



Information and Privacy
Commissioner/Ontario

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REPORT INTO CONTENTIOUS ISSUES MANAGEMENT IN THE MINISTRY OF FINANCE

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BACKGROUND

During the week of May 9, 2011, a number of questions were posed during Question Period in the Legislative Assembly dealing with the manner in which requests for access to information made pursuant to the *Freedom of Information and Protection of Privacy Act* (the *Act*), were being processed. The issues raised by these questions form the basis of this report.

On Monday, May 9, 2011, a member of the New Democratic Party questioned the appropriateness of the government having a process that flagged certain freedom of information (FOI) requests as “contentious access requests.” In particular, the member took exception to requests being labelled as “contentious” based on the identity of the requester, as for example, where the request was made by the media or a political party.

The following day, the Leader of the New Democratic Party asked a question regarding the handling of an FOI request submitted by a media outlet for an audit report of the Niagara Parks Commission. The question alleged that the Legislative Assistant to the Minister of Finance (the Minister) had made an attempt to interfere with the FOI process. In support of the allegation, the Leader introduced copies of emails that were exchanged between the FOI Office at the Ministry of Finance (the Ministry) and the Legislative Assistant.

The emails indicated that in November of 2009, a member of the media made a request under the *Act* for access to the final audit report of the Niagara Parks Commission. More specifically, the request was for “the final audit report on the Niagara Parks Commission by the Ontario Internal Audit Division in 2009.” After receiving the request and conducting a search for records, the Ministry’s FOI Office sent an email on November 13, 2009 at 2:07 p.m. to six individuals, including the Legislative Assistant. Two other individuals, including a staff member in the Minister’s Office and a Ministry staff person, were copied on the email. The email had the subject heading “**Contentious Access Request - G-09-0107-02 - group update.**” In this email, the FOI Office described the requester as a member of the media, set out the nature of the request, and indicated that the request was being transferred to the Ministry of Tourism (Tourism), because Tourism had a greater interest in the record.

The Legislative Assistant responded to this email at 2:11 p.m. that same day by stating:

no. please just say no records exist.

In her question to the Premier (which was referred to the Minister of Finance for response), the Leader of the New Democratic Party took the position that the Legislative Assistant’s email was an attempt to influence the response being provided by the Ministry; that is, by directing the FOI staff to tell the requester that no record existed even though Ministry staff were aware that the report was in the possession of Tourism. In response to these questions, the Minister denied that any political influence had been brought to bear and pointed out that, in fact, the request was transferred by the Ministry, to Tourism, and the report was released to the requester.

During Question Period on Wednesday, May 11, 2011, the Leader of the New Democratic Party raised a second allegation of interference in the FOI process by the same Legislative Assistant. This related to an FOI request submitted by the New Democratic Party in 2010 for information relating to the government's harmonized sales tax (HST) program. Specifically, the request was for "all briefing notes or e-mail communication regarding the decision to use the term "Single Sales Tax" instead of "Harmonized Sales Tax." In her question, the Leader indicated that on January 19, 2010, the FOI office sent an email to the Minister's political staff recommending that two documents responsive to the request be disclosed the following day – January 20, 2010. However, according to the Leader, due to the intervention of the Minister's Legislative Assistant, the records were not released until May, 2010.

The email in question had a similar subject line to the email in the earlier incident - "**G-09-0068-02-Contentious Access Request – group update**" and it was sent to a group comprised of similar individuals, including the Legislative Assistant. As noted, the January 19, 2010 email recommended that two responsive records be released the following day. However, on the same day, the Legislative Assistant sent an email to the FOI office in response, which stated:

Please phone me. Before this.

The Leader alleged that as a result of this email, the response to the access request was delayed four months. In the Legislature, the Minister denied that there had been any inappropriate political influence, and noted that the records responsive to the request had been released.

I was concerned when informed of the questions posed to the government on Tuesday, May 10th, relating to the first incident. My office has always maintained that, while it may be appropriate for political staff to be made aware of the nature of FOI requests, and the responses to them, any political interference in the FOI process is unacceptable. On the face of it, the email referred to in the Legislative Assembly dated November 13, 2009 appeared to show an attempt to do just that.

As a result, I asked my Assistant Commissioner (Access) to immediately pursue this incident. Similarly, when informed that a second incident had been raised in Question Period on May 11th, I requested that this be added to the scope of our inquiries. The Assistant Commissioner (Access) immediately contacted staff in the Minister's Office and the Ministry FOI Office to schedule interviews.

Subsequently, on May 13, 2011, I received a letter from Mr. Peter Kormos, an M.P.P. representing the New Democratic Party. The letter set out the details of the two incidents outlined above and included copies of the relevant emails. The letter concluded by saying that serious questions had been raised about the role of political staff in the FOI process and asked my office to investigate. I note that my staff had already commenced their inquiries with Ministry staff prior to the receipt of this letter.

ISSUES AND DISCUSSION

In my view, the questions asked of the Minister, and the emails referred to in the May 13th letter, raise three issues:

1. Is it appropriate for ministries of the government to have a “contentious issues management” process as part of their FOI response process?
2. Was there an attempt by political staff to inappropriately influence the handling of request G-09-0107-02 by the Ministry of Finance?
3. Did political influence play a role in delaying the Ministry’s response to request G-09-0068-02?

1. Is it appropriate for ministries of the government to have a “contentious issues management” process as part of their FOI response process?

During the interview of the Minister’s Chief of Staff and the Legislative Assistant, the following background information was provided.

At the material time, the Legislative Assistant had a range of responsibilities, including responsibility for FOI matters within the Minister’s Office. Although he was subsequently appointed to his current position of Press Secretary, for ease of reference, I will continue to refer to him throughout this report as the Legislative Assistant.

The Legislative Assistant was, and continues to be, a member of the Minister’s political staff. The Minister’s Chief of Staff is also a part of the Minister’s political staff and, therefore, neither of these employees are members of the public service.

As the access to information requests at issue here were referred to in the subject lines of the relevant emails as “contentious” FOI requests, both individuals were asked the significance of this designation. They stated that the identification of an FOI request as a “contentious access request” occurred within the FOI Office, at the time the request was received. The contentious issues management process in place at that time, and which continues today, requires FOI requests that may result in a question being put to the Minister, for example, by the media or by the opposition in Question Period, to be identified as “contentious access requests” by the FOI staff.

Once a request is identified as contentious, the FOI Office is instructed to keep the Minister’s Office and selected ministry staff (the contentious issues management group) informed of the status of the request by sending a “heads up” email, providing notice, if and when appropriate. For example, once the fee for the records is paid by the requester or a decision has been made to deny access, an email is sent to the contentious issues management group, including the Minister’s Office, with an attached briefing note. The purpose of the “contentious access

request” email is to ensure that the Minister is prepared for questions that he or she may receive from the media or from the opposition in the Legislative Assembly, rather than to provide political staff with an opportunity to influence the manner in which the request should be handled.

The Chief of Staff and the Legislative Assistant stated that the identification of an FOI request as a “contentious access request” would not result in a delay in the processing of the access request, nor would it change the manner in which the process unfolded within the Ministry. It was their understanding that the identification of a request as “contentious” was not implemented nor used to give the Minister’s Office an opportunity to exert political influence on the FOI process. They also stated that they were not aware of any circumstance where this had happened.

As previously stated, my staff also met with the FOI staff of the Ministry, including the Assistant Deputy Minister, Corporate & Quality Service Division, the Director, Business Services Division and the Coordinator and Assistant Coordinator of the Freedom of Information and Protection of Privacy Office. During that interview, the following information was provided.

The FOI Coordinator stated that the decision to label an access request as “contentious” is based on a number of criteria. It is used when a request is made by a member of the media, or when a request relates to information that would necessitate the preparation of a briefing note for the Minister or Deputy Minister. It is used to bring senior officials of the Ministry “into the loop” and is intended to operate as a “heads up.” Such a designation will also generate the preparation of additional briefing material for staff within the Minister’s Office once an access decision has been made.

The FOI Coordinator’s description of the contentious access request process was consistent with that of the Legislative Assistant. She also stated that, in her view, it was not used as a way to inject political influence into the FOI decision-making process, nor was it used as a way of delaying responses to FOI requests for political reasons.

Discussion

This office has previously addressed the problems that may be created by a contentious issues management process when processing FOI requests. Our position has consistently been that a system designed to give ministers and senior officials a “heads up” about the disclosure of potentially controversial records is acceptable. These processes or systems are designed to ensure the timely notice and communication of relevant details of the request and the related records, in order to assist the Minister or senior officials when responding to questions in the Legislative Assembly or from the media or members of the public.

However, we have also consistently taken the position that any such system must not interfere with the statutory timeframe for responding to FOI requests, and the appropriate processing of such requests.

This issue was raised in my 2000 Annual Report, where I said the following:

We recognize that the Ontario Cabinet Office's contentious issues management process was designed so as to not interfere with the administration of access requests within the time limits specified in the *Act*. It is intended to be a "heads-up" process, not a "sign-off" process...It is not acceptable for disclosure of records to be delayed past the statutory response date in order to accommodate an issues management priority.

This issue was revisited in my Annual Reports for 2003 and 2004. The latter report contained the following observation:

It is our understanding that the Ontario government still has a process in place to give ministers a "heads up" about the disclosure of potentially controversial records under FOI, which, on its own, is not a problem... Although we do not have any further recommendations in this area, we urge the government to continue to be vigilant about ensuring that politically driven processes do not interfere with the public's right to access government-held records.

As these Annual Reports indicate, the existence of a contentious issues management process for FOI requests need not be problematic, as long as the process does not delay the nature and timeliness of the response, and is not designed for, or used by, political staff to influence the FOI process. Similarly, labelling the source of a particular FOI request as being the "media" or "opposition party" is acceptable as long as such labelling does not result in the request receiving a different response.

As a result, I am satisfied that the existence of a contentious issues management process, absent evidence of "politically driven influences," is not inconsistent with the government's responsibilities under the *Act*.

2. Was there an attempt by political staff to inappropriately influence the handling of request G-09-0107-02 by the Ministry of Finance?

The Ministry's FOI Office provided the following background information relating to request G-09-0107-02. As noted above, the request in this case was for access to the final audit report of the Niagara Parks Commission. While the Ministry provides audit functions to other government ministries, once an audit is completed, the final audit report is sent to the ministry whose program was the subject of the audit. The final audit report on the Niagara Parks Commission would have been sent to Tourism as the responsible ministry.

As a result, it is the view of the Ministry that those ministries which are the subject of an audit have a greater interest than the Ministry in the final audit report. It follows that FOI requests for audit reports are routinely forwarded to the subject ministry, and decisions regarding access are made by that ministry. I find this a reasonable practice to follow and one that is consistent with the *Act*.

As noted above, after receiving the access request for the final audit report, the FOI Office sent a contentious access request email to the contentious issues management group, which stated that the request would be transferred to Tourism as it had a greater interest in the responsive records. The Legislative Assistant responded to the FOI Office with an email asking FOI staff to respond that “no records exist.”

The Legislative Assistant stated that at the time that he sent the email of November 13, 2009, to the FOI Office, he was not fully familiar with the Ministry’s responsibilities under the *Act*. In particular, he was not aware that section 25 of the *Act* created an obligation to transfer a request to the institution which had custody or control of, or a greater interest in, the requested records. It was his understanding that the Ministry did not have the responsive record in its custody or control. Consequently, rather than transfer the request to Tourism, he was suggesting that the Ministry simply respond to the request by saying that it did not have the record. He had no reason to believe that responding in this manner would be inappropriate and contrary to the *Act*.

He also stated that he received a phone call from the Ministry’s FOI Office immediately following the delivery of his email. Although he could not remember the identity of the individual to whom he spoke, he recalled that the FOI Office explained to him that the *Act* required the Ministry to forward the FOI request to Tourism, as that ministry had the record. He was advised that the FOI Office could not respond to the requester by telling him that “no records exist.” The FOI Office also explained to him that there was a time limit for responding to the request and, therefore, it should be forwarded to Tourism immediately as proposed in the initial email. The Legislative Assistant’s version of events was corroborated by an email that was subsequently sent by the FOI Coordinator, which is discussed in more detail below.

The Legislative Assistant stated that, once the obligations under the *Act* were explained to him, he accepted the explanation and understood that the FOI Office would be forwarding the request to Tourism, as required by the *Act*.

The FOI staff confirmed the Legislative Assistant’s version of events as set out above. Initially, they could not recall who spoke to the Legislative Assistant following the delivery of his email which stated “just say no records exist.” However, the FOI Coordinator was subsequently able to confirm, by reviewing the relevant file, that she had contacted the Legislative Assistant shortly after receipt of his email and had explained the Ministry’s obligations under the *Act*. In particular, the FOI Coordinator stated that she told the Legislative Assistant that the *Act* required the Ministry to advise the requester which institution had the greater interest in the requested record and to transfer the request to that institution.

As far as the FOI Coordinator was able to recall, the Legislative Assistant indicated that, in view of the obligations under the *Act*, the FOI Office should proceed as originally advised and should transfer the request to Tourism. She also confirmed that the request was transferred to Tourism that same day, as originally planned.

During the interview with my staff, the FOI staff undertook to search for any emails or other correspondence sent in response to the Legislative Assistant’s email. Subsequently, the FOI Coordinator provided my office with a copy of an email dated November 13, 2009. The e-mail

was sent as a “reply all” to the contentious issues management group at 2:14 pm by the FOI Coordinator. That email stated:

I’ve discussed this with [the Legislative Assistant]. We are proceeding as per [FOI staff’s] update.

In other words, three minutes after receiving the email from the Legislative Assistant saying “no, please just say no records exist,” it is evident that the FOI Coordinator had had a conversation with the Legislative Assistant, clarified the Ministry’s responsibilities, and conveyed this understanding to the recipients in the contentious issues management group.

On May 16, 2011, I met personally with the Minister of Finance to discuss this incident. The Minister expressed his concern with the perception created by the email sent by the Legislative Assistant and assured me that there had been no political interference. He also provided me with his personal assurances that he and his staff were committed to respecting not only the letter of the *Act*, but the spirit of transparency and accountability underpinning freedom of information legislation.

Discussion

Section 25 of the *Act* provides important context when considering the responsibilities of the Ministry when dealing with request G-09-0107-02, which gave rise to this incident. That section states, in part:

25. (1) Where an institution receives a request for access to a record that the institution does not have in its custody or under its control, the head shall make all necessary inquiries to determine whether another institution has custody or control of the record, and where the head determines that another institution has custody or control of the record, the head shall within fifteen days after the request is received,
 - (a) forward the request to the other institution; and
 - (b) give written notice to the person who made the request that it has been forwarded to the other institution.
- (2) Where an institution receives a request for access to a record and the head considers that another institution has a greater interest in the record, the head may transfer the request and, if necessary, the record to the other institution, within fifteen days after the request is received, in which case the head transferring the request shall give written notice of the transfer to the person who made the request.

The duty to transfer the request for the final audit of the Niagara Parks Commission pursuant to section 25 was properly recognized by Ministry FOI staff. Given that the audit report was in the custody and control of Tourism, the Ministry of Finance, as the recipient of the FOI request, had an obligation to forward the request to Tourism. This course of action was appropriately noted in the contentious access request email sent on November 13, 2009.

Unfortunately, by sending his email in response to that of the FOI staff, the Legislative Assistant demonstrated a significant lack of understanding of the *Act*. However, having reviewed the information provided during the interviews conducted by my staff, and having discussed the matter further in considerable detail with the Minister, I am satisfied that there was no intention on the part of the Legislative Assistant to interfere with the processing of the FOI request. His comment “please just say no records exist” was based on his lack of knowledge of the provisions of the *Act*, and his ignorance of the positive duty on the Ministry to transfer the request to Tourism. He was unaware that the Ministry could not simply respond to the request by saying that no records exist simply because that Ministry did not have custody or control of the audit report.

This version of events is borne out by the interviews, not only with the Legislative Assistant, but with FOI staff. Those interviews indicated that FOI staff quickly called the Legislative Assistant to explain the Ministry’s responsibility to transfer the request to Tourism. It is clear that once this happened, the request was indeed transferred, as initially intended by FOI staff.

Additional verification of this version of events is provided by the subsequent email sent on November 13th by the FOI Coordinator. This demonstrates that, within three minutes of the Legislative Assistant sending his e-mail, a conversation had taken place between the FOI Coordinator and Legislative Assistant, and an understanding was reached that the FOI Office’s original proposed course of action would be followed. This email contradicts the suggestion that the Legislative Assistant was making a genuine attempt to improperly influence the FOI process. If there had been any attempt to interfere with the FOI process, one reasonably would have expected a more protracted series of discussions about the decision to transfer the request.

In my view, while the Legislative Assistant should not have instructed the FOI office to respond to this request in the manner that he did, I am satisfied that he did so because of a lack of awareness of the responsibilities imposed by the *Act*, and not with any intentional disregard for those obligations.

3. **Did political influence play a role in delaying the Ministry’s response to request G-09-0068-02?**

Request G-09-0068-02 was a request filed by the New Democratic Party for access to information relating to the HST. A four month delay in responding to the request was alleged to have occurred as a result of political interference by the Minister’s political staff.

Ministry FOI Staff

Before reviewing the specifics of this request, my staff made some general inquiries about the timeliness of processing FOI requests by the Ministry. It was acknowledged that, on occasion, the Ministry is delayed in responding to access requests. In order to improve their response times, the FOI Office meets regularly with the Deputy Minister's Executive Assistant and the Minister's Legislative Assistant at a weekly meeting to update them on the status of pending FOI requests. This process is used to remind senior officials of the timelines set out in the *Act* and the current status of pending requests. While the Ministry does not always meet the deadlines for responding, staff believe that every possible effort is being made to do so. Most importantly, Ministry staff interviewed by my office were clear in stating that, in their experience, delays in responding to FOI requests were not the result of improper political interference or meddling in the process.

The FOI Office confirmed that access request G-09-0068-02 was received on September 15, 2009. That prompted an email to the relevant program areas asking that a search for responsive records be conducted. On the same day, an email was sent to the contentious issues management group in order to provide them with notice that this request had been received.

Subsequently, there were email exchanges with program area staff regarding the issues of search and fees. It is apparent from reviewing the relevant documentation that initially, the program areas were operating on the assumption that the responsive records would be voluminous, and that an interim decision with a fee for access would be issued.

As there was a possibility that responsive records might have existed in the Minister's Office, staff in that office were also required to conduct a search for responsive records. From a note that appears in the FOI Office file, it is evident that the Minister's Office advised on September 28, 2009, that it had completed its search for responsive records, and confirmed to FOI staff that no records existed in the Minister's Office.

Between the receipt of the request on September 15, 2009 and January 19, 2010, the FOI Office and the program areas were searching for records, obtaining legal advice and generally processing the request.

By January 19, 2010, FOI staff were in a position to issue a decision letter to the requester. Consistent with their usual practice, an email was sent by the FOI Office on January 19, 2010 to the contentious issues management group advising that two responsive records would be disclosed on January 20, 2010.

In response to this email, the Legislative Assistant sent an email dated January 19, 2010 which stated: "*Please phone me. Before this.*" This is the email referred to in the Legislative Assembly on May 18, 2011.

After reviewing the file, the FOI Coordinator recalled having a discussion with the Legislative Assistant minutes following receipt of this email. She made a note of their conversation in the file which stated: "*Direction given to FOI office not to mail out decision letter.*"

The FOI Coordinator recalled that this conversation took place between her and the Legislative Assistant, but could not recall whether the Legislative Assistant had offered any explanation for the “*direction.*” Following this phone conversation, the FOI Coordinator sent an email to the contentious issues management group advising that the status of the request had changed and that it should now be shown as “*pending.*”

The FOI Office staff stated that, as far as they were concerned, there was no expectation that they would take any further action in relation to this request until further direction was received. Since this request was now classified as “*pending,*” their only responsibility was to ensure that it was part of their regular weekly updates of pending contentious issues requests.

Between January 19, 2010 and March 8, 2010, it appears that there was no activity in relation to this request. On March 8, 2010, the file was reactivated in the FOI Office as is evidenced by the Assistant FOI Coordinator’s note to file which stated: “[The Legislative Assistant] directed the FOI Office to mail out decision letter.” As a consequence of receiving this advice, the FOI Office sent another email to the contentious issues management group on March 11, 2010, advising that the decision would be released on March 12, 2010.

The Legislative Assistant responded to the FOI Coordinator by way of an email dated March 11, 2010 which stated: “*Let’s chat.*” While the FOI Coordinator was able to confirm that she had a conversation with the Legislative Assistant, she could not recall the details, except that she had received another “*direction*” not to issue the decision letter.

The fact that this conversation took place is confirmed in an email that was sent by the FOI Coordinator - within 6 minutes of receiving the Legislative Assistant’s “*Let’s chat*” email - to the contentious issues management group which stated: “*As directed by [the Legislative Assistant], this decision will not be mailed out on March 12.*”

FOI staff could not recall whether or not the Legislative Assistant had given a reason for this direction during that phone conversation. As far as they could recall, this was just a “*direction*” from the Legislative Assistant, and no explanation for the “*direction*” had been provided.

Again, no further activity took place on the file for a period of time. On April 13, 2010, the FOI Coordinator sent an email to the Legislative Assistant which stated: “*[P]er your request, attached are the responsive records slated for release for this file.*” The FOI Coordinator could not recall what had prompted her to send this email.

On April 14, 2010, the FOI Coordinator made a note to file in which she set out the details of a discussion that she had that morning with the Legislative Assistant. Her note to file indicates that she received a phone call from the Legislative Assistant in which he questioned whether the two records that had been identified as responsive records were in fact responsive. The note further indicates that the Legislative Assistant would follow up directly with the program area to discuss this matter further. She also noted that the FOI Office would require a revised final recommendation regarding the release of the records and a briefing note in order to draft the revised decision.

The FOI Office stated that it continued to treat the request as pending during this interim period and was waiting for further “direction.”

It appears that a decision was made in this interim time period to sever portions of one of the records on the basis that they were non-responsive to the request, although FOI staff were not involved in that decision.

On May 20, 2010, the Assistant FOI Coordinator stated that she sent another email to the contentious issues management group advising that the two responsive records would be disclosed the next day. The Assistant FOI Coordinator states that she would have been instructed by the Acting FOI Coordinator (the FOI Coordinator was away from the office) to send out this email. She also stated that the Acting FOI Coordinator would have advised her how to prepare the records for disclosure, including severing some of the information from one of the records as being non-responsive. The Assistant FOI Coordinator does not recall having any discussions with anyone other than the Acting FOI Coordinator about the decision letter or how the records should be severed.

Consistent with the email of May 20, 2010, the decision letter was issued on May 21, 2010. Attached to the letter were two responsive records, one of which was severed in part on the basis of non-responsiveness.

Minister's Staff

The Legislative Assistant stated that his first involvement with this FOI request was to search the Minister's Office for responsive records as a result of receiving the email sent by the FOI Office on September 15, 2009, and to report back to the FOI Office on the results of that search. As indicated above, the FOI Office's file indicated that he reported back on September 28, 2009.

The Legislative Assistant had no additional involvement in the processing of the request between the date of its receipt and January 19, 2010, when he received the contentious issues management email indicating that two responsive records were to be sent out the following day. The Legislative Assistant could not recall the circumstances that had led him to respond to that email by asking the FOI Coordinator to contact him. He speculated that he might have sent this email because he had questions about the request and the responsive records. He explained that, in general, the Harmonized Sales Tax and Single Sales Tax were complex issues and he needed to be satisfied that the appropriate exemptions, including the cabinet record exemption, were considered, if and where it was appropriate to do so.

He acknowledged that the notation made to file by the FOI Coordinator confirmed that a conversation did take place. Although he also acknowledged that the notation indicated that he had provided “direction” not to release the documents, he would never have intended that his comments be construed in this fashion. He reiterated that he may simply have indicated that he wanted to see the records, or had questions about the records or the decision.

My staff pointed out to the Legislative Assistant that the FOI staff had used the word “direction” on more than one occasion in reference to conversations that they had with him about this request. When asked whether there had been any attempt on his part to set the “direction” on when, and the manner in which, the Ministry should respond to this access request, the Legislative Assistant denied that was the case, and stated that to do so would have been inconsistent with his understanding of the FOI process. He recognized that it was not his role to control or dictate the manner in which the Ministry responded to FOI requests. He explained again that, in this particular case, he may have wanted to refresh his memory regarding the nature of the responsive records, or to ensure that appropriate exemptions had been considered.

In addition, the Legislative Assistant stated that there would have been no political or other inappropriate motive to delay or withhold access to these records since the two records that were ultimately identified as responsive were relatively innocuous and not in the least contentious. He notes that, for the same reason, it is arguable that these records did not even justify receiving a contentious issues designation.

While no action occurred on the file between January 19th and March 8, 2010, and the FOI Office understood that the matter was to be treated as “pending” until the Minister’s Office advised otherwise, the Legislative Assistant stated that he could not recall whether there was any further action required by Ministry staff or the Minister’s Office during this time period.

The Legislative Assistant does not recall having the conversation with the Assistant FOI Coordinator on March 8, 2010 that was referred to in the FOI file note of the same date. He reiterated that the use of the word “*direction*” in the note was not consistent with how he understood the process and his involvement in the process.

He also does not recall the conversation that was referred to by the FOI Coordinator in her email of March 11, 2010 where she stated that another “*direction*” had been given to not mail the decision letter. Nor does he recall having had further conversations with the FOI Coordinator on April 14, 2010, regarding the scope of the request.

In addition, the Legislative Assistant does not recall whether there was any specific discussion in the Minister’s Office regarding this particular request and its status as a pending request. Although he did participate in weekly meetings with the Deputy Minister’s Executive Assistant where updates were provided on all open FOI requests, he does not recall whether this request was mentioned at those meetings.

The only explanation that the Legislative Assistant could offer for the delay was that he became busy with many of his other responsibilities and his failure to report back to the FOI Office was simply an oversight on his part. He noted that at the same time that this request was being processed, he had a number of important competing priorities: for example, he was heavily involved with issues relating to the preparation of the budget. He added that he truly regretted having “dropped the ball” and that this FOI request had been handled in this manner.

Discussion

The provisions of the *Act* again provide important context for considering this question. Section 26 is relevant here and it states:

26. Where a person requests access to a record, the head of the institution to which the request is made or if a request is forwarded or transferred under section 25, the head of the institution to which it is forwarded or transferred, shall, subject to sections 27, 28 and 57, ***within thirty days after the request is received,***

(a) give written notice to the person who made the request as to whether or not access to the record or a part thereof will be given; and

(b) if access is to be given, give the person who made the request access to the record or part thereof, and where necessary for the purpose cause the record to be produced. [emphasis added]

As a result, once the Ministry received the request from the NDP, it had 30 days to provide a response. Unless the Ministry was able to rely on the provisions of the *Act* that allow it to extend this time period, the failure to provide a response within 30 days would place the Ministry in a “deemed refusal” position.

My office has consistently stated that excessive delays defeat the purpose of access to information laws. The need to avoid such delays was first addressed in the report of the Williams Commission, which ultimately led to the passage of the *Act* and later, to its municipal equivalent. As that Commission stated, “Access delayed is access denied.” *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, (Toronto: Queen’s Printer, 1980) at pp. 266-67 and 268 to 273.

I note that my office has established an expedited deemed refusal process when the timelines under the *Act* have been missed. Through this process, my office has a high rate of success in requiring institutions to respond to late FOI requests, without resorting to adjudication. If a timely response cannot be negotiated, my staff can, and will, quickly issue an order requiring the defaulting institution to issue a decision by a set deadline. However, this system requires a requester to file an appeal with my office when an institution has missed the 30-day timeline. I have consistently encouraged all requesters, including the media and political parties, to take advantage of this process to get an expedited response from tardy institutions - I will continue to urge them to do so.

I also note that previous orders of my office have found that where a requester can establish that delays in processing a request are attributable to the contentious issues management process or for any other inappropriate reason, he or she may be entitled to a waiver of the fees associated with the access request (see for example, Order PO-1997).

I now turn to the specific circumstances of this request. First, let me state that the length of time to complete this FOI request is unacceptable. The time taken is even more perplexing upon examination of the record that was subsequently released. To require over nine months to release two innocuous paragraphs cannot be properly explained, nor condoned.

The period from September 15, 2009, when the request was received, to January 19, 2010 when an email was sent by the FOI Office providing notice that the response would be released the following day, involved the processing of the request by the Ministry. For example, Ministry staff were determining the scope of the request, searching for responsive records and consulting with the Ministry's legal department.

However, I am also satisfied that on January 19, 2010, when the telephone conversation took place between the Legislative Assistant and the FOI Office, and direction was given not to release the documents on the following day, responsibility for the delay that followed that conversation lay with the Minister's Office. As indicated during our interviews, the FOI Office understandably believed that it had received clear direction not to proceed with the disclosure, and waited until further direction was received as to how to proceed.

I have no evidence that the response to the request was delayed for "political" reasons – that is, because of the sensitivity of the record or the repercussions that its disclosure might have. In this regard, I accept the statements made by the Legislative Assistant when interviewed namely that, while he may have wanted to review the responsive records prior to release, he was inattentive to the request and allowed it to be lost amidst other priorities, such as budget preparation. This is borne out by my review of the actual document that was disclosed. It appears, for all intents and purposes, to be benign and non-controversial. Having considered all of these circumstances, I am satisfied that no inappropriate political influence was brought to bear upon this request.

However, in my view, the effect of the process that had been put into place contributed to the delays in responding to the request. In this case, it is clear that, as of January 19, 2010, Ministry staff were waiting for direction from the Minister's Office before releasing the decision letter. Although the Minister's Office staff may not have provided that direction due to other distractions and priorities, the fact that this led to a delay in the disclosure of the record was inexcusable. The version of events offered by the Legislative Assistant in response to questions posed by my office amounts to an explanation for the delay, not an acceptable excuse.

In addition, while I acknowledge that political staff may play a legitimate role in the contentious issues management process, the process should not be set up in a manner that allows political staff to have de facto *control* over the timing of the FOI process, which is in fact what happened here. When the Legislative Assistant failed to provide direction regarding the disclosure of the records, the request was allowed to sit in his office - any momentum leading to the completion of the request was lost. Nothing was done by Ministry staff to ensure that the disclosure took place on a timely basis, and understandably so, other than participation in the weekly review of outstanding requests with senior staff. The process allowed the "initiative" or authority for responding to the request to be transferred from Ministry staff to the Minister's Office. This is cause for concern, since it provided political staff with greater control over the processing of the

FOI request than was appropriate, and gave the appearance that political considerations were influencing the timing and nature of the response.

I would therefore strongly urge the Minister to review the FOI process currently in place, particularly the contentious issues management system, to ensure that delays in responding to FOI requests do not result from the inaction of staff in his office.

TRAINING

Having completed my review of these two incidents, I believe that the source of the problems in the processing of these requests lies with the inadequate knowledge of the FOI process by political staff, not only of how the contentious issues management process should function, but of the access and privacy regimes established by the *Act*. For example, had the Legislative Assistant known that the Ministry had a positive duty to transfer the request in the first incident to Tourism, it is unlikely that he would have sent his email dated November 13, 2009, and the appearance of inappropriate political influence would have been avoided. This gap in knowledge may partially be explained by the high rate of turnover of staff working in these roles.

During the course of my inquiries, I reviewed the training that is currently available to political staff in Ministers' Offices. I noted that only 20-25 minutes is set aside for training on the *Act*, which would include both the access and privacy responsibilities of government ministries. This is clearly not sufficient, as this incident indicates.

I am, therefore, very pleased that my office has been invited by the Office of the Premier to provide a training session in June to the staff members of Ministers' Offices regarding the *Act* and their responsibilities under it. My staff will be paying particular attention to the parameters that must be placed on the contentious issues management process, the time limits for responding to requests, and the appropriate limits on the involvement of political staff in the access to information decision-making process. As I have frequently said, access to government information and transparency of government action are at the core of our democratic values. Our democratic institutions must function, and must be seen to be functioning, consistently with the principles of openness and transparency set out in the *Act*.

CONCLUSION

I would like to commend the Minister and his staff, who fully cooperated with my office during the course of this inquiry. I would also like to commend the FOI Office for its actions in processing the two FOI requests examined by this inquiry. With respect to the first request, the FOI Coordinator immediately took the necessary steps to communicate to political staff the Ministry's obligations under the *Act*, and in turn, the request was responded to appropriately. FOI Office staff were also not responsible for most of the delay in responding to the second request. In particular, the practice of holding regular weekly meetings with senior staff, aimed at reviewing unanswered FOI requests, is laudable.

However, as noted above, more is required since the existing process was clearly not effective in preventing an unacceptable delay in the second incident. As a result of the inaction of the Legislative Assistant, this FOI request took an additional five months to process. During this time period, the request was left to languish in the Minister's office, not as a result of political considerations, but because of competing priorities. In my view, immediate steps should be taken to ensure that this does not happen again.

Having carefully considered all of the information before me, I find that there is no evidence that the Minister's political staff attempted to interfere, for political purposes, with the processing of these two FOI requests. However, changes are required to the Ministry's FOI process to ensure that inaction by political staff does not interfere with the timely provision of FOI responses.

SUMMARY OF FINDINGS AND RECOMMENDATIONS

1. The existence of a contentious issues management process, in and of itself, absent evidence of “politically driven influences,” is not inconsistent with the government’s responsibilities under the *Act*.
2. I found no evidence of inappropriate political interference in the FOI process in the two FOI requests referred to in this report.
3. The Ministry’s contentious issues management process allowed inaction by political staff to lead to an unacceptable delay in responding to request G-09-0068-02. I recommend that the Minister conduct a review of that process with a view to preventing problems of this nature arising in the future. The Minister’s office should report back to my office on the results of that review by **July 27, 2011**.
4. My office has undertaken to provide comprehensive training to ministerial political staff in early June. I recommend that the government ensure that political staff receive similar training on an annual basis in order to ensure that new staff are fully apprised of the government’s obligations under the *Freedom of Information and Protection of Privacy Act*.



Ann Cavoukian, Ph.D.
Commissioner

May 27, 2011