



**Information and Privacy  
Commissioner/Ontario**

**Commissaire à l'information  
et à la protection de la vie privée/Ontario**

# **ORDER PO-2431**

**Appeal PA-040227-1**

**Ministry of Health and Long-Term Care**



Tribunal Services Department  
2 Bloor Street East  
Suite 1400  
Toronto, Ontario  
Canada M4W 1A8

Services de tribunal administratif  
2, rue Bloor Est  
Bureau 1400  
Toronto (Ontario)  
Canada M4W 1A8

Tel: 416-326-3333  
1-800-387-0073  
Fax/Téloc: 416-325-9188  
TTY: 416-325-7539  
<http://www.ipc.on.ca>

## **NATURE OF THE APPEAL:**

The Ministry of Health and Long-Term Care (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the Act) for “access to the record or records showing the Ministry’s policy on retention and non-retention schedules.”

The Ministry transferred the request to the Archives of Ontario, Management Board Secretariat (Archives) on the basis that Archives has custody and control. Archives advised the Ministry that the requester had not provided sufficient detail to conduct a search for the records. As a result, the Ministry wrote to the requester asking him to provide more specific information.

The requester submitted a clarification of his request to the Ministry in which he advised that his request arises out of two earlier requests for retention schedules.

The requester (now the appellant) filed an appeal on the basis that the Ministry did not respond to his request.

In his letter of appeal, the appellant stated that the Ministry has not complied with Order PO-2213 [from appeal PA-020278-2] to provide him with the requested retention schedules, and that the Ministry had provided him with a retention schedule that is not responsive to his request in appeal PA-040155-1.

The mediator informed the appellant that the current appeal concerns his request for the Ministry’s policy on retention schedules and that his concerns regarding his previous requests for retention schedules will not be dealt with in this appeal.

With respect to his request for the Ministry’s policy or policies on retention schedules, the appellant agreed to narrow it as follows:

I wish to obtain access to the record or records showing the Ministry’s policy for retention schedules that pertain to my previous requests A-2002-00121 and A-2002-00444.

The mediator advised the Ministry that the appellant had narrowed his request and asked the Ministry to conduct a search for the responsive record or records. The Ministry located one record responsive to the request entitled “Management of Recorded Information Directive” dated June 1992. The Ministry asked Archives to transfer the request back to the Ministry and issued a decision granting access to this record.

The appellant advised the mediator that he is appealing the Ministry’s decision because he believes that further policy guidelines exist on retention schedules in the Operational Support Branch and Provider Services Branch. At the mediator’s request the Ministry provided a sworn affidavit to the appellant stating that the “Management of Recorded Information Directive” dated June 1992 “contains the only policy guidelines regarding retention schedules that the Ministry follows in developing **all** of its retention schedules [emphasis added].”

The appellant advised the mediator that he still believes the Ministry has further policy guidelines and the file was moved to adjudication.

I initially sent a Notice of Inquiry to the Ministry. The Ministry provided representations. A complete copy of the Ministry's representations was provided to the appellant along with a Notice of Inquiry. The appellant also provided representations which were then shared with the Ministry. The Ministry provided representations in reply. The appellant was then given a final opportunity to make representations on sur-reply and did so.

## **DISCUSSION:**

### **REASONABLE SEARCH**

#### **General principles**

Where an appellant claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 24 [Orders P-85, P-221, PO-1954-I]. If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [Order P-624].

Although an appellant will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.

#### **Representations**

The Ministry was asked to respond to a number of questions regarding the actions they took to respond to the request. In the following discussion I set out the relevant representations provided by the Ministry and the information provided in the affidavits given to the appellant during mediation.

- 3. Please provide details of any searches carried out including by whom were they conducted, what places were searched, who was contacted in the course of the search, what types of files were search and finally, what were the results of the searches. I would ask that you include details of any searches carried out to respond to the appellant's access request.**

During the mediation, on December 17, 2004, an experienced employee of the Ministry provided a sworn affidavit, stating that the Management of Recorded Information Directive dated June 1992 "contains *the only* policy guidelines

regarding retention schedules that the Ministry follows in developing all of its retention schedules". (emphasis added)

- 4. Is it possible that such records existed but no longer exist? If so please provide details of when such records were destroyed including information about record maintenance policies and practices such as evidence of retention schedules.**

The Records Retention Officer at Provider Services Branch has advised that except for physician registry documents, the majority of retention schedules only cover a ten-year period.

### CONCLUSION

The Ministry of Health and Long-Term Care respectfully submits that it has produced strong evidence in meeting the requirements of section 24 and has made **reasonable** efforts to locate and identify the records responsive to the appellant's request. The institution has conducted three separate searches for responsive records.... (emphasis in original)

And the following information was provided in the affidavits. The first affidavit is from the Acting Team Lead of the Access and Privacy Office of the Ministry and states:

1. I am a Team Lead (Acting) of the Access and Privacy Office of the Ministry and, as such, have knowledge of the matters set forth.
2. The Access and Privacy Office of the Ministry received a narrowed request from the requester through the Information and Privacy Commissioner's Office seeking access to the Ministry's policy of retention schedules that pertain to two other previous requests: [Request numbers].
3. The Access and Privacy Office forwarded the narrowed request on the Ministry's policy of retention schedules to the Supply and Financial Services Branch of the Ministry.

The second affidavit was provided by a Records Analyst at the Supply and Financial Services Branch of the Ministry and states the following:

1. I am a Records Analyst in the Supply and Financial Services Branch of the Ministry and, as such, have knowledge of the matters set forth.
2. An access to information request made pursuant to the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990 C. F. 31 was

received by the Supply and Financial Services Branch of the Ministry on June 2, 2004 for the record or records showing the Ministry's policy on retention and non-retention of records.

3. The document entitled "Management of Recorded Information Directive" which is a Directive prepared by Management Board Secretariat dated June 1992 contains the only policy guidelines regarding retention schedules that the Ministry follows in developing all of its retention schedules.

In response to the Ministry's representations the appellant provided a list of questions. The Ministry responded to these questions in their reply representations. In the following, I quote both the appellant's question and the Ministry's response.

1. The Management of Recorded Information, June 1992, which the Ministry disclosed, is a highly general document. It is a directive to develop policies (page 8, Deputy Heads, second bullet). There is nothing in it that would turn it, by itself into a Ministry policy. There must have been some action by the Deputy Head when it was received. Even if there was only a one-line memo directing staff attention to the document, that might be a Ministry policy document.

### **Response**

The Management of Recorded Information Directive dated June 1992 contains the only policy guidelines regarding retention schedules that the Ministry follows in developing all of its retention schedules. The Ministry did not find any other records directing staff on how to use these guidelines.

2. The narrowed request is for the policy for retention schedules that pertain to Ministry files [specified file and appeal numbers].

In the first of these files, the Ministry says that financial information, amounts paid for CMPA subsidies from 1988 to 2000, does not exist and cites retention schedules. The Ministry's submissions, Paragraph 4, says, "The majority of retention schedules only cover a ten-year period." On a ten-year basis the information would be available at least as far back as 1995, or 1992 since the request was made in 2002. If the information was destroyed sooner, one would expect there to be a policy for doing so. No applicable retention schedule has been provided.

### **Response**

The Ministry's response is that no records pertaining to the CMPA subsidies from 1992 to 2000 were found. There was no policy statement found pertaining to the destruction of the records relating to CMPA subsidies from 1992 to 2000.

3. In [specified appeal number], the other file, the Ministry provided retention schedule 095-R, dated in June 1988. This was before the Management of Recorded Information Directive, which is dated June 1992. There was therefore a Ministry policy in effect before 1992. It seems still to be in effect, since the Schedule is still being used.

### **Response**

The Management of Recorded Information Directive from 1988 would have been superceded by the 1992 policy and it is therefore no longer available. Management Board Secretariat (Archives) sets the policy for records management as the Ministry previously stated.

After reviewing the Ministry's responses the appellant provided a number of comments. The two main comments from the appellant appear to be that perhaps there is an unwritten policy regarding record retention which he should have requested and secondly, he feels that the records exist in regard to his two prior appeals and that the "right persons would find them if asked".

### **Finding**

I accept that the Ministry's search for responsive records was reasonable in the circumstances of this appeal. As stated above, the appellant was asked to clarify his request and based on the clarified request; the Ministry undertook a search for the responsive record. The Ministry has provided the appellant with sworn affidavits from knowledgeable employees who undertook the search. The affidavits speak to the Ministry's efforts to identify and locate responsive records.

The appellant's arguments that other policies "should exist" and that perhaps an "unwritten policy" may exist do not provide a conclusive basis for deciding the issue in *this* appeal, *i.e.* whether the Ministry's search for records was reasonable. In the circumstances of this case, the *Act* provides no avenue for me to rule that a specific policy regarding retention schedules as per the "Management of Recorded Information" directive "should" exist, or to impose further obligations on the Ministry in that regard.

It has been established in a number of previous orders that section 24 of the *Act* does not, as a rule, oblige an institution to create a record where one does not currently exist. In Order 99, former Commissioner Sidney Linden made the following observation with respect to the

obligations of an institution to create a record from existing information which exists in some other form:

While it is generally correct that institutions are not obliged to "create" a record in response to a request, and a requester's right under the *Act* is to information contained in a record existing at the time of his request, in my view the creation of a record in some circumstances is not only consistent with the spirit of the *Act*, it also enhances one of the major purposes of the *Act* i.e., to provide a right of access to information under the control of institutions.

In my view, the situation in this case is not akin to that contemplated in Order 99. The directive regarding record retention policies does not exist for the purpose of ensuring the availability of responsive records in the event of an access request, but rather, for general administrative purposes. If no such record exists then it is not up to the Ministry to create one to satisfy the appellant's request. I wish to emphasize that I am in no way commenting on whether the Ministry should have a retention schedule policy. I am simply stating that the Ministry was under no obligation in the current appeal to create a record responsive to the appellant's request.

The appellant also keeps referring to his past appeals with the Ministry and this office and the fact that records should exist which are responsive to those requests. His request for a retention schedule policy, the subject of this appeal, appears to be a way of commenting on the searches undertaken in these prior appeals. Again, I am not going to comment on the searches undertaken in those appeals and whether a retention schedule policy would have aided in the location of records responsive to those appeals.

In this appeal, I find that the Ministry's search for responsive records was reasonable and the Ministry has fulfilled its obligations under the *Act*.

**ORDER:**

The Ministry's search for the record was reasonable and I dismiss this appeal.

Original signed by: \_\_\_\_\_  
Stephanie Haly  
Adjudicator

\_\_\_\_\_  
November 29, 2005