



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

INTERIM ORDER MO-2259-I

Appeal MA07-87

Town of Petrolia



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BACKGROUND:

The information being sought by the requester in this case concerns the development of a new community centre (the Community Centre) for the Town of Petrolia (the Town). Community interest in building the Community Centre existed as far back as 1985, spearheaded by a group of community leaders that came to be known as the Oil Heritage District Community Centre Association (the Association). However, when Petrolia's Town Hall burned down in 1989 attention was diverted to rebuilding the Town Hall and the Community Centre project was put on the back burner. After the Town Hall was completed in or about 1992, the Association resumed its efforts to bring the Community Centre project to fruition. After twenty years of campaigning and fundraising by the Association, the Community Centre opened its doors in 2006.

Of significance to this appeal, the site of the Community Centre was formerly used for oil production and storage starting in the mid to late 1800's. This use continued until approximately 1950 when the day tanks were backfilled. The chain of title for the Community Centre site is not clear and the identity of the current owner of the property is a matter of contention between the parties to this appeal. The requester asserts that the site was owned by a private individual and then transferred to the Town in December 2000. A record that was disclosed to the requester by the Town at the request stage of this process may support the requester's view. However, the Town disagrees, asserting that this private individual donated the property to the Association.

It is also the Town's position that the Community Centre project was always an Association initiative. The Town asserts that the Association hired the general contractor and managed the development of the project. However, the Town acknowledges being involved in the project throughout, having contributed initial seed financing and political support. In addition, when it became evident that the site required a significant environmental clean-up in order to make it safe and that the financial and time costs of doing so were prohibitive, the Town stepped in and agreed to assume responsibility for the clean-up of a former oil storage tank (the day tank), located immediately west of the Community Centre. The Town retained a named company (third party #1) to do the excavating, clean-up and backfilling of the day tank and another named company (third party #2) to conduct soil testing.

It is the remediation of the day tank and, in particular, records relating to soil contamination in and around it that is of particular interest to the requester in this inquiry. The Ministry of the Environment (the Ministry) has also recently taken an interest in this matter. Both the requester and the Ministry are concerned about whether the Town properly disposed of contaminated soil at the Community Centre when the remediation work was completed.

NATURE OF THE APPEAL:

A request was submitted to the Town under the *Act* for access to the following information:

All environmental records produced by [third party #2], for the "OHDC" [Oil Heritage District Community Centre]. Documents to Include: "Phase I + Limited Phase II Environmental Site Assessment" Reference # T5218014.

All documents concerning clean up of [day tank], a service done directly for the Town of Petrolia. Any and all documents produced by [third party #2] about this matter.

The Town granted full access to some records and denied access to two other records. The Town did not indicate in its decision letter which exemptions it was relying on to deny access to the withheld information.

The requester (now the appellant) appealed the Town's decision.

During the course of the mediation stage of the appeal process, the Town clarified that the two records had been withheld pursuant to section 10(1) (third party information) of the *Act*.

Both the Town and the mediator notified another named third party (third party #3). Third party #3 responded that it was unwilling to consent to the disclosure of the two records to the appellant. The Town subsequently decided to grant full access to the withheld records and notified several third parties, including third parties #1, #2 and #3, of its decision. The third parties did not appeal the Town's decision and the Town subsequently disclosed the two records to the appellant. Accordingly, the application of section 10(1) is no longer at issue in this appeal.

However, during the mediation process the appellant advised the mediator that he believed additional records exist particularly in relation to the clean-up of the day tank. Accordingly, the reasonableness of the Town's search for responsive records was added as an issue to the appeal.

The parties were unable to resolve the search issue through mediation. The file was therefore transferred to the adjudication stage for an inquiry where the issue to be determined is whether the Town completed a reasonable search for records responsive to the appellant's request.

I scheduled an oral inquiry, to be conducted by teleconference, for December 5, 2007.

Prior to the hearing, I received a copy of a letter issued by the Town on November 15, 2007, in which it provides the appellant with several additional records associated with the remediation of the day tank.

In addition, prior to the hearing, I received a package of documents from the appellant that he states supports his contention that the Town did not conduct a reasonable search for responsive records. The appellant also provided the website address for two articles that appeared in the *Sarnia Observer* on December 1, 2007 and December 4, 2007 respectively, with regard to the clean-up and disposal of contaminated soil at the Community Centre and the disclosure of further records with regard to this matter.

On December 5, 2007, I conducted a hearing via teleconference into the reasonable search issue. The appellant was self-represented at the hearing. Participating for the Town were its Clerk

Administrator and its Director of Operations who, according to the Clerk Administrator conducted all of the physical searches for records responsive to the appellant's request.

DISCUSSION:

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 for records as required by section 17 [Orders P-85, P-221, PO-1954-I]. 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.

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.

Where a requester provides sufficient detail about the records that he is seeking and the institution indicates that records do not exist, it is my responsibility to ensure that the institution has conducted a reasonable search to identify any records that are responsive to the request. The *Act* does not require the institution to prove with absolute certainty that the records do not exist. However, in order to properly discharge its obligations under the *Act*, the institution must provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request [Order P-624].

A reasonable search would be one in which an experienced employee expending reasonable effort conducts a search to identify any records that are reasonably related to the request [Order M-909].

Parties' representations

The appellant

The appellant states that he has never been satisfied with the level of disclosure provided by the Town in relation to the clean-up of the day tank. Owing to his dissatisfaction, he states that he contacted the Ministry to inquire about the same records, after which time the Town resumed its search and located more documents. The appellant states that in addition to the records received with the Town's November 15, 2007 letter, he received an additional sixty-three pages of records a day or two before the inquiry, which he understands have also been disclosed to the Ministry. The appellant notes that the December 4, 2007 article in the *Sarnia Observer* makes reference to the Town having turned over "sixty pages of receipts" to the Ministry and the appellant. The appellant believes that if the Town had conducted a reasonable search at the outset of his request, these recently identified and disclosed records would have been found much earlier. It is his view that the Town is only now conducting a proper and thorough search and that further searches will reveal additional records.

The Town

The Director of Operations states that he was the individual responsible for conducting all of the searches for records responsive to the appellant's request. He provided the following outline of the steps he took to respond to the request:

- received instructions from the Clerk Administrator to provide all documentation requested by the appellant
- collected and disclosed all documentation that he felt was responsive to the request, including
 - Phase I and limited Phase II Environmental Assessment completed by third party #2, dated August 17, 2001
 - Geotechnical Investigation Reports completed by third party #2, dated February 1, 2005 and January 9, 2004, which were subsequently released to the appellant after third party notification
 - County of Lambton Building Inspector's Report
 - Contract documents, including contractors' letters of guarantee, certificates of operations and maintenance instructions
 - Construction drawings, including all shop drawings relating to structural specifications and a complete set of drawings for construction of the community centre
 - All manifest documentation relating to the day tank remediation
 - Third party #2 day tank soil sampling and characterization program report, dated June 19, 2006, which contained soil testing data, including soil pH levels and levels of volatile organic compounds, petroleum hydrocarbons and metals in the soil, and options for disposal – both on and off-site
 - Binders containing complete site specifications, including civil, mechanical, electrical, structural and h-vac
 - Manifests and back-up documentation regarding transport of contaminated soil to landfill and contaminated water to environmental processing plant for treatment

The Director of Operations states that the sixth item on the above list (manifest documentation relating to the day tank remediation) comprises the package of documentation that was sent to the appellant on November 15, 2007. The Director of Operations states that the manifest documents contain the details relating to the removal of the contaminated soil from the site, including what was removed, the date it was removed, the company retained to remove it, the specific location from which it was removed, and whether it was sent for treatment or disposal. He submits that when it came to his attention that the appellant was seeking additional information he sat down and went through his "seven or eight boxes of files" with a view to finding additional responsive information that he might have missed when the initial searches were completed. As a result of this additional search, he found the records that were subsequently forwarded to the appellant on November 15, 2007.

The final item (manifests and back-up documentation regarding the transport of contaminated soil and water) comprises the sixty-three page package of documents that was disclosed to both the Ministry and the appellant on or about December 4, 2007. He submits that these documents contain "back-up information that showed the same information as the previous manifests" that had been sent to the Ministry and the appellant. In his view, the back-up information just made it easier for a lay person to read and understand the manifests. These documents are essentially dockets showing labour, hours, supervision and equipment used. The Clerk Administrator acknowledges that this new information is responsive to the appellant's original request. As with the November 15th package, the Director of Operations states that in locating and disclosing these new documents he again was trying to think of information that might be helpful to the appellant but had been previously overlooked.

In response, the appellant states that despite having been provided with this additional information he has still not received any test results for soil testing completed by third party #2. It is his view that these test results exist because soil testing was within the scope of work to be performed by third party #2 for the Town. In support of this contention he refers to the "scope of work" section of third party #2's proposal to the Association for "day tank soil sampling/characterization" as well as copies of receipts for the completion of the testing that the Town provided. The appellant asserts that the Town clearly managed the Community Centre at the time of the remediation of the day tank and should have been provided with every document relating to that work. Furthermore, he believes that the Town, as the generator of the waste, would have been provided with the test results as would third party #1 and third party #2, as the two contractors involved in this operation. The appellant states that he is familiar with the reporting procedure that is followed when work of this nature is completed, having been involved in a professional capacity in other environmental clean-up operations. He believes that the back-side of each of the manifests would contain the actual test results that he is seeking. However, he states that the Town only provided him with the front-side of each of these manifests. He also believes that the Town would have received reports from third party #2 on its test findings.

Analysis and findings

As stated above, the issue for me to determine is whether the Town has completed a reasonable search for records responsive to the appellant's request. In exploring this issue, I must be satisfied that the searches carried out by the Town were reasonable in the circumstances. If I am not satisfied that the Town's search efforts were reasonable then I can order further searches.

Both the appellant and the Town, represented by the two staff who participated in this inquiry, have been forthcoming in presenting their evidence. I thank everyone for their participation and assistance.

In this case, weighing all of the evidence before me, I am not satisfied that the Town has completed a reasonable search for records responsive to the appellant's request. While it appears that the Town has endeavoured to be helpful to the appellant in providing information relating to the remediation of the day tank, the Town's actions reflect a less than thorough approach to the search process. This is evidenced by the amount of information that the Town discovered and disclosed in the four weeks preceding the hearing and the confusion around the possible existence of responsive information that the Town may have overlooked.

The Director of Operations acknowledges in his evidence that results should exist with regard to soil tested as part of the day tank remediation process. Also, both the Chief Administrator and Director of Operations both acknowledged during the inquiry that they weren't sure whether the back-sides of the manifests contained test results or whether they even looked at the back-sides of these documents to determine whether this information was present. They also weren't sure whether the Town ever received letters from third party #2 reporting on its test findings.

During the course of the inquiry, ownership of the Community Centre site was raised as an issue. In my view, it is not necessary for me to decide whether the Town or the Association is the owner of the Community Centre site in order to address the search issue. On the evidence, there is no dispute that the Town retained third party #1 and third party #2 to perform services regarding the remediation of the day tank. It is also evident that the Town paid third party #1 for excavation and disposal and third party #2 for soil testing. In my view, having entered into this contractual arrangement, the Town was entitled to receive and should have received reports from third party #1 and third party #2 regarding the work that they did. Therefore, ownership aside, I am satisfied that soil test results should exist in some form and that the Town should have them or have access to them.

In conclusion, based on all the evidence before me, I have concerns about the Town's search processes generally and its search efforts in this case specifically. I am not satisfied that the Town has conducted a reasonable search in this case and I will order it to conduct further searches for responsive records relating to the remediation of the day tank and, in particular, soil testing performed in relation to this work.

As a general comment, with regard to future requests for information, I would caution the Town to make its best efforts to thoroughly canvass the scope of each request it receives and, where appropriate, seek additional clarification from the requester to ensure that it has properly interpreted it. In my view, had the Town sought clarification from the appellant earlier in this process, the additional records the appellant seeks may have been located and a hearing avoided.

ORDER:

1. I order the Town to conduct further searches for responsive records, whether in printed form, on videotape, by electronic means or otherwise, within its record holdings. In conducting these searches, the Town is requested to consult all staff that have been involved with the Community Centre project. With regard to this provision, I order the Town to provide me with affidavits sworn by the individuals who conduct the searches by **January 16, 2008**. At a minimum, the affidavit should include information relating to the following:
 - (a) information about the employee(s) swearing the affidavit describing his or her qualifications, position and responsibilities;
 - (b) a statement describing the employee's knowledge and understanding of the subject matter of the request;
 - (c) the date(s) the person conducted the search and the names and positions of any individuals who were consulted;
 - (d) information about the type of files searched, the nature and location of the search, and the steps taken in conducting the search;
 - (e) the results of the search;
 - (f) if as a result of the further searches it appears that responsive records existed but no longer exist, details of when such records were destroyed including information about record maintenance policies and practices such as evidence of retention schedules.
2. If further responsive records are located as a result of the searches referred to in Provision 1, I order the Town to provide a decision letter to the appellant regarding access to those records in accordance with the provisions of the *Act*, considering the date of this order as the date of the request.
3. The affidavits referred to in Provision 1 should be forwarded to my attention, c/o Information and Privacy Commissioner/Ontario, 2 Bloor Street East, Suite 1400, Toronto, Ontario, M4W 1A8. The affidavits provided to me may be shared with the appellant, unless there is an overriding confidentiality concern. The procedure for the submitting and

sharing of representations is set out in *IPC Practice Direction 7*, which is available on our website.

4. I remain seized of this appeal in order to deal with any other outstanding issues arising from this order.

Bernard Morrow
Adjudicator

December 21, 2007