

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4680-F

Appeal PA23-00110

Ministry of the Environment, Conservation and Parks

July 18, 2025

Summary: The Ministry of the Environment, Conservation and Parks received a request under the *Freedom of Information and Protection of Privacy Act* for access to records provided to or sent from the ministry to the City of Sault Ste. Marie, its mayor, and its Member of Provincial Parliament regarding spills into a river by a steel company.

The ministry issued a decision advising that it did not locate any records responsive to the appellant's request.

In an interim order, the adjudicator determined that the ministry had not provided sufficient evidence to establish that it conducted a reasonable search for responsive records in compliance with its obligations under section 24 of the *Act*. She ordered the ministry to conduct further searches and to provide affidavit evidence detailing its efforts to search for and locate responsive records.

In this final order, the adjudicator finds that the ministry has conducted a reasonable search for some records but has not provided sufficient evidence to establish that it conducted a reasonable search for three specific types of records responsive to the appellant's request. She orders it to conduct another search for those three types of records and to issue an access decision on the results of that search.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, sections 10, 24, and 65(5.2).

Orders Considered: Order PO-4483-I.

OVERVIEW:

[1] This order addresses the reasonableness of the ministry's search for records following an interim order that ordered it to conduct another search for responsive records in response to the appellant's request.

[2] The Ministry of the Environment, Conservation and Parks (the ministry or MECP) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to:

Documentation provided [to] or sent (including correspondence) from the MECP to the City of Sault Ste. Marie [SSM] and the Office of the Mayor [of SSM] and Sault Ste. Marie M.P.P.¹ [name] from 2019 to 2020 regarding major emissions incidents/discharges to the environment on March 09, 2019, and October 18, 2019. This also includes all notices of any spills to the surface water/waterways including the St. Mary's River in 2019 and 2020.

[3] In its decision, the ministry informed the requester that a thorough search of the files of the ministry's Environmental Investigations and Enforcement Branch (EIEB) located no records responsive to the request. The ministry further advised that the requested records, if they exist, may be part of an ongoing court proceeding, and accordingly, would not be in the custody or control of the ministry.

[4] The appellant appealed the ministry's decision to the Information and Privacy Commissioner (the IPC).

[5] As mediation did not resolve the appeal, it was moved to the adjudication stage of the appeals process where an adjudicator may conduct an inquiry. I decided to conduct an inquiry. I sent the ministry a Notice of Inquiry (NOI), seeking the ministry's representations on its efforts to search for records responsive to the request. The ministry provided a brief response, stating:

The Ministry of the Environment, Conservation and Parks (MECP) has undertaken thorough searches through the email accounts of its past employees. The MECP reasserts its position as indicated in its Decision Letter of February 8, 2023, that no records, responsive to the request, exist.

[6] As the ministry did not provide representations detailing its search efforts, I issued Interim Order PO-4483-I (the interim order) finding that it had not established that it had conducted a reasonable search for responsive records in accordance with its obligations under section 24 of the *Act*. I ordered the ministry to conduct further search(es) for records responsive to the appellant's request and to provide the IPC with affidavit evidence detailing all of its efforts to search for and locate responsive records. I ordered

¹ Member of Provincial Parliament.

the ministry to issue an access decision with respect to any additional records that it located during these search(es).

[7] In response to the interim order, the ministry conducted additional searches for records responsive to the request and issued a supplementary access decision disclosing 14 pages of emails. In its decision letter it stated:

After a thorough search through the ministry files with expanded search terms based on your full request description and subsequent emails, records were located in the Minister's Office that were responsive to your request following a search conducted in the shared drive and Outlook accounts of 3 former ministry staff.

The final decision has been made to provide full access to the requested information and a copy of the records are attached.

No responsive records in addition to those released under [a prior request #] were located in the Northern Regional Office and Sault Ste Marie Area office.

[8] I then sought and obtained further representations from the parties.

[9] In this final order, I find that the ministry has conducted a reasonable search for some records but has again not provided sufficient evidence to establish that it has conducted a reasonable search for three specific types of records responsive to the request. I order the ministry to conduct another search for those records and to issue an access decision on the results of that search.

DISCUSSION:

[10] The sole issue in this appeal is whether the ministry has provided sufficient evidence to establish that it conducted a reasonable search for records responsive to the appellant's request in response to the interim order.

[11] If a requester claims that additional records exist beyond those found by the institution, the issue is whether the institution has conducted a reasonable search for records as required by section 24 of the *Act*.² If the IPC is satisfied that the search carried out was reasonable in the circumstances, it will uphold the institution's decision. Otherwise, it may order the institution to conduct another search for records.

[12] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, they still must provide a reasonable basis for concluding

² Orders P-85, P-221 and PO-1954-I.

that such records exist.³

[13] The *Act* does not require the institution to prove, with certainty, that further records do not exist. However, the institution must provide enough evidence to show that it has made a reasonable effort to identify and locate responsive records;⁴ that is, records that are "reasonably related" to the request.⁵

[14] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request makes a reasonable effort to locate records that are reasonably related to the request.⁶ The IPC will order a further search if the institution does not provide enough evidence to show that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.⁷

Representations

[15] In response to the interim order, the ministry conducted additional searches for responsive records and provided three affidavits detailing those searches from individuals experienced in responding to Freedom of Information (FOI) requests under the *Act*.

[16] The first affidavit is sworn by the ministry's Issues Project Coordinator in the Northern Region of the Drinking Water and Environmental Compliance Division. He affirms that his duties include tracking and providing support on non-routine FOI requests that involve the SSM district offices.

[17] The second affidavit is sworn by the ministry's Director of Issues Management and Legislative Affairs in the Minister's Office of the Ministry of the Environment, Conservation and Parks. He affirms that they coordinate searches for FOI requests that relate to the Minister's Office and Minister's Staff.

[18] The third affidavit is sworn by the ministry's Strategic Issues Advisor in the Drinking Water and Environmental Compliance Division/Strategic Delivery (formerly referred to as the Senior Divisional Information Coordinator in the Assistant Deputy Minister's Office). She affirms that she acts as a liaison between the divisional program areas and the ministry's other offices (e.g., Deputy Minister's Office and other divisions).

[19] The affiants all provided detailed information as to the searches they and their staff conducted for records responsive to the appellant's request.

[20] In response, the appellant provided representations submitting that the ministry had not conducted a reasonable search for responsive records. She submits that the

³ Order MO-2246.

⁴ Orders P-624 and PO-2559.

⁵ Order PO-2554.

⁶ Orders M-909, PO-2469 and PO-2592.

⁷ Order MO-2185.

ministry should have located the following records in its searches:

- The final draft including all records sent to the MPP and his office from the MECP regarding the MECP comprehensive report for the air emissions and spill to the St. Mary's River by a named steel company.
- Any interim documents and reports to the MPP prior to the final comprehensive report.
- Records sent to the MPP from the MECP including information related to the air emissions and a spill on October 18, 2019.
- Records from the MECP, including the IEBC, regarding air emissions and spills sent to the MPP, the City of Sault Ste. Marie, and the mayor.
- Records from the MECP Sault Ste. Marie District Office staff including the former MECP Supervisor and the MECP Environmental Compliance Officer and the Sudbury Regional Office staff including the former MECP Area Manager and the former MECP Assistant Northern Region Director to the MPP and the City of Sault Ste. Marie and its mayor regarding air emissions and spills including spills on March 9, 2019, and October 18, 2019.
- Records from two named MECP Ministers and their staff to the MPP and the City of Sault Ste. Marie and its mayor regarding air emissions and spills from the steel company.

[21] In reply, the ministry provided additional information about the searches that it conducted for responsive records and information about other individuals who also conducted searches. This additional information included advising that information about the March 9, 2019, spill event was provided by the SSM district office to the Assistant Deputy Minister's office in March and September 2019 and subsequently shared with the Deputy Minister's and Minister's offices and was used to inform responses provided by the Minister's office to inquiries from the SSM MPP's office. The ministry submits that these communications between the Minister's office and the SSM MPP's office were later found and provided to the appellant as records responsive to the request.

[22] The ministry also advised that the SSM district office did not communicate directly with the SSM MPP's or Mayor's offices in relation to the matters identified in the request.

[23] In sur-reply, the appellant provided additional representations on why she believes that further records should exist. I asked the ministry to provide representations on its search(es) for the following two items brought forward in the appellant's sur-reply representations, which in my view had not been clearly addressed by the ministry in its representations following the issuance of the first interim order:

1. Records of the former Sudbury District Manager MECP, and

2. emails from the Director of the Environmental Investigations and Enforcement Branch (EIEB) that indicate that there would be further communications coming from her.

[24] In response, with respect to item 1, the ministry states that the request sought records originating from the ministry and sent to SSM, the Mayor's Office, and the local MPP's Office between 2019 and 2020 regarding two specific spills to water. The ministry submits that it did not request that the former Sudbury District Manager conduct a search of his records because he would not typically have been directly involved in communications or document transmissions to SSM, the Mayor's Office, or the local MPP's Office. The ministry submits that despite not having been requested to conduct a search for responsive records, the former District Manager was aware of the request and, had he possessed any relevant records, he would have communicated this to the staff responsible for handling the request.

[25] The ministry further explains:

Further, it is important to note that interactions between district staff and officials such as the Mayor's Office or the local MPP's Office are infrequent and uncommon, making such contacts particularly noteworthy. MECP has established procedures to manage direct communications from MPP offices. Typically, MPP inquiries are directed centrally to the MPP Liaison Officer in the Minister's Office and subsequently distributed to district offices for information gathering. Given these procedures, direct MPP inquiries at the district level are rare, and when they do occur, they are documented and tracked in accordance with established MPP contact procedures.

[26] The ministry submits that, in the context of the request at issue, the staff members who would have been most likely to have interacted with the relevant entities were the former Sault Area Office District Supervisor and the Senior Environmental Officer responsible for the steel company which had the spills set out in the request. The ministry submits that these individuals were the frontline district staff responsible for responding to spills and overseeing spill cleanup efforts. Accordingly, it submits that they were the appropriate personnel to conduct the initial records search.

[27] In response to the ministry's submissions on the searches it conducted for records responsive to item 1, the records of the former Sudbury District Manager MECP, the appellant submits that a search should have been conducted by the former District Manager who oversaw the local SSM office staff, including the MECP Supervisor and the Senior Environmental Officer. The appellant submits that these two staff were responsible for responding to spills and overseeing clean-up efforts. She states that the ministry has not provided any specific details of what searches were conducted by these two SSM office staff.

[28] With respect to records responsive to item 2, the ministry indicated only that, apart

from the emails already identified as responsive to the request, no additional emails from the EIEB Director were located. It did not describe its search efforts for records of this type.

[29] In response to the ministry's submissions on its searches for emails of the EIEB Director, the appellant submits that the ministry did not provide evidence to demonstrate that the EIEB Director or her staff conducted any searches for these records. She submits that it is reasonable to assume additional records exist because a number of other individuals were copied on emails that have already been provided to her.

[30] The appellant submits that a reasonable search of the EIEB office, the office responsible for investigation and potential prosecution of cases for non-compliance with environmental laws,⁸ would include supporting evidence from the MECP's FOI Office of who conducted the search and how it was completed considering the initial decision letter stated, "As the records you are seeking, if they exist, may be part of an ongoing court proceeding, are not presently in the custody or control of the ministry". The appellant submits that a reasonable search of the EIEB office should have included supporting evidence of searches about the existence of such responsive records that may have been part of an ongoing court proceeding.

Analysis and findings

[31] The appellant claims that additional records exist beyond those found by the ministry in the searches conducted in response to the interim order. I must determine whether the ministry's search for responsive records is reasonable as required by section 24 of the *Act*.

[32] As indicated above, the appellant requests access to records regarding two spills into a river by a named steel company which were exchanged between the ministry and SSM, the SSM Mayor, and the local SSM MPP from 2019 to 2020. In this order, I must determine whether the ministry has conducted a reasonable search for records responsive to the request.

[33] In the interim order, I ordered the ministry to conduct additional searches for responsive records and provide affidavit evidence detailing those additional search efforts.

[34] I accept that the three affidavits provided by the ministry in response to the interim order detail searches conducted by experienced employees, knowledgeable in the subject matter of the request. All three affiants provided sufficient evidence that reasonable searches undertaken for the following types of responsive records:

⁸ See <https://www.ontario.ca/page/what-expect-when-environmental-or-water-compliance-officer-inspects-your-facility>

- Communications sent to the SSM MPP's office or the mayor's office in 2019 to 2020;
- emails from the accounts of three Minister Office staff in the role MPP Liaison role and who had involvement with and knowledge of the subject matter of the request;
- shared drive folders from the Minister's Office;
- incoming and outgoing emails and shared drive folders of the Strategic Issues Advisor; and
- records of a former supervisor and an environmental compliance officer at the ministry's SSM district office.

I also accept the ministry's submission that, aside from the May 9, 2019 email correspondence of the environmental compliance officer, the SSM district office did not communicate directly with the SSM MPP's or Mayor's offices in relation to the matters identified in the request.

As a result of these searches, the ministry provided the appellant with a supplementary decision letter, providing her with full access to the records located and advising that:

After a thorough search through the ministry files with expanded search terms based on your full request description and subsequent emails, records were located in the Minister's Office that were responsive to your request following a search conducted in the shared drive and Outlook accounts of 3 former MO staff.

... No responsive records in addition to those released under [a previous request number] were located in the Northern Regional Office and Sault Ste Marie Area office.

The ministry also provided the appellant with EIEB records, specifically, emails sent by the appellant to the ministry where the parties named in the request were copied, that it had not previously considered responsive. The ministry advised that, aside from these emails, EIEB has confirmed that there was no other correspondence between it and the parties named in the request.

[35] Despite the ministry's response to the interim order and the additional disclosure that arose as a result of its additional searches, I find that the ministry has not provided sufficient evidence to demonstrate that the ministry conducted a reasonable search for three specific types of records identified by the appellant in her representations, specifically:

1. records of the former Sudbury District Manager MECP;

2. emails from the EIEB Director, who had indicated that there would be further communications coming from her; and,
3. records that may relate to an ongoing court proceeding.

[36] Regarding the ministry's search for records of the former Sudbury District Manager MECP, I find that the ministry did not provide sufficient evidence to demonstrate that it conducted a search of his record holdings. I agree with the appellant that his records may be responsive to the request because the former District Manager's responsibilities included overseeing local SSM office staff, including the MECP Supervisor and the Senior Environmental Officer, who were responsible for responding to spills and overseeing clean-up efforts.

[37] Although I note that the ministry stated that "the former District Manager was aware of the request and, had he possessed any relevant records, he would have communicated this to the staff responsible for handling the request," I find this is insufficient to meet the ministry's search obligations under section 24 of the *Act*. The ministry has not provided me with evidence that the former District Manager, or any other ministry staff, were asked to search the former District Manager's record holdings for responsive records.

[38] Regarding emails from the EIEB Director that indicate that there would be further communications coming from her, I find that the ministry has not provided sufficient evidence to confirm that searches were conducted for these types of records. The ministry has not confirmed if the EIEB Director or her staff conducted any searches themselves for emails of this type. The ministry simply refers to previous emails that were disclosed and indicates that there are no further records of this type.

[39] Based on my review of the contents of the emails of the EIEB Director that were already disclosed to the appellant, it appears that these emails were copied to many individuals including the Mayor and the MPP referred to in the request. Accordingly, I find that the appellant has established a reasonable basis to conclude that follow up responsive emails would have been generated.

[40] I also find that the ministry did not provide sufficient evidence to demonstrate that it conducted a reasonable search for responsive records that may relate to any previous or existing ongoing court proceeding.

[41] The appellant is seeking records dated between 2019 and 2020. In its initial decision letter of February 8, 2023, the ministry indicated that the records the appellant is seeking, if they exist, may be part of an ongoing court proceeding and are not presently in the custody or control of the ministry.

[42] In its decision letter after the interim order of April 12, 2024, the ministry makes no mention of records that may be part of an ongoing court proceeding, or even if there still is an ongoing court proceeding. As well, in its representations, both before and after

the interim order, the ministry made no mention of any responsive records related to any court proceedings. Furthermore, the ministry has provided no details of any searches it conducted for responsive records that may relate to any court proceedings.

[43] Although the ministry indicates that the records may relate to an ongoing court proceeding, it has not indicated what kind of court proceeding these records may relate to. If records relate to an ongoing court proceeding that is a prosecution, then they may be excluded from the application of the *Act* under section 65(5.2) if all proceedings in respect of the prosecution have not been completed.

[44] Section 65(5.2) reads:

This Act does not apply to a record relating to a prosecution if all proceedings in respect of the prosecution have not been completed.

[45] Even if the ministry ultimately claims that responsive records relate to an ongoing prosecution and are not within its custody or control, the ministry must demonstrate that it conducted a reasonable search for those records.

[46] Whether the responsive court proceeding records relate, or do not relate, to an ongoing prosecution, the ministry should have searched for them and issued an access decision on any such records.

[47] Regarding any records related to a court proceeding that is not an ongoing prosecution, section 10(1) of the *Act* provides for a general right of access to these records that are in the custody or under the control of an institution governed by the *Act*. It reads, in part:

Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless . . .

[48] The ministry was advised in the NOI that if responsive records exist that are not in the institution's possession, the ministry may still have an obligation to search for them because, under section 10(1) of the *Act*, a right of access applies to any record that is in the custody or under the control of an institution.⁹ This includes records not in the institution's possession if they are under the institution's control.

[49] The ministry did not address in its representations, although ordered to do so in the interim order, what responsive records may have existed but no longer exist in its custody or control. Accordingly, I will order the ministry to search for responsive records that may be, or may have been, part of an ongoing court proceeding and to issue an access decision on any located records.

⁹ Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.).

Conclusion

[50] In conclusion, I find that the ministry has conducted a reasonable search for some records responsive to the request and I uphold its search in part. However, I find that the ministry has not provided sufficient evidence to demonstrate that it conducted a reasonable search for the following three types of records, which I find, are reasonably responsive to the appellant's request. Specifically, I will order the ministry to search for the following three types of records and issue an access decision related to these records:

- records of the former District Manager;
- records related to the emails of the EIEB Director that indicate that there would be further communications coming from her; and,
- records that are, or have been, part of an ongoing court proceeding.

ORDER:

1. I partially uphold the ministry's search for records following the interim order.
2. I order the ministry to conduct further searches for the following records responsive to the appellant's request:
 - records of the former District Manager;
 - records related to the emails of the EIEB Director that indicate that there would be further communications coming from her; and,
 - records that are, or have been, part of an ongoing court proceeding.
3. If the ministry locates additional responsive records as a result of its further search(es), or if it does not locate such records, or if it identifies that responsive records exist that are not in its custody or under its control, I order it to issue an access decision to the appellant in accordance with the requirements of the *Act*, treating the date of this order as the date of the request for the purpose of the procedural requirements of the *Act*.
4. In order to verify compliance with this order, I reserve the right to require the ministry to provide me with a copy of the records disclosed with the access decision referred to in order provision 4.

Original Signed by: _____

Diane Smith
Adjudicator

July 18, 2025 _____