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

ORDER MO-1809

Appeal MA-020401-2

Regional Municipality of Peel

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NATURE OF THE APPEAL:

The Regional Municipality of Peel (Peel) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records dealing with a construction-related problem arising in the context of the East Brampton Reservoir Expansion project. The company represented by the requester had been involved as a contractor on the project. The requester subsequently clarified the request to include the following:

1. records which initially determined the potential problem
2. records of the reviews and additional inspections and monitoring that occurred
3. records of notification to the Ministry of the Environment of the problem, and any exchanges with that Ministry
4. records of the retention of the contractor to replace existing membranes, i.e., quotes, tenders, evaluations, etc.
5. all records touching upon the requester's proposal for doing this remedial work.

Peel issued a decision letter granting access to 16 pages of responsive records upon payment of a fee in the amount of $158.70. Peel itemized the fee in its decision letter as follows:

- $3.20 for photocopying (16 pages @ $0.20 per page)
- $125.50 for document search (251 pages x 60 seconds per page @ $30.00 [per hour])
- $30.00 for document preparation (1 hour @ $7.50 per 15 minutes)

The requester paid the fee, but advised Peel that he reserved the right to appeal. The requester also asked for a fee waiver, pursuant to section 45(4)(c) of the *Act* (benefit to public health or safety).

The requester (now the appellant) then wrote to this office appealing Peel's decision. He objected to the amount of the fee and also took the position that more responsive records should exist.

During mediation of this appeal, Peel issued a second decision letter to the appellant. In it, Peel withdrew the $30 fee for document preparation, denied the appellant's request for a fee waiver, and provided him with the 16 pages of responsive records it had previously agreed to disclose.

After reviewing the disclosed records, the appellant reiterated his position that more responsive records should exist. He also withdrew the portion of his appeal relating to the search and photocopy fees. The appellant also requested a review of Peel's decision to deny his request for a fee waiver.

Further mediation was not successful and the file was transferred to the adjudication stage of the appeal process. The two issues identified in the Mediator's Report that was provided to the parties at the completion of mediation were: (1) fee waiver; and (2) adequacy of search.

This office initiated an inquiry by sending a Notice of Inquiry to Peel, setting out the facts and issues and seeking representations. A copy of correspondence provided by the appellant between

the close of mediation and the date of the Notice was also provided to Peel at that time. Peel submitted representations, which were then shared with the appellant along with a copy of the Notice. The appellant also provided representations. I determined that Peel should be provided with an opportunity to respond to the appellant's representations, so I forwarded them to Peel and received a final set of representations in reply.

DISCUSSION:

FEE WAIVER

Section 45(4)(c): public health or safety

Section 45(4) of the *Act* requires an institution to waive fees, in whole or in part, in certain circumstances. Section 8 of Regulation 823 sets out additional matters for a head to consider in deciding whether to waive a fee.

During the mediation stage of this appeal, the appellant made a request to Peel for a fee waiver under section 45(4)(c) of the *Act*, which reads:

> A head shall waive the payment of all or any part of an amount required to be paid under subsection (1) if, in the head's opinion, it is fair and equitable to do so after considering,
>
> > (c) whether dissemination of the record will benefit public health or safety;

Peel denied the appellant's request, stating that:

> Your position is that the fee should be waived for health and safety reasons. After having considered all of the relevant criteria, I regret to advise you that Peel has decided to deny your fee waiver request. …

General principles

The following factors may be relevant in determining whether dissemination of a record will benefit public health or safety under section 45(4)(c):

- whether the subject matter of the record is a matter of public rather than private interest
- whether the subject matter of the record relates directly to a public health or safety issue

- whether the dissemination of the record would yield a public benefit by
    - disclosing a public health or safety concern, or
    - contributing meaningfully to the development of understanding of an important public health or safety issue
- the probability that the requester will disseminate the contents of the record

[Orders P-2, P-474, PO-1953-F, PO-1962]

This office has found that dissemination of the record will benefit public health or safety under section 45(4)(c) (or the equivalent section 57(4)(c) in the provincial *Freedom of Information and Protection of Privacy Act*) where, for example, the records relate to:

- compliance with air and water discharge standards [Order PO-1909]
- a proposed landfill site [Order M-408]
- a certificate of approval to discharge air emissions into the natural environment at a specified location [Order PO-1688]
- environmental concerns associated with the issue of extending cottage leases in provincial parks [Order PO-1953-I]
- safety of nuclear generating stations [Orders P-1190, PO-1805]
- quality of care and service at group homes [Order PO-1962]

Representations

Peel submits:

> The appellant's reasoning for a request for fee waiver was based on his assumption that there was a health and safety concern regarding the expansion project. [Peel] reviewed the request and provided a letter denying the fee waiver … Reasons for denying the fee waiver include:
>
> a) There is no mandatory requirement to test water from reservoirs however Peel's own water quality standards requires that [the Ontario Clean Water Agency] collect and analyze samples from each reservoir three times per week.

b) There is no mandatory requirement to have continuous chlorine analyzers at reservoirs however Peel has installed analyzers at all reservoirs. This ensures that the water is adequately disinfected. Chlorine analyzer readings at all reservoirs are monitored at a central control centre staffing 24 hours per day. Each time bacteriological samples are collected a manual chlorine residual measurement is performed to confirm the chlorine analyzer is accurate. These measurements are recorded on the bacteriological laboratory reports released to the appellant. Analyzers are calibrated if the manual measurement varies significantly from the analyzer reading.

c) Over 1900 samples were collected and tested at reservoirs in Mississauga and Brampton in 2002. All samples are tested by a Presence Absence (P-A) test method which is more sensitive than the alternative Membrane Filter test method. The P-A test provides an enriched growth environment for bacteria that may be in the water sample. If bacterial growth occurs it is considered a "positive" result and further testing (confirmatory testing) is performed to determine the type of bacteria present since a variety of bacteria can grow in this enriched environment (We must determine if harmful or pathogenic bacteria are present). If growth is detected but pathogenic bacteria are not detected then this is considered a false positive.

d) Over 150 samples were collected at the East Brampton Reservoir in 2002. There were only two "positive" results. Further testing confirmed that *Aeromonas* bacteria was present in the sample collected in March and the second "positive" sample collected in May was false positive. Extra samples are immediately collected whenever a "positive" result is detected. All of the re-samples were absent of pathogenic bacteria. Often sample collection error causes positive sample results as these test methods are extremely sensitive.

e) Chlorine residuals, both manual measurements and analyzer readings in 2002 confirm that the water was adequately disinfected at all times.

f) There is no mandatory requirement to perform testing for heterotrophic bacteria in reservoirs. Heterotrophic bacteria (HPC) form the general population of harmless bacteria in the water. Municipal treated water is not sterilized therefore bacteria may be present just as there are bacteria on the food we eat and all over the environment we live in. There is a standard test method for HPC

> that is commonly used by most municipalities including Peel. Peel conducted a trial of a more sensitive test method for HPC in 2002 and it is now a standard in Peel. The test uses R2A media. Reservoirs are tested every month, since reservoirs typically retain water longer than most watermains. The longer water remains in a reservoir, the greater the potential for bacterial growth. The R2A test results for East Brampton in 2002 confirm that the water samples were free of heterotrophic bacteria. This is a great indicator of adequate disinfection and that the reservoir is not providing a good environment for bacterial growth. That is, there is adequate chlorine, inadequate nutrients and/or effective turnover of the water stored in the reservoir. Whenever there are more than 500 bacteria detected per millilitre of water this is an indicator of inadequate disinfection. The highest level of HPC detected using the R2A media at reservoirs in 2002 was 3.

The appellant's representations deal primarily with the adequacy of search issue. He does not respond directly to any of the points outlined in Peel's representations on fee waiver, simply reiterating his position that a waiver should be allowed based on public heath and safety grounds. The appellant's representations include the following statements that could be interpreted as supporting his fee waiver request:

> This request concerns an event of interest, being the finding, on or about February 2002, that the East Brampton Reservoir, a buried underground tank holding over 50,000,000 Litres (over 50 Million Litres) of treated potable drinking water, was found to have surface runoff water leaking into it and mixing with the treated water before being distributed to the local Brampton community, or several hundred thousand people.
>
> Because the surface water runoff was entering the reservoir through an old deteriorated waterproofing membrane, this condition is known to have existed for many years prior to the problem being discovered by my company when doing other work on this facility in February 2002.
>
> …
>
> This request concerns specifically a health and safety matter similar to the Walkerton Tragedy, wherein surface water runoff similarly entered the treated potable water system going out to the small community of Walkerton and is now tragically part of Canada's history, receiving international attention.

The appellant also makes reference to other appeals involving Peel that, in his view, "relate to the same event and [are] reasonably covered by my initial request".

Analysis and findings

Having considered the representations of both parties, I am not persuaded that disclosing the records provided to the appellant in response to his request would result in any benefit to public health and safety, as required in order to fall within the scope of section 45(4)(c).

The appellant makes assertions of problems with the water supply at the East Brampton Reservoir in 2002, but does not back them up with evidence. Peel goes into considerable detail in its representations to outline the steps it took to ensure that water from the Reservoir in 2002 was tested and determined to be safe for public consumption. In the absence of any evidence or argument from the appellant in response to Peel's representations, I find that there is no reason to question the testing process, and clearly no basis for any reasonable conclusion that the health or safety of the public was put at risk.

I should also point out that, in response to the appellant's request, Peel explains that it contacted the Ontario Clean Water Agency and obtained copies of various water sampling documents. It identified the documents that related to the East Brampton Reservoir and disclosed those documents to the appellant. The appellant makes no reference to these records in his representations, which would lead me to conclude that he has identified no evidence of any health or safety risks reflected in these test records.

In summary, I find that:

- the subject matter of the records provided to the appellant do not relate to a public health or safety issue;

- their dissemination would not yield a public benefit by disclosing a public health or safety issue or contribute meaningfully to the development of understanding of an important public health or safety issue; and

- in light of the fact that the appellant has had the records for some time now without making them more widely available to the public, there is a low probability that he will disseminate the contents of the test results in a manner that would enlighten the general public.

Accordingly, I find that the requirements of section 45(4)(c) of the *Act* have not been established and I uphold Peel's decision not to grant a fee waiver to the appellant.

ADEQUACY OF SEARCH

General Principles

In appeals involving a claim that more responsive records exist, as is the case here, the issue to be decided is whether Peel has conducted a reasonable search for all records as required by section 17 of the *Act*. If I am satisfied that the search carried out was reasonable in the

circumstances, Peel's decision will be upheld. If I am not satisfied, further searches may be ordered.

The *Act* does not require Peel to prove with absolute certainty that additional records do not exist. However, in my view, in order to properly discharge its obligations under the *Act*, Peel must provide me with sufficient evidence to show that they have made a **reasonable** effort to identify and locate all records responsive to the request.

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

The request and Peel's response

In his original request, the appellant describes the types of records he is seeking access to, namely those relating to the waterproofing project at the East Brampton Reservoir his company had been involved with. His request was quite general, consisting of "all records dealing with this health and safety matter and how it has been addressed by [Peel] to date."

The request was later clarified by the appellant and Peel to five types of records:

1. records which initially determined the potential problem
2. records of the reviews and additional inspections and monitoring that occurred
3. records of notification to the Ministry of the Environment of the problem, and any exchanges with that Ministry
4. records of the retention of the contractor to replace existing membranes, i.e., quotes, tenders, evaluations, etc.
5. all records touching upon the requester's proposal for doing this remedial work.

Peel conducted a search for these records, identifying 16 pages of water sampling records and disclosed them to the appellant.

Representations

In response to the Notice of Inquiry, Peel outlined the approach it took to identifying responsive records:

> The appellant indicated that the records involved a matter of health and safety to the residents of East Brampton, serviced by East Brampton Reservoir. Further to the initial request for information, to satisfy the appellant's requirements regarding the health and safety issue, the documents deemed responsive would support that this in fact was not a health and safety issue. The search for the records involved [Peel's] Freedom of Information (FOI) Coordinator contacting

> the custodian of the records requesting copies of records associated with the health and safety matter of the east Brampton Reservoir Expansion. The custodian provided a binder of approximately 251 hard copies of water sampling documents produced by [the Ontario Clean Water Agency]. The FOI Coordinator reviewed the documents to find information specifically pertaining to East Brampton Reservoir, from the review, 26 records were deemed responsive and were released to the appellant.

In response, the appellant provides copies of records that, in his view, "identify the event of interest and indicate clearly that significant records ought to exist and be responsive". These records consist of:

1. a letter from Peel to the appellant, dated November 1, 2002, which acknowledges the appellant's health and safety concern, points out that additional inspections and monitoring took place, and confirms that it retained a contractor to replace the roof membrane and notified the Ministry of the Environment of its plans.

2. a report to Peel Council from the Commissioner of Public Works, dated October 28, 2002, seeking approval to hire a contractor to undertake the roof membrane replacement project, including reference to the contractor, the facts gathered to substantiate the need for the work project, and reference to Peel having advised the Ministry of the Environment that the project was being undertaken.

3. excerpts from various Peel Council meeting minutes that refer to documents tabled with Council on the roof membrane replacement project, including various tests undertaken in that context.

The appellant also explains that he was in contact with the Regional Councillor for the East Brampton area who, according to the appellant, undertook to look into the matter.

The appellant submits that, based on this evidence, it is reasonable to assume that additional responsive records exist, including correspondence exchanged by Peel and the Ministry of the Environment and/or Ontario Clean Water Agency, reports tabled with Peel Council, communications between Peel staff and the local Councillor, and test and inspection results over and above the 16 records already provided to him.

In reply, Peel takes the position that, because the appellant's request pertained to health and safety issues regarding the East Brampton Reservoir, only the test results are responsive, and not:

- records exchanged between Peel and the Ministry of Environment and/or Ontario Clean Water Agency;

- records of additional inspections/testing undertaken at the Reservoir;

- records of notices provided to the Ministry of the Environment; and

- the project file for the Reservoir Roof Replacement Project.

Peel states that a copy of its purchasing by-law and all relevant test results at the Reservoir have already been provided to the appellant.

Peel points out that "exemptions were applied against one page" of correspondence between Peel and contractor hired to complete the roof repair work, and that "in accordance with Order MO-1752, [this record] will be released in full on or before March 2, 2004". I assume this has taken place.

Peel takes the position that any other records identified by the appellant fall outside the scope of his request, specifically:

1. records exchanged between Peel and the Ministry of the Environment and/or Ontario Clean Water Agency;

2. additional inspections/testing undertaken at East Brampton Reservoir;

3. records of notices provide to the Ministry of the Environment;

4. records reflecting "delays associated with the understanding of the reservoir concerns through to the inspection on September 27, 2002";

5. records exchanged between Peel and the Ministry of the Environment regarding isolation of the East Brampton Reservoir; and

6. records relating to any discussions between Peel staff and the local Councillor.

In my view, Peel has taken an overly restrictive interpretation of the scope of the appellant's request and, as a result, has not undertaken an adequate search for all responsive records.

Although the test results identified by Peel and provided to the appellant are clearly relevant and responsive, and speak directly to the public health and safety concern he identifies, a plain reading of the request makes it clear that the appellant was seeking other related records as well. Perhaps the clearest example is records exchanged between Peel and the Ministry of the Environment. The third item listed in Peel's decision letter to the appellant is:

> records of notification to the Ministry of the Environment of the problem, and any exchanges with that Ministry

It is simply not credible for Peel to now argue, as it does, that exchanges of correspondence and notifications involving the Ministry of the Environment fall outside the scope of the request when they are specifically described in the decision letter as being within scope.

In order to discharge its responsibilities under section 17 of the *Act*, I require Peel to conduct further searches for records described in all five parts of the appellant's request. This would clearly involve:

- exchanges of documents or notifications involving the Ministry of the Environment and the Ontario Clean Water Agency;

- additional inspections or tests of the East Brampton Reservoir undertaken in the context of the roof membrane replacement project;

- other records relating to the retention of the project contractor;

- reports to Peel Council on this project; and

- records reflecting discussions between Peel staff and the local Councillor.

ORDER:

1. I uphold Peel's decision to deny the appellant's fee waiver request.

2. I find that Peel has not undertaken an adequate search for all responsive records, and I order Peel to undertake additional searches for records responsive to all five parts of the appellant's request, in accordance with my direction in this order. I order Peel to complete these searches by **August 3, 2004**, without recourse to any time extensions, and to issue a decision letter to the appellant outlining the results of the searches, in accordance with the requirements of section 17 of the *Act*.

3. I order Peel to provide me with a copy of the decision letter referred to in Provision 2 of this order.

Original signed by: June 30, 2004
Tom Mitchinson
Assistant Commissioner