

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER PO-3411

Appeal PA13-535

Ministry of the Attorney General

October 15, 2014

**Summary:** The appellant sought access to records which address the reasons behind the placement of the Freedom of Information Coordinator position on its organizational chart. The ministry attempted to respond to the request with clarification of the manner in which it has organized its various divisions, including that governing the Freedom of Information functions. The appellant appealed this decision, arguing that the ministry had not identified records responsive to his request. In this order, the adjudicator finds that the appellant did not clearly state the basis for his belief that additional records ought to exist and that the appellant premised his position on an unwarranted assumption that records ought to have been created with each change in government since 1988. As a result, the ministry's decision that no responsive records exist is upheld and the appeal is dismissed.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 21(1) and (2); *Ministry of the Attorney General Act*, R.S.O. 1990, m.17, section 5; *Management Board of Cabinet Act*, R.S.O. 1990, m.1, section 3; and the *Legislation Act, 2006*, section 79.

### OVERVIEW:

[1] The Ministry of the Attorney General (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) which read as follows:

The record of the opinion and its foundation founding the decision to place "Coordinator Freedom of Information" where it is positioned in its

relation to the administrative hierarchy in the Ministry of Attorney General's organization chart as shown at [a specified website operated by the ministry].

[2] The ministry issued a decision to the requester advising that no responsive records exist. The ministry went on to state that:

The *Freedom of Information and Protection of Privacy Act* came into force in 1988. The *FIPPA* Coordinators deal with [Freedom of Information] requests made to the respective Provincial Ministries.

You may wish to check the following website regarding administration of the *Act*:

[a specified website operated by the Ministry of Government Services].

[3] The requester (now the appellant) filed an appeal of the ministry's decision.

[4] During the mediation stage of the appeal process, the appellant provided some clarification regarding his access request and the types of records that he was seeking, and this information was relayed to the ministry by the mediator. The ministry agreed to conduct a second search for records responsive to the clarified request and issued a supplementary decision to the appellant, advising the following:

Please be advised that the Ministry has reviewed your request again. We understand that you are seeking records supporting the Ministry's decision to place the FOI Coordinator's position where it is in the organizational chart on the Ministry's website. We also understand from the Mediator at the IPC that according to you, it appears on the organizational chart, that the position of the FOI Coordinator is placed low on the chart and it appears to have lesser importance in comparison to other roles.

We wish to clarify that the Ministry of the Attorney General is organizationally split into 11 divisions. The *FIPPA* office falls under the Assistant Deputy Attorney General CAO of the Corporate Services Management Division (CSMD). There are 8 Branches under the CSMD and Heads of all the 8 branches (including the *FIPPA* office) report directly to the ADAG & CAO and are all at the same level. Due to lack of space, the chart is prepared vertically, however, had these positions been placed in a horizontal chart, all Heads of the 8 branches would be shown as directly reporting to the CSMD – ADAG & CAO, who directly reports to the Deputy Attorney General.

As explained in our decision letter dated November 18, 2013, the *Freedom of Information and Protection of Privacy Act* came into force in 1988. The *FIPPA* Coordinators positions also came into effect at that time. Please note, records related to the creation and documentation of job positions and classifications have a retention period of 11 years + current. Since the *FIPPA* Coordinator's position has been in force since 1988, records with respect to the creation of this position would now fall beyond the retention period, and would have been destroyed.

[5] The appellant was not satisfied with the ministry's supplementary decision and maintained his position that records responsive to his request should exist. Because no further mediation was possible, the file was moved to the adjudication stage of the appeal process. I sought and received representations from the appellant, initially. Because of the manner in which I will determine the issue in this appeal, it was not necessary for me to seek the ministry's representations. The sole issue for me to determine in this appeal is whether the ministry met its obligations to reformulate and properly respond to the appellant's request, as framed, within the meaning of section 24(2) of the *Act*.

[6] In this order, I find that the ministry made sufficient efforts to offer assistance to the appellant in reformulating his request under section 24(2) and that it has adequately addressed the appellant's request for information, as it was framed and clarified during the processing of the appeal. Accordingly, I dismiss the appeal.

## **DISCUSSION:**

### **The appellant's position**

[7] The appellant made lengthy representations which are often difficult to follow and comprehend. I have carefully reviewed his submissions and have summarized them in the following way. Essentially, the appellant argues in favour of a finding that the ministry has not conducted an adequate search for, nor has it identified, the records that are responsive to his request and that it has misinterpreted the thrust of the request.

[8] The appellant begins his submissions with a review of the request, the decisions and a detailed discussion of the delegation of the powers of the head under the *Act*, in this case the Attorney General, to the "Coordinator Freedom of Information". The appellant argues that the ministry failed to conduct a reasonable search for records responsive to his request and goes on to refer to the principles governing the requirements of a "reasonable search" which have been established in earlier decisions of this office.

[9] When asked in the Notice of Inquiry for the basis of his belief that records responsive to his request ought to exist, the appellant provides a lengthy review of what he describes as the "concept of the finality of the initial 1988 decision" to create a Freedom of Information Coordinator position at the time that the *Act* came into force.

[10] The appellant then submits that the decision to create the Coordinator's position and the decision respecting where to place that position in the hierarchy of the ministry ought to have been revisited each time a new Attorney General took office, either as a result of a Cabinet shuffle or an election. He suggests that each time this process was undertaken, the ministry ought to have documented the decision-making process with records that are responsive to the request. He submits that the *Ministry of the Attorney General Act*, the *Management Board of Cabinet Act* and the *Legislation Act, 2006* mandate that this be done.

[11] The appellant follows this submission with a very lengthy discussion of the principles of finality, estoppel and *res judicata*. He appears to suggest that the decision by the ministry on the placement of the Coordinator's position on the organizational chart was a judicial decision and that it falls within its legislative mandate. Moreover, the appellant takes the position that the ministry is obliged to revisit all of its administrative decisions, including that with respect to the placement of the Coordinator's position with each change of Attorney General. He suggests that by failing to do so, the ministry has been "fettered by issue estoppel". On this basis, the appellant argues that the ministry ought to revisit its decision whenever a new Attorney General takes office.

[12] The appellant argues that since there have been 6 provincial elections since 1988, there have been "6 decisions over the subject of my request as written." He also responds to the ministry's position that any records responsive to the 1988 decision pertaining to the placement of the Coordinator's position have been purged in accordance with the ministry's records retention policy, as follows:

Finally, regarding [the Coordinator's] unreasonable claim of a retention period for records responsive to my request: it does not comply with the law on the subject of the A-G's administrative discretion as a decision maker on the subject.

### **Analysis and findings**

[13] Section 24(1) and (2) of the *Act* set out the access procedure to be followed by a requester seeking access to records under the *Act*. These sections state:

(1) A person seeking access to a record shall,

- (a) make a request in writing to the institution that the person believes has custody or control of the record;
- (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record; and
- (c) at the time of making the request, pay the fee prescribed by the regulations for that purpose.

...

- (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[14] The appellant indicates that the ministry has failed to adequately respond to his request and has failed to locate and render a decision on access to the records he is seeking. The appellant argues in favour of the existence of additional records responsive to his request beyond those discussed in the ministry's decisions. I have reviewed the request, as originally framed, as well as the "clarification" provided by the appellant to the mediator. In my view, the appellant has failed to provide the ministry with "sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record" which might be responsive to his request, as framed and clarified with the mediator and ministry.

[15] I find that the appellant's argument is premised on the notion that whenever a new Attorney General takes office, particularly after an election where there is a change in government, an entirely new set of decisions about administrative issues, such as the positioning of the FOI Coordinator position within the ministry, is made and documented. It is on that basis that the appellant believes that additional records would have been created on each occasion when a new administration took office following a provincial election. The appellant did not, however, provide me or the ministry with any evidence to support his argument that this decision-making process was undertaken with each change of government or that one was legally necessary, beyond his own conjecture.

[16] The appellant also relies upon sections 26 and 62(1) of the *Act* which describe the requirements of a response from an institution to a request under the *Act* and the process whereby a head may delegate a power under the *Act*; section 5 of the *Ministry of the Attorney General Act*,<sup>1</sup> which sets out the powers of the Attorney General;

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<sup>1</sup> R.S.O. 1990, m.17.

section 3 of the *Management Board of Cabinet Act*,<sup>2</sup> which describes the powers of Management Board of Cabinet; and section 79 of the *Legislation Act, 2006* which describes the exercise of legislative powers. The appellant has not provided me with sufficiently persuasive representations that would assist me in understanding how these provisions have any bearing on the issues before me. Based on my review of these provisions and the appellant's representations, I find that they are not relevant to the issues in this appeal.

[17] In the ministry's decision and its subsequent clarification of January 28, 2014, I find that it attempted to respond to the questions raised by the appellant in his request and following discussion with the IPC's Mediator. I further find that in its January 28, 2014 letter, the ministry offered assistance to the appellant in reformulating the request as contemplated by section 24(2). In my view the wording of the request, even following clarification during mediation, was ambiguous and did not "provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record", as required by section 24(1)(b) of the *Act*. I find that the ministry met its obligations to the appellant under section 24(2) to attempt to clarify and reformulate the request and that its January 28, 2014 explanatory letter was a reasonable effort to respond to the request, as it then understood it.

[18] I find that the appellant has not demonstrated a reasonable basis for his belief that further records exist pertaining to the administrative decisions made by the ministry after 1988 regarding the positioning of the office of the FOI Coordinator in its hierarchy. The appellant posits that records about this decision making process ought to exist, but has provided no evidence to substantiate his belief that this is in fact what transpired following provincial elections that have resulted in a change of government or a change in Attorneys General since 1988. While I accept that the ministry can at any time decide to revisit its decision-making around the placement of the FOI Coordinator's position within its administrative structure, I have been provided with no evidence to indicate that it has ever done so. On the contrary, I accept the explanation provided by the ministry to the appellant in its January 28, 2014 letter respecting the placement of this office with the ministry.

[19] It is on this basis that I dismiss the appeal and uphold the ministry's decision respecting the search which it has undertaken for responsive records.

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<sup>2</sup> R.S.O. 1990, m.1.

**ORDER:**

I dismiss the appeal.

Original Signed By:  
Donald Hale  
Adjudicator

October 15, 2014