



**Information and Privacy
Commissioner/Ontario**

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

INTERIM ORDER P-1525

Appeal P-9700260

Ministry of the Environment



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NATURE OF THE APPEAL:

The Ministry of the Environment, formerly the Ministry of Environment and Energy (the Ministry), received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to records relating to a specific waste disposal site in the City of Kingston. In particular, the requester sought access to the contents of the Kingston Region's approval file for the disposal site and to the handwritten notes, journal entries and records of conversations of three Ministry employees pertaining to the landfill site in the City of Kingston.

The requester represents the City of Kingston which is being charged by the Ministry for allegedly contaminating the environment through the waste disposal site.

The Ministry granted access in full to the contents of the Kingston Region's approval file but indicated that there was a 1985 file which they had not been able to locate.

With respect to the second part of the request, the Ministry granted access to some records which were related to but not directly responsive to the request. The Ministry denied access to the handwritten notes of two of the three employees (the Environmental Officers) pursuant to the exemptions provided by sections 14(1)(a), (b), (d) and (f) of the Act. The Ministry explained that these records related to an active investigation by its Investigation and Enforcement Branch. The requester appealed the decision to deny access to the second part of the request.

During mediation, the Ministry advised that it only had the handwritten notes of the two Environmental Officers mentioned in the request. The Ministry explained that the third employee (the District Manager) did not have occasion to take notes and therefore, none existed. The requester, now the appellant, agreed that the notes of the Environmental Officers, withheld under section 14(1) of the Act were the only records at issue in the appeal. The appellant also confirmed that he was not seeking access to those portions of the records which pertained to other investigations.

This office provided a Notice of Inquiry to the appellant and the Ministry. Representations were received from the appellant.

In his representations, the appellant provided a photocopy of handwritten notes dated February 26, 1997, taken by the District Manager, and submitted that therefore, such records must exist. Consequently, this office provided a supplementary Notice of Inquiry inviting comments on the issue of the reasonableness of the Ministry's search for responsive records. Representations were received from the Ministry only.

The Ministry did not provide any submissions on the application of section 14(1) of the Act and later confirmed that it was no longer relying on this exemption to deny access to the handwritten notes of the Environmental Officers. With its representations, the Ministry provided a copy of its letter dated December 16, 1997 to the appellant granting full access to the records previously withheld under section 14(1) together with a copy of the District Manager's handwritten notes, dated April 17, 1997, being the only additional record located as a result of a second search. The Ministry's letter confirmed that the appellant had also previously received copies of the same records under the disclosure requirements of the litigation process. Accordingly, these records are no longer at issue in this appeal.

As part of its submissions on the reasonableness of its search, the Ministry provided a memorandum of explanation from the District Manager.

The District Manager states that he maintains "a personal Daily Journal of meetings and telephone conversations." He states that the notes are entered every evening at home and that he considers these entries to be "personal material protected from public access even though they do record daytime workplace-related, as well as personal activities." He states that he did not review the journal as part of his search for responsive records. The Ministry states that it has never seen this journal and that it does not have access to these notes which are maintained at the District Manager's home. In my view, this raises the issue of whether the Ministry has custody and control over these notes.

I have accordingly provided the parties with another Notice of Inquiry seeking their submissions on this issue. I will address this issue in my final order and this order will necessarily be an interim order, in which I will only consider whether the Ministry's search for the handwritten notes of the District Manager was reasonable in the circumstances.

DISCUSSION:

REASONABLENESS OF THE SEARCH

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

Although the appellant will rarely be in a position to indicate precisely which records have not been identified in the Ministry's response to a request, the appellant must, nevertheless, provide a reasonable basis for concluding that such records exist. As I have indicated above, the appellant has provided this office with a copy of the District Manager's handwritten notes dated February 26, 1997 to substantiate his position that such records exist. The Ministry was asked to respond.

The Ministry states that the records located as a result of the initial search included typed records that were signed or contained brief instructions written by the District Manager. These were disclosed to the appellant.

The Ministry states that in response to the supplementary Notice Of Inquiry, a second search was conducted by the Assistant FOI Liaison Officer for Eastern Region, the file clerk and the District Manager. The Ministry converted its files from a function focus to a site focus during the spring of 1997. This conversion resulted in the original four files for the one landfill site being amalgamated into one comprehensive file. The Ministry states that the filing clerk arranged the whole file in chronological order and that upon review, only one additional record dated April

17, 1997, was located. The Ministry submits that the file clerk, who is responsible for all filing, is the most qualified person to search for responsive records. No other records, including the record dated February 26, 1997 referred to above, were found.

The District Manager acknowledges that he does take notes during meetings. These are not entered in a bound journal, rather they are made on note pad and at the end of the meeting, the notes are sent to filing and then retrieved from the Ministry's filing system as and when necessary. The District Manager states that any responsive notes on file have previously been disclosed to the appellant in response to an earlier request made in April, 1997.

The Ministry points out that while the District Manager does take notes when he attends meetings, he did not routinely attend the meetings involving the landfill site because he had two experienced staff (the Environmental Officers) who did exactly that. However, when these Environmental Officers left the Ministry, the District Manager did become involved in the issue and his first meeting took place on February 26, 1997 which resulted in the handwritten notes of the same date.

In his memorandum, the District Manager points out that an earlier request dated April, 1997 for the same records was received from the appellant and responsive records were disclosed to the appellant at that time. The District Manager believes that the record dated February 26, 1997 was among the records previously disclosed to the appellant.

The Ministry states that the February 26, 1997 notes were the only records that the District Manager provided to the Ministry's investigator. The Ministry advises that the investigator has provided a copy of his entire file to the City of Kingston as a requirement for full disclosure in the prosecution process.

I have carefully reviewed the evidence before me. I am satisfied that the Ministry has made a reasonable search for records responsive to the request.

ORDER:

1. I find the Ministry's search was reasonable and I dismiss this part of the appeal.
2. I remain seized of this appeal on the issue of custody and control of responsive records maintained by the District Manager at his personal residence.

Original signed by: _____
Mumtaz Jiwan

January 30, 1998

Inquiry Officer