

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4016

Appeal PA18-389

Ministry of Natural Resources and Forestry

December 11, 2019

Summary: The Ministry of Natural Resources and Forestry received a request for access to records relating to a deer harvest in a provincial park in 2017. The ministry conducted a search and granted partial access to the records that it identified as responsive to the request. The requester appealed the ministry's decision based on her belief that additional responsive records should exist. The sole issue in this appeal is whether the ministry conducted a reasonable search as required by section 24 of the *Act*. In this order, the adjudicator upholds the ministry's search as reasonable and dismisses the appeal.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F31, section 24.

OVERVIEW:

[1] The Ministry of Natural Resources and Forestry (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for:

...copies of all communications (including emails, handwritten notes, and text messages) regarding the Short Hills Deer Hunt for the following days of 2017.

Friday November 10, Saturday November 11, Sunday November 12, Monday November 13, Friday November 24, Saturday November 25, Sunday November 26, Monday November 27, Sunday December 3, Monday December 4, Tuesday December 5, and Wednesday December 6.

[2] The request was later clarified to be limited to a search of the Ontario Parks Zone Staff and the Ontario Parks Director's office.

[3] The ministry conducted a search, which located records responsive to the request. The ministry notified third parties under section 28(1) of the *Act* in order to obtain their views regarding disclosure of the records. Following third party notification, the ministry issued a decision granting partial access to 94 pages of responsive records. Access to the withheld information was denied pursuant to the personal privacy exemption at section 21 of the *Act*. As well, some of the responsive records were deemed to be excluded from the scope of the *Act* under section 65(5.2) (ongoing prosecution).

[4] The requester appealed the ministry's decision to this office.

[5] During the mediation stage of the appeal process, the appellant advised the mediator that there was no longer an ongoing prosecution, and that she believed there were additional records that had not been provided to her by the ministry. The mediator raised these issues with the ministry. The ministry issued a supplementary decision stating that it no longer relies on section 65(5.2), and disclosing the records that had previously been withheld under that exclusion. The ministry also advised that it was notifying a third party under section 28(1) of the *Act* to obtain its views regarding disclosure of certain records. Following third party notification, the ministry released additional records to the appellant. The ministry also provided the appellant with colour copies of certain photographs that had been originally disclosed to her in black and white.

[6] The appellant asked the mediator to notify two affected parties to see if they would consent to the disclosure of information in the records that relates to them. The mediator did so and the affected parties provided their consent. After receiving the affected parties' written consent, the ministry disclosed the information relating to the affected parties to the appellant.

[7] Following that disclosure, the appellant advised the mediator that she did not wish to pursue access to the remaining undisclosed information in the records. Accordingly, the application of the personal privacy exemption at section 21 of the *Act* is no longer at issue. However, the issue of reasonable search remains, as the appellant continues to believe that additional records should exist that have not yet been identified by the ministry.

[8] No further mediation was possible and the appeal was moved to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*. During my inquiry, I invited and received representations from the ministry and the appellant. The parties' representations were shared in accordance with *Practice Direction Number 7* and the *IPC's Code of Procedure*.

[9] For the reasons that follow, I find that the ministry conducted a reasonable

search for records responsive to the appellant's request, and I dismiss the appeal.

DISCUSSION:

Did the ministry conduct a reasonable search for records?

[10] The sole issue for determination in this appeal is whether the ministry has conducted a reasonable search for records that are responsive to the appellant's request. Where a requester 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 as required by section 24.¹ 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.

[11] The *Act* does not require the ministry to prove with absolute certainty that further records do not exist. However, the ministry must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.² To be responsive, a record must be "reasonably related" to the request.³

[12] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.⁴

[13] A further search will be ordered if the ministry does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.⁵

[14] Although a requester 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.⁶

The parties' representations

The ministry's representations

[15] The ministry maintains that it has conducted a reasonable search for records responsive to the appellant's request, in accordance with the requirements of section 24

¹ Orders P-85, P-221 and PO-1954-I.

² Orders P-624 and PO-2559.

³ Order PO-2554.

⁴ Orders M-909, PO-2469 and PO-2592.

⁵ Order MO-2185.

⁶ Order MO-2246.

of the *Act*.

[16] To support its position and provide context for the request that led to this appeal, the ministry's submissions included the following background information:

Six annual indigenous traditional deer harvests have been carried out by the Haudenosaunee Confederacy in Short Hill Provincial Park between 2013 and 2018. A single annual harvest is normally comprised of three two-day harvesting periods. The harvests are carried out because the Haudenosaunee Confederacy have a treaty right to hunt in an area of Southwestern Ontario that includes Short Hills Provincial Park [...] Similar Indigenous deer harvests take place in various Provincial Parks, however the harvest at Short Hills Provincial Park differs due to the significant presence of protest activity.

[17] Upon receipt of the request at issue in this appeal, the ministry submits that the Ontario Parks' South West Zone Manager (the manager) contacted the appellant to clarify the scope of her request. The manager then identified other employees who might possess responsive records, as determined by their involvement in the ministry's oversight and implementation of the Short Hills deer harvest in 2017. In total, the ministry advises that 16 employees were selected to conduct searches for records responsive to the appellant's request, including the South West Zone Manager, Manager of Park Operations, Operations Specialist, Senior Park Planner, Park Planner, Zone Ecologist, Assistant Zone Ecologist, Protected Areas Specialist, Discovery Program Coordinator, GIS Technician, and Protected Lands Specialist.

[18] The ministry maintains that all of the employees who conducted the search are knowledgeable in the subject matter of the Short Hills deer harvest and familiar with the Ontario Parks' file and records management system. In addition, the ministry explains that all of the employees have conducted similar searches in the past, because the ministry has received a number of requests relating to the deer harvest in Short Hills Provincial Park.

[19] The ministry submits that the employees expended a reasonable effort to locate records responsive to the appellant's request. In support of this position, the ministry explains that its employees searched paper files, handwritten reports, computer network drives, hard drives, Outlook sent, received, and archived email folders, Outlook calendar invites, cell phone text messages, and BlackBerry Messenger messages.

[20] The ministry provided an affidavit sworn by the manager who was responsible for coordinating the search. The affidavit evidence reiterates the ministry's submissions, and adds that as a result of the ministry's search, the appellant was initially granted partial access to 42 responsive records comprising 94 pages, and three additional records were also subsequently disclosed to her.

The appellant's representations

[21] The appellant believes that there are remaining reports and text messages that the ministry has not yet located in its search efforts. In support of this position, the appellant advises that she has received "multiple handwritten reports from various levels of staff" in response to similar requests in the past, yet she did not receive any handwritten reports in response to the request at issue in this appeal.

[22] She also explains that while she requested copies of all texts, she only received texts between "junior level staff." She specifically requests texts made by a named ministry employee on November 25, 2017 at approximately 2 pm. The appellant says that she "is certain that [these texts] exist" because she was standing near the employee at that time, and has a photograph of him texting. She maintains that shortly thereafter, several other ministry staff arrived and "had quite obviously" been instructed to attend the location as backup.

[23] Moreover, she notes that one of the text conversations that she received from the ministry referred to notes and reports, which were not among the records located by the ministry.

The ministry's reply representations⁷

[24] The ministry submits that the appellant's representations speculate that certain reports must exist because similar records were created in previous years. In response, the ministry maintains that it has no obligation to create daily reports simply because similar reports were created in the past. The ministry states that if any notes or other daily reports existed, they would have been located during its search.

[25] In support of this position, the ministry provided additional affidavit evidence. The reply affidavit was sworn by the ministry employee that is named in the appellant's representations, who is a Senior Park Planner with Ontario Parks (the senior planner). The senior planner advises that "end of shift" reports are not required to be completed by Ontario Parks staff as part of their duties. He also states that handwritten reports or notes are only prepared to document "violations and significant occurrences." He notes that such reports have been provided in response to other requests, when they were available.

[26] The senior planner also explains that while reference was made to handwritten reports in a text message, as noted by the appellant, those reports were not, in fact, prepared. Instead of preparing a written report that day, the senior planner advises that the results of the daily harvest were communicated verbally.

⁷ As the ministry's reply representations did not raise any new facts or issues, I was satisfied that it was not necessary to invite sur-reply representations from the appellant.

[27] The ministry also maintains that the appellant has speculated that additional records exist because of interactions that she witnessed among ministry staff on November 25, 2017. In response, the ministry says that if any records were created as a result of the interactions that the appellant witnessed, they would have been transitory in nature and destroyed in accordance with the *Government of Ontario Common Records Series Transitory Records* (May 2015), which allows its staff to delete transitory records when they are no longer required.

[28] The ministry explains that "text messages [that are] sent or received are considered transitory as [they] have no ongoing value or usefulness beyond an immediate and minor transaction or the preparation of a subsequent record." With regard to the text messages that the appellant witnessed the senior planner send on November 25, 2017, the ministry advises that they were deleted at the end of the senior planner's shift and are no longer in the ministry's possession.

[29] In support of this position, the senior planner attests to sending text messages on November 25, 2017, to other Ontario Parks staff. He explains that the text messages confirmed his location and informed his manager that there was a harvested deer that required a pick-up. He also requested assistance "as there were unauthorized persons attempting to prevent [him and his colleague] from retrieving the deer." The senior planner also attests to deleting those text messages at the end of his shift, as they were administrative and transitory in nature and had no ongoing value.

[30] Accordingly, the ministry submits that the appellant's representations do not provide a reasonable basis for showing that it has failed to conduct a reasonable search, as required by the *Act*. Rather, the ministry maintains that it has established that it made a reasonable effort to identify and locate responsive records, by demonstrating that experienced employees who are knowledgeable in the subject matter of the request expended a reasonable effort to locate records which are reasonably related to the request.

Analysis and findings

[31] The appellant claims that additional records responsive to her request exist which have not yet been located by the ministry's searches. For example, she submits that she witnessed a ministry employee sending text messages on November 25, 2017, which have not yet been located by the ministry. She also points out that the texts messages that were disclosed to her refer to a daily report, but the ministry's search efforts have not identified or located that report.

[32] As mentioned above, although a requester will rarely be in a position to indicate precisely which records an institution has failed to identify, the request must still provide a reasonable basis for concluding that such records exist. In my view, the appellant had reasonable grounds for believing that the ministry failed to locate some records that are responsive to her request. I accept that she was justified in questioning why a report that is referred to in records that she received, as well as text messages

that she witnessed an Ontario Parks employee sending, were not disclosed in response to her request.

[33] However, I am also satisfied that the ministry has responded to the appellant's queries about the text messages, as well as the existence of a report that was referred to in a record that she obtained from the ministry. I accept that the text messages, which communicated the senior planner's location, the need for a deer pick-up, and additional assistance, were transitory in nature and therefore would have been destroyed in accordance with the government's record retention policy. I also accept, based on my review of the ministry's submissions and the record that refers to the allegedly unaccounted-for daily report, that such a report may not have, in fact, been created. In any event, my role is not to determine whether these additional records exist, but to decide whether the ministry conducted a reasonable search in attempting to locate records responsive to the appellant's request under the *Act*.⁸ In my view, it has.

[34] Based on the totality of the evidence before me, I find that the ministry has conducted a reasonable search for records responsive to the appellant's request, including any records that would match the description of those mentioned in the appellant's submissions. In making this finding, I am satisfied that the scope of the request, once clarified by the appellant, was unambiguous, thereby allowing the ministry to identify both the employees and the locations that should be included in a search for responsive records.

[35] I accept that the employees who conducted the search included the South West Zone Manager for Ontario Parks, and multiple other individuals who were involved with the oversight and implementation of the 2017 deer harvest in Short Hills Provincial Park. I also accept that those employees had all conducted similar searches in response to past access-to-information requests. Accordingly, I am satisfied that the ministry's search was coordinated and carried out by experienced employees who were knowledgeable in the subject matter of the appellant's request, as well as the work required in order to respond to the request.

[36] Finally, I am satisfied that by searching through paper files, handwritten reports, computer network drives, hard drives, various email folders, and cell phone messages, the ministry employees expended a reasonable effort in order to locate records which are reasonably related to the request. This finding is supported by the fact that the ministry's search effort identified, located, and provided the appellant with partial access to more than 40 responsive records.

[37] Accordingly, for the reasons outlined above, I find that the ministry has

⁸ Order PO-1920.

demonstrated that it conducted a reasonable search for records responsive to the appellant's request, as required by the *Act*.

ORDER:

I uphold the ministry's search for records, and I dismiss the appeal.

Original signed by _____
Jaime Cardy
Adjudicator

December 11, 2019 _____