



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-2279-I

Appeal MA07-288

County of Simcoe



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NATURE OF THE APPEAL:

The County of Simcoe (the County) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the Act) for access to the following:

...a detailed list of the past events and recent information sent to the County administration that caused [it] to direct [a named law firm] to write [to the appellant] on June 22, 2007 and warn [him] to not become personal to any of the public officers in [his] criticism of [a] public project.

By way of background, the public project in question concerns the development of the Ministry of the Environment approved Landfill Site 41 in the Township of Tiny (the landfill project). The letter referenced in the above request was prepared by the County's outside legal counsel (the County's lawyer).

The County issued a decision in which it advised that there were no records responsive to the appellant's request.

The requester (now the appellant) appealed the County's decision, insisting that records must exist in response to his request.

The parties were unable to resolve the appeal during the mediation stage of the appeal process and the matter was referred to adjudication, where the sole issue to be determined is whether the County conducted a reasonable search for records responsive to the appellant's request.

I scheduled an oral inquiry, to be conducted via teleconference, for February 7, 2008.

Prior to the hearing, I received two letters from the appellant, one addressing his participation and that of a named individual at the hearing and the second a copy of a letter from the appellant to the County with two attachments, a handwritten fax from the appellant to the County's lawyer dated June 25, 2007 and a letter from the County's lawyer to the appellant dated July 6, 2007. The County's lawyer forwarded a letter setting out the names and titles of those individuals who would be present and available to give evidence at the hearing on behalf of the County.

On February 7, 2008, I conducted a hearing via teleconference into the reasonable search issue. The appellant attended the hearing and gave evidence. The appellant was assisted and supported at the hearing by a named individual who identified himself as the Chair of the "Community Monitoring Committee", also known as the "CMC" (the CMC representative). Attending for the County were the County's lawyer, Chief Administrative Officer (CAO), Clerk and Deputy Clerk. During the inquiry I heard from the County's lawyer, CAO and Deputy Clerk.

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 states that his motivation for making his request was a desire to understand what caused the County's lawyer to write the letter of June 22, 2007 to him.

The County's lawyer states that the letter was written in an attempt to avert a potentially volatile situation between the County and a group of community organizations and a number of individuals, who had expressed concerns about the landfill project. He indicates that while there has been considerable concern raised by various community groups and individuals regarding the landfill project over the past twenty years, the County had become increasingly uncomfortable with what it considers to be personal attacks on various public officials involved in the project. The County's lawyer states that what precipitated his letter was the receipt of a package of documents by the County's CAO from a local council member. The package was apparently received by the local council member at his home address and then brought to the CAO's attention.

While the appellant acknowledges that he has been an opponent of the landfill project, he indicated that he had not sent a package to a local council member. Accordingly, he does not understand why he was singled out and sent a lawyer's letter threatening possible legal action.

In response, the County's lawyer explains that it was an oversight that the letter was addressed only to the appellant. He advised that he had intended to address the letter to the appellant as well as to four individuals and four organizations that were "copied" on it. However, due to miscommunication with his administrative assistant the letter was addressed only to the appellant while the others received copies.

The County's lawyer also states that his "concern" about personal criticism was not documented, but rather based on anecdotal information. He suggests that he had not received anything in

writing regarding the delivery of this package and that the matter had simply been brought to his attention for response.

Regarding the County's interpretation of the appellant's request, the County's lawyer states that the request was interpreted to mean that the appellant was only interested in a detailed list that documented both past events and recent information regarding allegations of criticism. And, since the County states that no such list has ever existed, it does not have information that is responsive to the appellant's request.

The appellant's view is that the County should have consulted with the appellant regarding the scope of his request and that had it done so it would have discovered that his interest in a list was confined to "past events" and not "recent information". The appellant states that he is interested in a list of past events and recent information, not necessarily in list form, sent to County administration, and that had the County sought clarification from him it would have been able to respond properly to his request.

The County's lawyer states that the County never sought clarification from the appellant regarding the scope of his request prior to or following the issuance of its decision letter, as it relied on what it believed to be a reasonable interpretation of the request based on its wording. Therefore, the County's lawyer submits that the County's initial searches were confined to finding a "list". However, the County's lawyer acknowledges that as he and the County began preparing for the inquiry he, along with others, made inquiries as to whether there are any other responsive records, including the package that had been delivered to the local council member. The County's lawyer states that these additional inquiries were made two to three weeks prior to the oral inquiry, and that no further responsive information was found.

The County's CAO confirms receiving a package of documents from a local council member. However, he stated that he did not retain a copy of the package.

The County's Deputy Clerk states that she was the individual responsible for conducting the search for responsive records. She indicates that she sought input from the CAO's assistant and from the County's Communications Manager. The Deputy Clerk states that her focus was on locating a "list" and that as a result of discussions with the CAO's assistant and the Communications Manager she understood that a list did not exist that is responsive to the appellant's request. She also states that she asked these individuals whether they had seen the package of documents that had been received from the local council member and was advised that they had not. The Deputy Clerk indicates that she had subsequent discussions with the County's Manager of Environmental Services who advised that he did not have records responsive to the appellant's request.

Analysis and findings

As stated above, the issue for me to determine is whether the County 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 County were reasonable in the circumstances. If I am not satisfied that the County's search efforts were reasonable then I can order that further searches be completed.

In this case, weighing all of the evidence before me, I am not satisfied that the County has completed a reasonable search for records responsive to the appellant's request. In my view, the appellant's request was open to interpretation and in need of clarification from the time it was received by the County. I arrive at this conclusion based on two factors: first, the partial wording of the appellant's request and second, the parties' divergent interpretations of the scope of the request.

Dealing with the first factor, a portion of the wording of the appellant's request was taken directly from the June 22, 2007 letter from the County's lawyer to the appellant. That letter makes reference to concerns regarding criticism of the landfill project directed personally at public officials "based on past events and from recent information sent to the County administration...". In my view, based on this choice of wording it is not unreasonable to conclude that the appellant was interested in more than just lists that address these sources of criticism.

Turning to the second factor, we now know that the County initially restricted its focus to locating a detailed list of both past events and recent information regarding allegations of criticism of the landfill project while the appellant viewed his request more broadly to include a list of past events and recent information, not necessarily in list form. However, had the County given some further thought to the appellant's request, in light of the way it was worded, and sought clarification from him rather than unilaterally assuming that he was only interested in a list, it may have been in a better position to respond. Eventually, it appears that the County considered the appellant's request more broadly in the weeks leading up to the hearing. However, aside from trying to locate a copy of the package that was received from the local council member, it is unclear on the evidence before me what additional searches were carried out and, in particular, what places were searched, by whom were they conducted, what types of files were searched and finally, what were the results of the searches.

Accordingly, in the circumstances of this case, I conclude that the County has not conducted a reasonable search for records responsive to the appellant's request. I will order the County to conduct a further search focusing, in particular, on "recent information sent to the County" regarding criticism of the landfill project directed personally at County public officials.

ORDER:

1. I order the County 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 County is requested to consult all staff that have been involved with the landfill project. With regard to this provision, I order the County to provide me with affidavits sworn by the individuals who conduct the searches by **March**

13, 2008. At a minimum, each 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 County 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.

Original Signed By: _____

Bernard Morrow
Adjudicator

February 21, 2008