Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-1920

Appeal PA_010086_2

Ministry of Natural Resources

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NATURE OF THE APPEAL:

The Ministry of Natural Resources (the Ministry) received the following request pursuant to the *Freedom of Information and Protection of Privacy Act* (the *Act*):

> This is a request under the Freedom of Information and Privacy Act, for all memos, reports and information connected with 1) the "detailed site inspection," 2) the "EIS" that was "required," 3) a values map showing "HAZ land in Lot 6, "and 4) the "Application required under Lakes and Rivers" legislation, all of which are referred to on the appended pages obtained through my previous FOI request, Reference Number [file number] regarding the Osprey Links subdivision and golf course.

The Ministry responded as follows:

> ...
>
> With respect to Part 1 of your request, all information pertaining to site inspections was provided to you in your previous Freedom of Information Request [file number]. No records exist for Parts 2 and 4 since the requirements for an EIS and L&RIA application were based on preliminary comments made by Ministry staff that were not subsequently carried forward as formal comments to the developer and approval authority. I have decided to grant full access to records pertaining to Part 3 of your request as indicated in the disclosure column of the attached index of responsive records.

The requester (now the appellant) appealed the Ministry's decision that no records exist with respect to parts 2 and 4 and that additional records exist with respect to part 1.

This office provided the appellant and the Ministry with a Notice of Inquiry informing them that an oral inquiry will be held to determine whether the Ministry conducted a reasonable search for records which respond to the request. The inquiry was conducted via teleconference. Present were the appellant, the Ministry's Legal Counsel, the Acting Information and Privacy Co-ordinator (Co-ordinator), an Assistant Information and Privacy Co-ordinator and the Information Supervisor (Supervisor) of the Ministry's district office. Both the appellant and the Ministry provided oral representations.

DISCUSSION:

REASONABLENESS OF SEARCH

Where a requester provides sufficient details about the records which he or she is seeking and the institution indicates that records do not exist, it is my responsibility to ensure that the institution has made a reasonable search to identify all responsive records. The *Act* does not require the institution to prove with absolute certainty that records do not exist. However, in order to properly discharge its statutory obligations, the institution must provide me with sufficient evidence to show that it has made a **reasonable** effort to identify and locate responsive records.

Although an appellant will rarely be in a position to indicate precisely which records have not been identified in an institution's response to a request, the appellant must, nevertheless, provide a reasonable basis for concluding that such records may, in fact, exist.

Parts 1 and 4 of the Request

During the oral inquiry, the search issue surrounding parts 1 and 4 was resolved. For part 1, the Supervisor provided details of her search efforts; namely who she contacted or attempted to contact and which files were searched. For part 4, the Ministry's Legal Counsel provided a detailed explanation regarding the *Lakes and Rivers Improvement Act* in relation to this application. The appellant was satisfied with the Ministry's explanations with respect to parts 1 and 4 and agreed that his appeal regarding the reasonableness of the search for these parts has been resolved.

Part 2 of the Request

During the oral inquiry, the appellant was provided, via fax, with a copy of 1) the Ministry's cover letter to the appellant dated June 12, 2001, with 25 pages of records relating to site inspections on Callendar Bay attached and 2) a letter, dated October 21, 1998, with the Checklist for Scoped-Site IAs attached which was received by the Ministry from the municipality.

First, I will describe the Ministry's searches for the records and then address the appellant's outstanding concerns.

The Supervisor who co-ordinated the searches explained that when she received the request from the former Co-ordinator on January 29, 2001, a search was conducted at the district office and records were found and provided to the former Co-ordinator. The former Co-ordinator had concerns about the sufficiency of the district office's search and, after providing information on the *Act's* definition of a "record," the district office conducted a second search. Additional records were located: photographs, video tapes, storm water management plans. In view of finding these additional records, the former Co-ordinator sent an e-mail to the district office again expressing her concern with the thoroughness of the searches conducted. As a result, the Supervisor went to everyone that she thought may have had an involvement with this particular application. She asked them to sign-off that they have in fact searched all of their records. In addition to herself, the other five individuals were the district planner responsible for municipal planning; the biologist responsible for the water portion related to this particular application; the biologist responsible for the land portion where the application occurred; the Communications specialist; and the area supervisor. Each individual signed-off on March 8th and 9th 2001, that they did conduct a thorough search and had provided all responsive records.

Subsequently, the district office was made aware of a conversation between the Communications Director and the appellant where the appellant advised that there may be a possibility of an EIS being completed or related to a consent application. At this time, the district staff were unaware there was a consent application to sever the original holdings into two separate parts. They had been focussing their attention on the sub-division. Again, out of concern about the thoroughness of the search, on that day, the district planner responsible for municipal planning conducted a fourth search of all related files and no records were found.

Finally, the Ministry also approached the municipality to inquire about the EIS. The municipality confirmed that there was an EIS undertaken and faxed the records to the district office. This was item #2 that was provided to the appellant during the oral inquiry, mentioned previously.

Despite the Ministry's explanation regarding their searches, the appellant still maintained that additional records should exist. The appellant referred to the Ministry's letter of June 12, 2001. He specifically referred to the paragraph that states as follows:

> ...In 1996, MNR recommended that an EIS be conducted before approval of an Application for Consent to sever lands in the golf course development was granted. This recommendation was not followed at that time.

The appellant contended that the fact that this recommendation was not followed should have generated some discussion and exchange of e-mails and memos. The appellant therefore submitted that documentation must exist leading up to the Ministry's recommendation and in support of the statement that the recommendation was not followed.

In this regard, the Supervisor explained that the letter is making reference to the Ministry requesting an Environmental Impact Statement as part of the consent application. She explained that the Ministry commented on a consent application on February 21, 1996. There were actually two consent applications; one was to sever the golf course from the actual sub-division housing development and the other was to recognize the sub-division separately. When the Ministry commented on the consent application, it indicated that it had no objections to the portion that was to become the sub-division. The Ministry did, however, express concerns about the consent application that involved the golf course because the golf course affected lands that were adjacent to a provincially significant wetland. The Ministry commented that prior to final approval, all lands within 120 metres (considered to be "adjacent lands"), be subject to an application for rezoning and that that rezoning application be accompanied by an Environmental Impact Statement. The EIS was to accompany the rezoning application not the consent application.

In response, the appellant stated that the correspondence provided to the Ministry from the municipality shows that a scoped site impact assessment was filed on October 21, 1998, and notes that "this checklist should have accompanied the rezoning application for the golf course." As a result, the appellant is of the view that this site impact assessment was quite a bit late and did not accompany the rezoning application as the Ministry had recommended. The appellant believes this apparent non-compliance with the Ministry's recommendation should have generated discussions, memos, reports and information.

The Ministry advised that it too would like to know when the rezoning application was prepared and whether it occur after May 1996 when Bill 20 came into place, at which time the Ministry's role was much more limited. Without this information, it remains uncertain whether the Ministry would have been provided with the rezoning application for comment. The Ministry stated that the municipality would be in the best position to know when the rezoning application occurred. Nonetheless, the Ministry maintained that if comments were provided by the Ministry, they would be contained in the zoning file which was reviewed during the Ministry's searches.

The appellant then submitted that this was a plan of sub-division which was made before Bill 20 and Bill 163. The Planning Act clearly states that the plan of sub-division would have been dealt with under the old Act. This means that the Ministry still had commenting responsibilities. Bill 20 and the one-window approach should have had no impact on this particular file because the section of the Planning Act when Bill 20 was passed stated that anything that occurred before March 28, 1995, regarding a plan of sub-division, would be dealt with under the old Planning Act. Therefore the Ministry would maintain its' commenting powers. If an EIS was rebuffed by either the applicant or by the municipality, it is the appellant's view that this would have drawn the attention of Ministry officials who would have written memos to determine why the sub-division applicant and the municipality did not ensure that an EIS was completed. The appellant then pointed out that a scoped site impact assessment was done and contended that between 1996 when it was stated that one had to be done and 1998 when the scoped site impact assessment was submitted, some documentation would have been generated by the Ministry since it was their responsibility.

In response, the Ministry reiterated that it has already detailed the files that were searched, and how each of the searches were conducted and if records of the nature the appellant described existed, they would be in the files that were searched.

Findings

I have carefully considered all the representations submitted by both parties. The Ministry has described in considerable detail the nature and extent of the searches which it has undertaken for records responsive to the appellant's request. Four separate searches were conducted. The Ministry also contacted the municipality in an effort to ascertain the facts of the situation and subsequently obtained additional records which were disclosed to the appellant.

While the appellant has presented arguments as to why records should exist, my responsibility is not to determine whether records exist. Rather my responsibility is to determine whether the searches carried out by the Ministry in attempting to locate records responsive to the appellant's request were **reasonable**.

I am satisfied that:

- the searches which were conducted by the Ministry were done by experienced and knowledgeable individuals;

- the appropriate staff were canvassed;

- the relevant files were identified and searched; and

- having completed four searches, the Ministry has expended a reasonable effort to locate and identify all records which respond to the appellant's request.

ORDER:

I find that the Ministry has conducted a reasonable search for responsive records and dismiss the appeal.

Original signed by: July 6, 2001
Mona Wong
Acting Adjudicator