



**Information and Privacy  
Commissioner/Ontario**

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

# **ORDER PO-1960**

**Appeal PA-010084-2**

**Ministry of Natural Resources**



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## **NATURE OF THE APPEAL:**

The Ministry of Natural Resources (the Ministry) received a request from a member of the media for access to records produced or received by a named Ministry official in connection with a subdivision and golf course project on Lake Nipissing near the City of North Bay. The Ministry initially granted only partial access to the records, denying the requester access to the remaining records under the invasion of privacy exemption in section 21(1) of the *Act* and taking the position that other portions of the records were not responsive to the request. The requester, now the appellant, appealed the Ministry's decision to deny access to the records.

As a result of a lengthy, but productive, mediation process, the sole issue remaining in dispute between the parties is whether additional records responsive to the request exist. The appellant takes the position that additional records beyond those identified by the Ministry must exist. The Ministry argues that the searches which it has undertaken for responsive records were reasonable in the circumstances.

I initially provided a Notice of Inquiry to the appellant, seeking his submissions in support of his position that additional records beyond those identified by the Ministry should exist. The appellant provided me with representations in response which were then shared with the Ministry, who also submitted representations. I then shared those submissions with the appellant who chose to provide me with reply representations.

## **REASONABLENESS OF SEARCH**

In appeals where the appellant believes that additional records exist, as is the case in this appeal, the sole issue to be decided is whether the Ministry has conducted a reasonable search for the records as required by section 24(1) of the *Act*. If I am satisfied that the search carried out was reasonable in the circumstances, the decision of the Ministry will be upheld. If I am not satisfied, further searches may be ordered.

### **The Initial Representations of the Appellant**

In both his initial and his reply representations to me, the appellant describes in some detail the reasons for his belief that the Ministry's search for responsive records was inadequate. As a result of receiving additional records through other requests made under the *Act*, the appellant has become aware of a number of meetings, telephone conversations, e-mail messages and other communications involving the named employee which occurred during the time period covered by the request. This individual was the former District Manager of the Ministry's North Bay District and, since May 4, 1998, now serves as the Executive Assistant to the Deputy Minister of Natural Resources.

The appellant provided me with a chronological list of dates of meetings, e-mail messages, memoranda, notes and telephone conversations which he believes demonstrate the involvement of the former District Manager in the Ministry's handling of a "sensitive issue" during the period from April 14 to May 8, 1998. The appellant's reconstruction of these events is premised on the information he has received from other sources, including following his examination of records

obtained through other requests under the *Act*. In my view, these submissions lead one to a logical conclusion that additional records are reasonably likely to exist beyond those identified by the Ministry. For this reason, I decided to seek the representations of the Ministry in response to those of the appellant.

### **The Ministry's Submissions**

The Ministry's submissions rely heavily on the fact that a search of its record-holdings for information in response to another request from this same appellant was undertaken. Indeed, following an appeal to the Commissioner's office which resulted in Order PO-1920, the reasonableness of the Ministry's search for records responsive to **that request** was upheld. The Ministry advises that as a result of the searches conducted in response to the earlier request, it was able to advise the requester that no records responsive to the present request existed in its North Bay District Office. It argues that because of the extensive searches conducted by its employees at the behest of its North Bay District Office Information Management Supervisor for records responsive to that request, it was not necessary for it to conduct an additional search for records responsive to the present request.

In addition to its communications with the North Bay District Office, the Freedom of Information Assistant Co-ordinator responsible for processing this request contacted the former District Manager, requesting that she conduct a search of her record-holdings for the information sought in the request. The Ministry states that:

[E]xcept for notebooks which she kept during her tenure as District Manager and upon the assumption of her current position, [the former District Manager] indicated that any records created before May, 1998 would be found in the District files . . . and that she was aware of only two other records which fell into the ambit of the request.

The Ministry's submissions go on to describe these two records and the reasons why they are no longer available. It adds that the former District Manager did not keep subject files and there were "no other records other than her notebooks in the period after she joined the Deputy Minister's office."

The Ministry responds to the suggestions contained in the appellant's initial submissions as to the reasons why he believes additional records should exist by commenting that:

These suggestions are based on his interpretation of extracts from notes and other documents. A discussion of whether or not a record should have been created tends to take on metaphysical dimensions. Such a discussion, while interesting, is not really relevant within the context of this appeal.

The Ministry reiterates its reliance on the findings in Order PO-1920 and submits that the applicable standard in cases such as this is whether the searches conducted by the Ministry in attempting to locate responsive records were reasonable. It submits that the searches undertaken in the North Bay District Office for records responsive to that earlier request were found to be

reasonable in the decision and that additional searches of its North Bay District Office record-holdings were unnecessary.

### **The Appellant's Reply Submissions**

The appellant points out that the Ministry is relying on a previous search conducted in response to a request for records "with a different scope and different wording". The appellant indicates that it is clear from the material provided by the Ministry that the former District Manager did not cooperate in the searches undertaken and that any documents which she may have produced were provided only from their recipients, and not from her own "hand".

In addition, the appellant reiterates that the Ministry has not responded to his specific points concerning the meetings, e-mail communications and telephone conversations which occurred during the period April 14 to May 8, 1998. He states that the Ministry has not offered any explanation as to the whereabouts of any records which the former District Manager may have generated or received during that period relating to the subdivision and golf course development. He points out that the other individuals involved in these communications kept records and that he would have expected that the former District Manager would have done so as well.

The appellant makes additional submissions in support of his contention that because of the high-profile nature of the subdivision and golf course development, "the paucity of notes, e-mails, briefing notes and the like, beggars belief."

Finally, the appellant indicates that, as the former District Manager took a new position in the Deputy Minister's office during the time period specified in the request, a search of the records-holdings of that office ought to have been undertaken. As well, the appellant questions whether a search was undertaken for responsive records in the files maintained in the former District Manager's personal computer in both the North Bay District and the Deputy Minister's offices.

### **Findings**

I note firstly that the request which formed the basis for the appeal which gave rise to Order PO-1920 involved records relating to "the detailed site inspection", "the EIS [Environmental Impact Study]", a "values map" and an Application which is referred to on other pages submitted with the request. The request in the present appeal seeks access to records produced or received by the former District Manager during a specified time period in relation to the named golf course and subdivision. Clearly, the requests are very different in scope, the time frame involved and their intent. Equally clear, in my view, is that records responsive to each of these requests are quite different in nature.

I also note that the searches undertaken in response to the first request, which are described in detail in the decision of Acting Adjudicator Mona Wong in Order PO-1920, do not include searches of the record-holdings, including those maintained on her personal computer, of the former District Manager, either at the North Bay office she formerly occupied or at the position she presently holds in the Deputy Minister's office. Rather, the searches appear to have been undertaken only in the District Office's record-holdings for documents pertaining only to the

areas specified above. The scope and the time period of the earlier request were much different from that in the present appeal. In my view, records which may be captured by a search for documents responsive to that earlier request are unlikely to be the same as the records which will be responsive to the present, very different, request.

I am also concerned by the lack of specific information in the Ministry's submissions with respect to the searches which it undertook specifically for records maintained by the former District Manager. While it would appear that this individual, along with a large number of others, was contacted and requested to look for records following the Ministry's receipt of the initial request, it is unclear to me what documents, if any, she located as a result of these searches. As a result, I am unable to determine if the Ministry's efforts to locate and identify records responsive to the request in the present case were, in fact, reasonable or not.

The obligations of the Commissioner's office when it conducts a review of a decision by an institution which submits that it conducted a reasonable search for records were recently canvassed by Assistant Commissioner Tom Mitchinson in Order PO-1954-I. In that case, he held that:

In conducting a reasonable search inquiry, the *Act* gives me the power as well as the obligation to satisfy myself that all reasonable steps have been taken to locate and identify records responsive to a request. I have the ability as well as the responsibility to determine what questions are objectively relevant in this regard, and to require that these questions be answered. In the context of these four inquiries, I determined that the most basic of questions associated with any reasonable search appeal of this nature were relevant and needed to be answered, and it is not acceptable for the government to refuse to answer direct questions of this nature, and to require me to accept indirect answers derived from the evidence it chooses to submit.

...

Although the search activities undertaken by the four institutions in these appeals were unquestionably extensive, given the approach adopted by the institutions, and the resulting error in defining the proper search parameters, I am unable to satisfy myself that all reasonable efforts have been made. The reason for these deficiencies, in my view, stems from the apparent decision on the part of the government to rely on indirect evidence when direct evidence would have been more appropriate. I am unclear as to why this approach was adopted, but at the end of the day I must make my decisions based on the evidence and arguments presented by the institutions and legal counsel. At many stages of the inquiry process, beginning with the Notice of Inquiry, and throughout the two days of oral inquiries, I made it clear what type of evidence I required in order to satisfy myself that all reasonable steps have been taken to identify records responsive to the appellant's request. That type of evidence was not forthcoming.

In the present case, the Ministry appears to have chosen not to require that the former District Manager directly address the questions raised by the appellant in both the mediation stage of this appeal and in his representations. I find the Ministry erred in a manner similar to that described by Assistant Commissioner Mitchinson. It declined the opportunity to present its best evidence, that of the individual whose record-holdings were being requested, the former District Manager. Instead, the Ministry chose to rely on the search information gathered for an earlier request for what appears to be very different information.

In my view, the Ministry's search for records responsive to the appellant's later request was inadequate. Moreover, the Ministry failed to provide me the type of evidence which is necessary for me to determine whether the searches conducted for records was reasonable as it failed to tender evidence from the individual who would best be able to address the questions posed, the former District Manager.

In order to ensure that a more effective and efficient search is undertaken by the former District Manager for records responsive to the request, it may be prudent to have the Ministry provide this individual with the request and the initial submissions of the appellant in order to assist her in focussing the scope of her searches.

**ORDER:**

I order the Ministry to conduct a further search for records responsive to the appellant's request and that it provide him with a decision regarding access to any responsive records pursuant to section 26 of the *Act*, without recourse to the time extension provisions found in section 27 of the *Act*, using the date of this order as the date of the request.

Order signed by: \_\_\_\_\_  
Donald Hale  
Adjudicator

\_\_\_\_\_ October 24, 2001