



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-2333-F

Appeal MA07-87

Town of Petrolia



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BACKGROUND:

This order disposes of issues arising from my Interim Order MO-2278-I, which was issued subsequent to my initial Interim Order MO-2259-I. For a complete review of the background to this matter, please see Interim Orders MO-2259-I and MO-2278-I.

Briefly, 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). The site of the Community Centre was formerly used for oil production and storage starting in the mid to late 1800's until approximately 1950 when the storage tanks were backfilled. It is the remediation of a former oil storage tank (the day tank), located immediately west of the Community Centre and, in particular, records relating to soil contamination in and around it that is of particular interest to the requester. 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.

The Ministry of the Environment (the Ministry) has also 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 *Municipal Freedom of Information and Protection of Privacy Act* (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. It 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 was whether the Town completed a reasonable search for records responsive to the appellant's request.

On December 5, 2007, I conducted a hearing via teleconference into the reasonable search issue.

I subsequently issued Interim Order MO-2259-I, in which I expressed concerns regarding the Town's search processes generally and its search efforts in this case specifically. Based on the oral evidence provided by the parties at the hearing, I concluded that the Town had not conducted a reasonable search for responsive records and I ordered it to conduct further searches for responsive records relating to the remediation of the day tank and, in particular, soil testing in relation to this work, and to provide affidavits sworn by the individuals who conduct the searches.

In response to my interim order, the Town submitted an unsworn document in the form of a letter, dated January 24, 2008, co-signed by the Town's Director of Operations and its Clerk-Administrator, outlining the former's additional search efforts. The letter included several attachments. One of the attachments was a copy of a revised report, dated January 17, 2008, submitted by affected party #2 to the Oil Heritage District Community Centre Association, care of the Town, regarding the day tank remediation (the Revised Report), a copy of which was delivered to the appellant.

Shortly thereafter an Adjudication Review Officer in our office received a call from the appellant in which he questioned whether an earlier version of the Revised Report exists. The Adjudication Review Officer called the Clerk-Administrator and communicated the appellant's concern to her. The Town responded with an email from the Director of Operations to the Adjudication Review Officer, which included an embedded email from a representative of affected party #2 to a Ministry employee. The embedded email indicates that an earlier version of the Revised Report had existed in Portable Document Format (PDF) and had been provided to the Town and third party #1 for comment.

I provided the appellant with a copy of the Town's January 24th letter (along with the attachments) as well as a copy of the email communication from the Director of Operations, and I invited him to provide representations. The appellant responded with submissions.

I subsequently issued a second decision, Interim Order MO-2278-I, in which I concluded that an earlier draft version of the Report (the Draft Report) should exist, based on evidence that a PDF copy of it had been provided to the Ministry for comment. And, as it is a record that is responsive to the appellant's request, I would order the Ministry to make an access decision regarding disclosure of it to the appellant.

In addition, the appellant's submissions and the information provided by the representative of affected party #2 in his email to the Ministry employee lead me to question whether there is additional technical information, in the form of manifests and/or raw test data, that is responsive to the appellant's request and which is under the custody and control of the Town.

In light of my findings, I issued the following order provisions:

1. I order the Town to make an access decision, pursuant to section 19 of the *Act*, with regard to the [Draft Report], dated January 17, 2008, with the date of this order treated as the date of the request.
2. I order the Town to provide representations, by **March 13, 2008**, on whether it has custody or control, within the meaning of section 4(1) of the *Act*, of additional technical records pertaining to the remediation of the day tank and, in particular, with respect to the [Draft Report] and Revised Report, both dated January 17, 2008.
3. I remain seized of this appeal in order to deal with any issues arising from this order and to address my final decision on the reasonable search issue.

DISCUSSION:

The following three issues are before me at this juncture:

- the status of the Draft Report and the appellant's right of access to it,
- the extent to which the town has custody or control, pursuant to section 4(1) of the *Act*, of additional technical records pertaining to the remediation of the day tank and, in particular, with respect to the Draft Report and Revised Report, and
- whether the Town has discharged its responsibilities under section 17 the *Act* to conduct a reasonable search.

Parties' representations

The Town responded initially to Interim Order MO-2278-I with two letters, one sent to our office, dated February 29, 2008, and the second sent to the appellant with a copy to our office, dated March 26, 2008.

In its February 29th letter the Town stated that the Draft Report is the same report as the Revised Report that was submitted to the Ministry at a meeting on January 18, 2008 and delivered to the appellant on January 24, 2008. The Town submits that third party #2 prepared the Draft Report in "PDF format" and then made "typing corrections and added the additional information received from [third party #1]," which is why the Revised Report was labelled as such.

The March 26th letter is a decision letter issued by the Town to the appellant in response to provision 1 of Interim Order MO-2278-I. In this letter the Town reiterates that the Draft Report and the Revised Report are one and the same and that there are “no earlier drafts, editions or revisions.”

I found the Town’s position confusing. If the Draft Report was initially prepared in PDF format by third party #2 and then edited, as the Town has suggested in its submissions, then what happened to the Draft Report version? I decided to seek representations from third party #2 with regard to this question. Third party #2 submitted representations in response.

Third party #2 states that it “has issued only one report on [the] Day Tank project.” It submits that a hard copy of the Revised Report was issued during a meeting it attended on January 18th with the Town, third party #1 and the Ministry. Third party #2 states further that a “draft copy was forwarded electronically to the Town and [third party #1] the day before the meeting for review.” Third party #2 states that third party #1 provided “a few additional logs and disposal documents.” Third party #2 submits that it “updated the Report and saved the file as Revised.” It adds that “no copies of the report were ever issued prior to the revisions.” Additionally, third party #2 states that it “may have corrected a few typographical errors” between the Draft Report and final Revised Report.

I then provided the appellant with complete copies of both the Town’s and third party #2’s representations for review and comment.

The appellant did not comment on the apparent discrepancy between the Draft Report and the Revised Report. Instead, he focused on a passage in a letter, dated February 21, 2008, from third party #2 to the Ministry. The Town had included this letter as an attachment to its February 29th representations. The relevant passage makes reference to test results that had been faxed by third party #2 to third party #1 on August 14, 2006. The appellant questioned the whereabouts of that information.

I instructed an Adjudication Review Officer to explore the whereabouts of these test results with the Town. The Town subsequently wrote to me, attaching six pages of documents that it obtained from third party #2, which contain the test results referred to by the appellant. In its cover letter the Town states it is “advised that the analyticals in the attached documentation were issued within the bound [Revised] Report, Tables 4, 5 and 6.”

The six pages, which I will refer to as the August 2006 records, are comprised of the following documents:

- a fax cover page addressed to a representative of third party #1 from a representative of third party #2, dated August 14, 2006
- an internal fax cover sheet addressed to a representative of third party #2 from another representative of third party #2, undated, regarding tests conducted

- a Certificate of Analysis for “Soil”, dated August 11, 2006
- a Certificate of Analysis under the heading “Ontario Regulation 558 – TCLP Leachate (Volatile Organic Compounds)”, dated August 11, 2006
- a Certificate of Analysis under the heading “Ontario Regulation 558 – TCLP Leachate (Semi-Volatile Organic Compounds), dated August 11, 2006
- a fax transmission report, confirming the sending of a five-page fax on August 14, 2006

The appellant then sent me a further letter in which he states that on April 30, 2008 the Ministry ordered additional testing of the Community Centre site, with particular emphasis on the area around the day tank. The appellant goes on to say that this testing has been completed and the Town and the Ministry are now in possession of the test results (the new test results). The appellant argues that the new test results fall within the scope of his request because they are directly related to the focus of his request (the clean-up of the existing day tank), they were compiled while his appeal was ongoing and, under the *Act*, the Town has no right to withhold environmental information about Town held property. In support of his position, the appellant suggests that his request for information was open-ended, since he never set a time frame for the receipt of records in response to his request. The appellant also argues that by agreeing to deal with both the Draft Report and Revised Report in this inquiry, both of which are dated January 17, 2008 and came into existence after the date of the request (February 1, 2007), I had established a precedent that I would address records found after the date of the request.

Analysis and findings

The Draft Report

Pursuant to provision 1 of my Interim Order MO-2278-I, the Town was required to make an access decision regarding the Draft Report, in accordance with section 19 of the *Act*. Inferred within this provision is the understanding that the Town is in the custody or control of this record and, therefore, in a position to make an access decision.

During the course of this inquiry I have heard from both the Town and third party #2 in an effort to determine the whereabouts of the Draft Report. Both the Town and third party #2 have suggested that an electronic version of the Draft Report existed, possibly in PDF format, and that this version was edited, to include additional information received from third party #1 and to correct a few typographical errors, and then finalized into what became the final product, the Revised Report.

I am satisfied, therefore, that the Draft Report did exist in some format and that it is a record responsive to the appellant’s request regardless of whether or not any hardcopies were printed or circulated. However, based on the evidence presented at this inquiry, it would appear that

neither the Town nor third party #2 retained a copy of the Draft Report and that any electronic or hardcopy versions of it were deleted and/or destroyed once the Revised Report was finalized.

In this case, the issue for me to decide is whether the Town has taken *reasonable* steps to search for records responsive to the appellant's request [Orders P-85, P-221, PO-1954-I]. A reasonable search is 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]. The key is, therefore, *reasonableness*. An institution is not required to go to extraordinary lengths to search for records responsive to a request. The *Act* does not require an institution to prove with absolute certainty that records do not exist. Accordingly, an institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request [Order P-624].

In my view, the Town has made a reasonable effort to determine the whereabouts of the Draft Report. Under the circumstances, in my view, it would not be reasonable to ask the Town to consult again with its staff, further review its records or deliberate further with third party #2, in an attempt to determine the whereabouts of the Draft Report.

While I am disappointed that the Town does not appear to have retained a copy of the Draft Report, I appreciate that it cannot disclose what it does not have. Accordingly, I accept that it is not in a position to issue an access decision with regard to the Draft Report.

However, in the future, I would encourage the Town to pay greater attention to its record keeping practices, particularly with regard to the retention of draft documents and electronic records.

Additional technical records

Two distinct technical sets of records have been brought to my attention. The first set is comprised of the six pages of documents that I have referred to as the August 2006 records. The second set is made up of the new test results.

With regard to the August 2006 records, I have carefully compared their contents with Tables 4, 5 and 6 of the Revised Report, which the Town has suggested contain the same information. Based on my review, while there is some similarity between the data in the two locations, the information in the August 2006 records and that contained in the above tables is not identical. For example, with regard to the August 2006 records, the Certificate of Analysis under the heading "Ontario Regulation 558 – TCLP Leachate (Volatile Organic Compounds)" contains six columns of data and the date of analysis is clearly stated as August 8, 2006. In the corresponding Table 4, the same testing parameters are stated but there are only three columns of data and there is no mention of the date of the analysis. I have noted similar differences between the contents of the other test results contained in the August 2006 records and the information in Tables 5 and 6.

In conclusion, on my review, I find that the information in the August 2006 records is more substantial and complete than that provided in Tables 4, 5 and 6 of the Revised Report. Accordingly, I will order the Town to make an access decision regarding the disclosure of the August 2006 records in their entirety (all six pages) to the appellant, pursuant to section 19 of the *Act*.

With regard to the new test results, it is my view that these records are not within the scope of the appellant's request.

The *Act* clearly contemplates requests for continuing access to a record. Section 17(3), which addresses this issue, states:

The applicant may indicate in the request that it shall, if granted, continue to have effect for a specified period of up to two years.

However, in my view, it is clear that this section is intended to apply only in circumstances where the requester specifically indicates in the request that it wishes the right of access to continue and specifies an end-date for continuing access that is no more than two years from the date of the request. In this case, the appellant has not given any indication in his request that he is seeking ongoing access for any specified period. Accordingly, the appellant's argument that his request was open-ended is irrelevant and, in fact, of no assistance to him in this case.

With regard to my having dealt with the Draft Report and Revised Report, both of which came into existence after the date of the request, I point out that these records were brought to my attention through this inquiry process, in response to my interim Order MO-2259-I. The Revised Report was disclosed to the appellant pursuant to a decision letter issued under the *Act*. In contrast, the alleged new test results have been brought to my attention by the appellant. There is no evidence of an access request and/or an access decision in regard to this new information, nor have I sought representations from the parties with regard to this new information. In the absence of a decision to deny access, I have no jurisdiction to hear an appeal concerning access to this record.

In conclusion, I find that the appellant has no continuing right of access to the new test results and this information is not, therefore, before me in this inquiry.

If the appellant wishes to pursue access to the new test results he is free to submit a new access request to the Town and/or the Ministry. In the event that the appellant makes such a request and the matter results in an appeal to this office, he can ask that it be streamed directly to adjudication and consideration will be given to his demand.

Reasonable search

In light of my findings above, I am satisfied that the Town has adequately addressed the provisions of Interim Order MO-2278-I and has conducted a reasonable search for records responsive to the appellant's request. Accordingly, I see no basis for ordering further searches.

ORDER:

1. I order the Town to make an access decision, pursuant to section 19 of the *Act*, with regard to the August 2006 records (all six pages), with the date of this order treated as the date of the request.
2. On the basis of the Town's compliance with Interim Order MO-2278-I, I uphold the Town's search for records responsive to the appellant's request.
3. I remain seized of this appeal in order to deal with any issues arising from Provision 1 of this order.

Original signed by:
Bernard Morrow
Adjudicator

July 30, 2008