactions to records (computer and hand-written notes) related to the Area Committee meeting of January 27, 2011, where reference was made to other legal aid applicants, and
- computer log-in and call information provided to Area Committee members.

[33] The LAO states that the applications referred to are legal aid applications which were sent to the Group Applications and Test Cases Committee (GATCC), and related to legal aid applicants other than the appellant. It also states that access was denied to records related to the Area Committee meeting of January 27, 2011 because reference is made to legal aid applicants other than the appellant.

[34] The LAO then refers to the specific wording of section 90(1) of the *LASA* and states:

Under 90(1), information or material received by specified persons in the course of his or her duties or in the provision of legal aid services shall not be disclosed, subject to exceptions set out in subsection (2). Subsection 90(2) does not provide mandatory exceptions, but discretionary ones, based on the use of the word "may".

It is submitted by LAO that the records in this case consist of material furnished to or received by legal aid employees in the course of their

duties and in the provision of legal aid services. This is established by the nature of the records. The records are material or information which has come from other legal aid applicants, including names and case details. It is apparent that this information came to legal aid in the course of accepting legal aid applications and administering the Group Applications and Test Cases Committee process, all of which constitute the actions of legal aid employees in the course of their duties. The sign in and log in information for the Area Committee members which was also redacted was clearly received by the members of the Area Committee in the course of their duties and Area Committee members are one of the named persons in section 90(1) to whom the section applies.

[35] The LAO relies on Order PO-2994 in support of its position. It states that that order:

... contains an analysis of what constitutes information or material furnished to or received by a legal aid employee in the course of his or her duties. That decision states as follows with respect to the meaning of section 90(1):

In contrast to the wording of section 89(1) which is limited to legal communications, section 90(1) is a very broadly worded statutory provision which prohibits those listed in the section from disclosing "any information or material" furnished to or received in the course of their duties or in the provision of legal aid services. Under section 2 of LASA, "legal aid services" is defined to mean "legal aid and other services provided under" LASA. In my view, the wording of the provision is intentionally broad and meant to capture all types and forms of information and materials, including records that originated with or were exchanged within LAO.

[36] The LAO then reviews the reasons why it determined that section 90(2) did not apply, and that disclosing the information was not "in the performance of his or her duties or in the provision of legal aid services." It refers to LAO policies and practices, as well as the wording of the *LASA*, and states:

In the circumstances of this case, it is the established policy of Legal Aid not to disclose client-related information, including names of applicants or clients of Legal Aid to any third party, without the consent of the legal aid applicant. This policy mirrors the provisions of section 90(2) which requires the consent of the legal aid applicant to confer an exception to information or material which falls within section 90(1). No consent of the relevant legal aid applicants has been provided in this case. Therefore, it

is LAO's submission that the exception in section 90(2) does not apply in this case to allow further disclosure.

[37] In support of its position, the LAO refers in detail to specific sections of its Privacy Policy, and concludes by stating:

Accordingly, it is the submission of LAO that there is no exception in 90(2) which would allow the exercise of discretion to release the information which was redacted. The policies of Legal Aid in fact prohibit this disclosure and therefore disclosure is not permitted pursuant to the legislation.

[38] The LAO then also submits that the exempted records fall within section 89 of *LASA*, as "their disclosure would disclose the names of other legal aid applicants and thereby disclose the nature of the legal aid retainer." Given my finding below, it is not necessary to review the LAO's representations on section 89 in detail.

[39] With respect to the issue of whether the confidentiality provisions in section 89 and/or 90 of the *LASA* apply in the circumstances of this appeal, such that these sections prevail over the Act, the LAO refers to the following quotation from Order PO-2083, which stated:

Section 67(2) is not a jurisdiction-limiting provision that excludes certain categories of records from the Act's application. Rather, it simply provides that the Act is not the controlling statute for protecting the confidentiality of information that falls within the scope of one of the listed confidentiality provisions of another statute. Section 67(2) specifically includes sections 89 and 90 of the *LASA* among the listed confidentiality provisions that prevail over the Act. If LAO establishes that the requirements of section 89 or 90 of the *LASA* are present, section 67(2) 7.0.1 provides that the Act must yield to these specific confidentiality provisions.

[40] LAO then states:

... it is LAO's submission that once it is established that the records in this case fall within section 90 of the *LASA*, the IPC should not undertake a review of the decision that there is no basis for an exercise of discretion under section 90(2).

It is respectfully submitted that should the IPC determine that the records in this case consist of information or material described in subsection 90(1) of *LASA*, *LASA* then controls whether or not the information is released and FIPPA does not. This ends the jurisdiction of the IPC.

LAO also submits, however, that if the IPC does not accept this submission, the decision not to exercise discretion under 90(2) to release the records was a proper one, based on the analysis set out above under question one.

[41] The appellant does not directly address the issue of the application of section 67(2) of the *Act* or sections 89 and 90 of the *LASA*.

Analysis and Finding

[42] To begin, I accept that section 67(2) is not a jurisdiction-limiting provision that excludes certain categories of records from the *Act's* application. Rather, it simply provides that the *Act* is not the controlling statute for protecting the confidentiality of information that falls within the scope of one of the listed confidentiality provisions of another statute [Orders PO-2029, PO-2083 and PO-2411-I]. Section 67(2) 7.0.1 specifically includes section 90 of *LASA* among the listed confidentiality provisions that prevail over the *Act*.

[43] In Order P-26 former Commissioner Sidney Linden held that where a "confidentiality provision" exists which bars the application of the *Act*, there is no authority under the *Act* to order the release of records.

[44] With respect to the exception at section 90(2) of the *LASA*, in Order PO-2083, former Assistant Commissioner Tom Mitchinson commented on this section by stating that the exercise of discretion in this section clearly rests in the LAO. He stated:

Section 90(2) contains exceptions, specifically the consent of the applicants or the authorization of LAO. The application of these exceptions is not established in this case, and in my view it would defeat the purpose of the provision to require LAO to seek consent or authorization in response to receiving a request under the *Act*.

[45] I will now apply this analysis to the records in my analysis of the application of section 90(1) of *LASA*.

Section 90(1)

[46] Section 90(1) of *LASA* reads:

A member of the board of directors, an officer or employee of the Corporation, an area director, a member of an area committee, a lawyer, a service-provider or a member, officer, director or employee of a clinic, student legal aid services society or other entity funded by the Corporation shall not disclose or permit to be disclosed any information or

material furnished to or received by him or her in the course of his or her duties or in the provision of legal aid services.

[47] Section 90(1) is a very broadly worded statutory provision which prohibits those individuals or funded entities listed in that section from disclosing "any information or material" furnished to or received in the course of their duties or in the provision of legal aid services. Section 2 of *LASA* defines "legal aid services" as "legal and other services provided under" *LASA*.

[48] The five portions of records which the LAO claims fall within section 90(1) include meeting notes (both typed and handwritten), information relating to meetings, and references to individual legal aid applicants other than the appellant.

[49] Based on my review of the portions of the five records and the representations of LAO, I accept that the portions of the records remaining at issue fall within the scope of section 90(1) of the *LASA*. The redacted information from the five pages of records contains specific information provided to Area Committee members concerning the meetings these members are involved in. The redactions contain information about other legal aid applicants (including names, case details and other information about their applications) and/or confidential details about the scheduled area committee meeting itself. I also find that this information was furnished to the Area Committee members in the course of their duties.

[50] Accordingly, I find that the records at issue fall within the scope of the confidentiality provision at section 90(1) of *LASA*. In accordance with section 67(2) 7.0.1 of the *Act*, section 90(1) of *LASA* prevails over the *Act*, and I therefore uphold LAO's decision to deny access on that basis.

Issue B. Did LAO conduct a reasonable search for records?

Introduction

[51] In appeals involving a claim that additional responsive records exist, as is the case in this appeal, the issue to be decided is whether LAO has conducted a reasonable search for the records as required by section 24 of the *Act*. If I am satisfied that the search carried out was reasonable in the circumstances, the LAO's decision will be upheld. If I am not satisfied, further searches may be ordered.

[52] A number of previous orders have identified the requirements in reasonable search appeals (see Orders M-282, P-458, P-535, M-909, PO-1744 and PO-1920). In Order PO-1744, Acting-Adjudicator Mumtaz Jiwan made the following statement with respect to the requirements of reasonable search appeals:

... the *Act* does not require the Ministry to prove with absolute certainty that records do not exist. The Ministry must, however, provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records. A reasonable search is one in which an experienced employee expends a reasonable effort to locate records which are reasonably related to the request (Order M-909).

[53] I agree with Acting-Adjudicator Jiwan's statement.

[54] Where a requester provides sufficient detail about the records that he/she is seeking and the institution indicates that records or further records do not exist, it is my responsibility to ensure that the institution has made a reasonable search to identify any records that are responsive to the request. The *Act* does not require the institution to prove with absolute certainty that records or further records do not exist. However, in my view, in order to properly discharge its obligations under the *Act*, the institution must provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request.

[55] Although an appellant will rarely be in a position to indicate precisely which records have not been identified in an institution's response, the appellant must, nevertheless, provide a reasonable basis for concluding that such records exist.

Representations

[56] LAO provides lengthy representations, as well as five affidavits, in support of its position that it conducted a reasonable search for responsive records.

[57] LAO begins by stating that the request was read liberally and not narrowly, and adds:

... the search for records included contact with all parts of the organization that the requester was known to have dealt with and which were raised in the ... request. Records were also assembled related to LAO policies and procedures, giving a very broad approach to the request. Responsible managers in each of the departments initiated searches. These managers are experienced and knowledgeable in LAO process and procedures and are in a position to know whether responsive records have been provided. Records in all forms were searched, including paper records, computer records, emails and client files. A large number of responsive records were generated and provided. It is LAO's submission that a reasonable effort was made to locate responsive records.

[58] LAO also acknowledges that two supplementary decision letters were sent, which included additional responsive records. LAO then reviews the circumstances which resulted in the LAO locating these additional records. It states that the first supplementary decision, which provided additional records, was a result of a delay in receiving certain records which were initially requested. LAO states that these records had been requested as part of the initial search of records, but that the member of the Group Applications and Test Cases Committee who provided the handwritten notes did not respond to the request in a timely way and, as a result, the records were not received within the thirty day period for responding to the Freedom of Information request. LAO then states that, when the records were received, the supplementary decision letter was released. The LAO provides affidavits in support of this position.

[59] With respect to the second supplementary decision letter, which also disclosed additional records to the appellant, the LAO states that this decision was issued:

... following a search for records in the possession of an employee of the Toronto District Office who had dealt with the requester's case but had left the Toronto District Office to work elsewhere in the organization. The [identified affidavit] sets out the circumstances that resulted in these records being located. [A named individual] inadvertently failed to include [a named employee – employee A] in the request to staff to provide records as part of her search for records. [The individual] subsequently realized this error and contacted [employee A], which resulted in additional records being located. ... These records made reference to [a specific complaint]. As no records had been provided by the Complaints Department regarding this, the ... Co-ordinator contacted the Manager of the Complaints Department to ask that a further search be conducted, with specific reference to that complaint. Additional responsive records were located as a result. All of the additional responsive records obtained as a result of these additional searches were provided, without exemptions.

[60] The LAO also provides five affidavits in support of its position.

[61] The first affidavit is sworn by the Freedom of Information Coordinator for the LAO (the coordinator). In her affidavit, she reviews in detail the actions she took upon receiving the request, including naming the various individuals and departments that were contacted and that conducted searches. She also identifies the specific personal actions she took in conducting searches. In addition, the coordinator's affidavit describes in detail the circumstances resulting in the two additional supplementary decisions being provided, as well as the steps taken by the LAO to conduct further searches for these records.

[62] The second affidavit is sworn by the Business Manager, Policy & Research at LAO who deals with applications for legal aid assistance which are considered by the Group Applications and Test Cases Committee. She also describes in detail the individuals who were contacted and the searches conducted, and states that all responsive records were provided to the coordinator. In addition, she describes the circumstances which led to the locating of additional records, as referenced above.

[63] The third affidavit is sworn by the Director, Administration, Civil and Immigration Law Services (GTA Region). She indicates that she was the person responsible for searching for all responsive records in the GTA region relating to the appellant. She indicates the nature of the searches conducted for records, and that all of the identified records were provided to the coordinator. In addition, she describes the circumstances which led to the locating of additional records from a former employee, as referenced above.

[64] The fourth affidavit is sworn by the Senior Special Advisor to General Counsel, who acted as Chair of the Area Committee for the GTA Region during the relevant time period. He indicates the steps taken to locate responsive records held by the Area Committee members who were present for the hearing of the appeal, including the contacts he had with them, and confirms that no other records were located.

[65] The fifth affidavit is sworn by the Manager of the Complaints Department at the LAO. She reviews the searches which were conducted for responsive records, and indicates that the located records were provided to the coordinator. She also reviews supplementary searches that were conducted, as referred to above.

[66] The appellant also provided representations on the search issue. His representations can be summarized as follows:

- Without a detailed index of all of the documents, it is not possible to properly review the search issue;
- the affidavits provided by the LAO are generic, and do not address the documents they know are in dispute;
- the affidavits are made in bad faith, are deficient upon their face and have "no credibility."

[67] The appellant cites three examples in support of his position that the affidavits are deficient. He states that one of the affidavits omits any "corresponding affidavits from each of the committee members" and also deviates from "LAO policy and procedure." He posits that if a claim made in another affidavit is true, the affiant subsequently violated the *Act* by providing the appellant with certain information. The

appellant also states that one of the affidavits fails to refer to information the appellant believes ought to have been included.

[68] As noted above, the appellant's representations also refer to search issues identified in the September and October 2011 correspondence. The relevant portions of that correspondence which speak to whether additional records exist focus on two primary concerns raised by the appellant: 1) that the answers given to the appellant in response to questions he had regarding what policies and procedure were relied on by the LAO were inadequate; and 2) concerns regarding the existence of an LAO Area Office Procedures Manual.

Findings

[69] As set out above, in appeals involving a claim that responsive records exist, the issue to be decided is whether LAO has conducted a reasonable search for the records as required by section 24 of the *Act*. In this appeal, if I am satisfied that LAO's search for responsive records was reasonable in the circumstances, LAO's decision will be upheld. If I am not satisfied, I may order that further searches be conducted.

[70] A reasonable search is one in which an experienced employee expending reasonable effort conducts a search to identify any records that are reasonably related to the request [Order M-909]. In addition, in Order M-909, Adjudicator Laurel Cropley made the following finding with respect to the obligation of an institution to conduct a reasonable search for records. She found that:

In my view, an institution has met its obligations under the *Act* by providing experienced employees who expend a reasonable effort to conduct the search, in areas where the responsive records are likely to be located. In the final analysis, the identification of responsive records must rely on the experience and judgment of the individual conducting the search.

[71] I adopt the approach taken in the above orders for the purposes of the present appeal.

[72] In this appeal, LAO located records responsive to many of the categories of requested records. The LAO also provided detailed affidavits by five individuals directly involved in the searches for responsive records. These affidavits describe in some detail the nature of the searches conducted, the results of the searches, and explain why certain records were located subsequent to the initial decision letter being sent to the appellant. In this appeal, with one exception set out below, I am satisfied that the searches conducted by the LAO for responsive records were reasonable.

[73] The appellant's representations regarding the adequacy of the searches raise a number of issues, which I address as follows.

[74] With respect to the appellant's concern that the LAO did not provide a detailed index, I find that the LAO did provide the appellant with a detailed index of the records requested. In its initial five-page decision letter, the LAO reviewed in detail the appellant's lengthy request, and identifies that access is granted to many of the requested records. Attached to the decision letter sent to the appellant is a detailed six-page index of the records, identifying the records to which access is granted, and indicating the portions of five pages of records which were not provided on the basis of the application of section 90(1) of the *LASA*. I am satisfied that the LAO did provide the appellant with a sufficiently detailed index in this appeal.

[75] Regarding the appellant's general concerns about the affidavits provided by the LAO, I do not accept the appellant's view that they are "generic," made in bad faith, "deficient upon their face" and have "no credibility". The affidavits clearly set out the information about the nature of the searches conducted and the results of these searches. The affidavits also identify the position and title of the affiants, and their role in conducting the searches. They are sworn by individuals directly involved in the searches for records, and clearly set out the results of those searches.

[76] I have also considered the three specific examples provided by the appellant in support of his view that the affidavits are deficient.

[77] With respect to the appellant's concern that one of the affidavits omits "corresponding affidavits from each of the committee members," and that another affidavit omits certain information, I note that previous orders have confirmed that the issue to be decided is whether the LAO has conducted a reasonable search for the records, and that this depends on a number of factors. Furthermore, Order MO-2143-F confirms that not all individuals involved in a matter need to provide affidavits. The relevant portion of that order reads:

The appellants state that one-third of the individuals named in the request were not contacted. I accept that not every individual listed or mentioned in the appellants' detailed nine-page single-spaced request was contacted in the course of the Board's search for records. However, based on my review of the Board's searches, and particularly given that the affidavits were provided by senior employees (or former employees) at the Board who had direct knowledge of the nature of the records requested, and that numerous other individuals most directly related to the appellants' request were contacted, I find the searches conducted were reasonable.

The appellants take the position that the Board's efforts to search for and locate records held by a number of the individuals who were contacted was inadequate (i.e.: that contact was made by means of a single short telephone call, made by an administrative assistant). As set out above, the issue to be decided is whether the Board has conducted a reasonable search for the records. Whether a search is reasonable depends on a number of factors. In this appeal, I am satisfied that contacting a number of the individuals by telephone and asking relevant questions relating to the search for responsive records was reasonable in the circumstances of this appeal, particularly given the large number of individuals identified by the appellants in their request.

[78] Regarding the other specific examples of information cited by the appellant in support of his view that the affidavits are inadequate (that is - that the affidavits refer to information which might suggest that members at the LAO deviated from policy and procedure and might have subsequently violated a section of the *Act*), these concerns do not directly address the search issue, and I will not review them further in this order.

[79] With respect to the concerns raised by the appellant in exhibits B and C provided by him in September of 2011, that the answers given to him regarding what policies and procedure were relied on by the LAO were inadequate, I find that the general search issues referred to in those exhibits are adequately addressed in the affidavits provided to the appellant in the course of this inquiry.

[80] Lastly, the appellant refers to concerns raised by him in the fall of 2011, and referenced in exhibits D and E, relating to a manual titled the "LAO Area Office Procedures Manual." These exhibits include a series of communications between the LAO and the appellant regarding this manual. It appears that this manual was referenced on the LAO website in 2009, but was not identified as a responsive record in this appeal. A representative of the LAO states as follows in response to the appellant's questions about this manual:

We inquired and were advised that the Area Office Procedures Manual is not in use anymore and the reference to it in the Area Office Policy Manual is to be removed.

It was a manual in use prior to 2005 as it refers to our previous computer system which has not been used to take applications since 2005.

[81] The appellant takes the position that this response by the LAO is false. He asserts that the LAO ought to provide documentation evidencing the decision to remove the procedures manual, and that such a decision would require committee decisions and supporting documentation. He also acknowledges that this request for supporting

documents would constitute a new request for records under the *Act*. It is not necessary for me to address these issues in the context of this appeal.

[82] I note, however, that the multi-part request resulting in this appeal was broadly worded and included requests for records dating back to 2001 and 2002. Many of the requests included the additional phrase: "This request includes all related ... manuals and guidelines produced by LAO" In my view, a responsive manual which was in use prior to 2005 would be captured by the scope of the request, and it is not clear to me from the material provided by the LAO that a search for this prior manual was conducted. In the circumstances, I will require the LAO to conduct a search for this specific manual and provide the appellant with a decision on access to this manual.

ORDER:

1. I uphold the LAO's decision to deny access to the withheld portions of records.
2. I order the LAO to conduct a search for the "LAO Area Office Procedures Manual" referred to above, and to provide the appellant with a decision letter relating to that record in accordance with the provisions of the *Act*, considering the date of this order as the date of the request.
3. With regard to the other matters raised in this appeal, I find that the LAO has conducted a reasonable search for records responsive to the request.

Original Signed by: _____
Frank DeVries
Adjudicator

September 28, 2012 _____