



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

INTERIM ORDER M-1013

Appeal M-9700164

Local Services Board of Foleyet



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NATURE OF THE APPEAL:

The Local Services Board of Foleyet (the Board) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) to view (and be allowed to selectively copy) all records relating to the financing, design and construction of all sewer and water works carried out in Foleyet since 1985. The request included all records in the possession of the Board's engineers and any other consultants retained in the relevant period. Also requested were the "site diary and daily pipeline inspection reports" for Project No. 52-0020, contracts 2 and 3.

In its decision, the Board advised the requester that no records exist that are responsive to the request. The requester (now the appellant) appealed this decision. The appellant provided copies of three records which relate to the request and should be in the custody or under the control of the Board. The existence of these records was brought to the attention of the Freedom of Information Co-ordinator for the Board.

This office sent a Notice of Inquiry to the Board and the appellant. The primary issue in this inquiry is whether the Board conducted a reasonable search for the records relating to the request. However, because of the information provided by the appellant, the Notice of Inquiry also solicited representations from the parties on the issue of custody and control.

Representations were received from the appellant only.

DISCUSSION:

REASONABLE SEARCH

Where an appellant provides sufficient details about the records which he is seeking and the Board indicates that records do not exist, it is my responsibility to ensure that the Board has made a reasonable search to identify any records which are responsive to the request. The Act does not require the Board 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 Board 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 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.

At the time of the appeal, the appellant provided copies of three records which appear to be responsive to the request and which also appear likely to be under the custody and control of the Board. In response to the Notice of Inquiry, the appellant states that it is in possession of at least 100 documents over and above the samples provided and that "These documents would also be in the possession of the [Board]." In addition, the appellant indicates that it is also in possession of a report and contract prepared by another company which relates to the request. The appellant states that it believes these documents would also be in the possession of the Board. The appellant

argues that approximately \$6,000,000 of taxpayers' money was spent on these projects and it is hard to believe that the Board would not have any records in its custody and control which relate to the work.

Therefore, in my view, the appellant has provided a reasonable basis for concluding that records responsive to the request may, in fact, exist.

The Board did not make written representations on either issue raised in the Notice of Inquiry.

Because the Board did not provide any evidence to show that it made a reasonable effort to identify and locate records responsive to the request, I cannot find in their favour in this appeal.

ORDER:

1. I order the Board to conduct a further search for records responsive to the appellant's request, including but not restricted to making inquiries to determine whether any individual or company connected to or retained by the Board or any other institution has custody or control of the record(s).
2. I order the Board to provide me with an affidavit outlining the steps taken to search for records. The affidavit is to include a list of individuals, businesses and organizations contacted. The Board is to provide the affidavit to me no later than **October 17, 1997**.
3. In the event that responsive records are located within the custody or control of the Board in the search referred to in Provision 1, I order the Board to render a final decision on access to the records in accordance with the provisions of sections 19 and 22 of the Act, treating the date of this order as the date of the request, without recourse to a time extension under section 20 of the Act.
4. In the event that responsive records are found to be within the custody or control of another institution in the search referred to in Provision 1, I order the Board to transfer the appellant's request to that institution within fifteen (15) days of the date of this Interim order.

5. I order the Board to provide me with a copy of the correspondence referred to in Provisions 1, 3 and 4 (if applicable), within thirty-five (35) days of the date of this order. This should be forwarded to my attention, c/o Information and Privacy Commissioner/ Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.

Original signed by: _____
Marianne Miller
Inquiry Officer

_____ October 2, 1997