Information and Privacy Commissioner,
Ontario, Canada

Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER MO-2671

Appeal MA08-234

City of Guelph

November 17, 2011

Summary: The appellant sought access to the electronic input data files and other records related to a groundwater study undertaken by an external consultant. This order determines that the city does not have custody or control of the electronic input data files and that it conducted a reasonable search for responsive records. The appeal is dismissed.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as am., ss. 4(1) and 17(1) and (2).

Orders and Investigation Reports Considered: Orders MO-1251, MO-1289, MO-2416.

Cases Considered: *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 4072, *City of Ottawa v. Ontario*, 2010 ONSC 6835, *David v. Ontario (Information and Privacy Commissioner) et al (2006), 217 O.A.C. 112 (Div. Ct.), Walmsley v. Ontario (Attorney General),* (1997), 34 OR. (3d) 611 (C.A.).

OVERVIEW:

[1] The City of Guelph (the city) hired an external consultant to complete a groundwater supply study. The appellant submitted a request under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*) to the city for information relating to the study, and in particular, for:

> …all records in the possession of the City of Guelph, including without limitation correspondence, reports, internal memoranda, notes, records of

telephone conversations and published data relating to the letter dated November 29, 2007, from the Mayor of the City of Guelph to [name] at the Ontario Ministry of Natural Resources and its attachment, a letter dated November 29, 2007 from [name], Water Supply Program Manager for the City of Guelph to [name at the Ontario Ministry of Natural Resources] including:

(1) the report by [named consultant] referenced on page 2 and in Figures 2a and 2b of the [Water Supply Program Manager's] letter;

(2) the boundary conditions for the model runs presented on Figures 3 and 4 of the [Water Supply Program Manager's] letter;

(3) the electronic input data file for the [computer] model runs presented on Figures 3 and 4 of the [Water Supply Program Manager's] letter; and,

(4) the well head protection area and related supporting documentation for the Membro, University and Downey wells under current quarry conditions, quarry license limits and the current quarry rehabilitation proposal.

[2] The requester subsequently narrowed his request to items 2, 3 and 4.

The city's access decision

[3] The city located the responsive records and issued an access decision, containing the following details:

Item 2 (Boundary Conditions)

[4] With respect to item 2, the city indicated that it had previously provided the requester with a copy of the consultant's report entitled *Additional Groundwater Supplies for the City of Guelph – The Guelph Lime Project* (the Report).

Item 3 (Electronic Input Data Files)

[5] With respect to item 3, the city's indicated that it was denying access on the basis of sections 7(1) (advice or recommendations), 11 (economic and other interests) and 15 (information soon to be published) of the *Act*.

Item 4 (Well Head Protection Area)

[6] With respect to item 4, the city cited section 7(1) of the *Act*, indicating that disclosure would reveal advice or recommendations of employees of and consultants retained by the city.

The appeal

[7] The requester, now the appellant, appealed the city's decision to deny access to the records responsive to items 3 and 4 of the request. The appellant also asserted that the record provided for item 2 (the Report) does not contain the information requested.

[8] During mediation, the appellant asserted that section 7(1) is not applicable and that one or more of the exceptions contained in section 7(2) should prevail. In addition, the appellant contended that there is a public interest in the records, thereby raising the public interest override provision contained in section 16 of the *Act* as an issue in this appeal. In addition, the appellant also contended that additional records exist; therefore, the reasonableness of the city's search for records is also at issue.

[9] Also during mediation, the city confirmed that it relies on sections 11(a) and (d) for item 3 and that it no longer claims section 15(a) for this item.

[10] The city issued a supplemental decision letter during mediation. In addition to releasing the record responsive to item 4, a letter dated June 5, 2007, it also indicated that it was also relying on sections 9 (relations with other governments), 10 (third party information) and 13 (danger to safety or health) of the *Act* with respect to item 3. Subsequent to its supplemental decision, the city clarified that with respect to section 9, it is relying on sections 9(b) and (d) of the *Act.*

[11] As mediation did not resolve all of the issues in this appeal, the file was transferred to the adjudication stage of the appeal process, in which an adjudicator conducts an inquiry under the *Act*. Following mediation, the applicability of sections 7, 9(b) and (d), 10, 11 (a) and (d), 13 and 16 were at issue, as well as the reasonableness of the city's search for records responsive to items 2 and 4 of the request.

[12] I sent a Notice of Inquiry, setting out the facts and issues in this appeal, to the city, its external consultant (the affected party) and another party that may have had an interest in the record, the Grand River Conservation Authority (GRCA) initially, seeking their representations. I received representations from all three parties. The GRCA indicated that it did not have ownership of the electronic input data files, the record responsive to item 3 of the request, and, therefore, was not objecting to disclosure of the record. I sent a copy of all three representations to the appellant and sought and received representations from the appellant. I then sought reply

representations from the city and the affected party. I received reply representations from only the city.

[13] Subsequently, I sought representations from the city and the affected party on whether the city has custody or control of the electronic data input files, the record that is responsive to item 3 of the request. In making representations, I asked the parties to also refer to the analysis set out in Order MO-2416, which discusses the issue of custody or control concerning what appears to be a similar record as that at issue in this appeal. I received representations from both these parties. I then provided these representations to the appellant and sought his representations. I received representations from the appellant, which I then sent to the city and the affected party. I received reply representations from the city and the affected party. I provided a copy of the reply representations to the appellant. The appellant responded by reiterating his representations on custody or control of the record.

[14] The appeal was then placed on hold pending the outcome of the judicial review application of Order MO-2416. This judicial review application was subsequently withdrawn.

[15] The order determines that the city does not have custody or control of the electronic input data files and that the city had conducted a reasonable search for records responsive to items 2 and 4 of the appellant's request.

RECORD:

[16] The record at issue is responsive to item 3 of the request and consists of the electronic input data files for the computer model runs generated by the affected party as part of its consulting work for the city. These computer model runs were utilized in the study that is the subject matter of the Report.

ISSUES:

[17] The issues in this appeal are:

A. Does the city have custody or control of the record responsive to item 3 of the request?

B. What is the scope of the appellant's request concerning item 2 and has the city conducted a reasonable search for records responsive to items 2 and 4?

DISCUSSION:

A. DOES THE CITY HAVE CUSTODY OR CONTROL OF THE RECORD RESPONSIVE TO ITEM 3 OF THE REQUEST?

[18] Section 4(1) of the *Act* reads, in part:

> Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless . . .

[19] Under section 4(1), the *Act* applies only to records that are in the custody or under the control of an institution.

[20] A record will be subject to the *Act* if it is in the custody OR under the control of an institution; it need not be both.[1]

[21] The courts and this office have applied a broad and liberal approach to the custody or control question (*Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 4072, (hereinafter referred to as *OCCRB*), *Canada Post Corp. v. Canada (Minister of Public Works)* (1995), 30 Admin. L.R. (2d) 242 (Fed. C.A.), Order MO-1251).

[22] The city describes the record, the electronic input data files, as being created by the affected party as part of a computer-modeling tool to enable the affected party to fulfill a contract for services dated June 8, 2004. This contract resulted in the Report (item 2) being issued in February 2006. Concerning the record at issue in this appeal (item 3), the affected party provided the mediator with five pages of computer code as a sample of the record, advising that the record consists of over 28,000 pages of this type of data.

[23] In its initial representations, the city states that the record contains data from other public institutions that has been combined with city information and adapted by the affected party to make predictions concerning groundwater flow and the availability of water supply.

[24] The city refers to section 1.06 of the contract between it and the affected party that provides as follows:

> 1.06 Patents
> All concepts, products or processes produced by or resulting from the Services rendered by the Consultant in connection with the Project, or which are otherwise developed or first reduced to practice by the Consultant in the performance of his Services, and which are patentable, capable of trademark or otherwise, shall be and remain the property of the Consultant. The Client shall have permanent non-exclusive royalty free license to use any concept, product or process, which is patentable,

[1] Order P-239, *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.).

> capable of trademark or otherwise produced by or resulting from the Services rendered by the Consultant in connection with the Project and for no other purpose or project.

[25] Relying on this provision of the contract, the city states that the record is the property of the affected party. The city also states that it is not a licensed user of the specialized commercial software required to use the raw data in record.

[26] The affected party states that:

> …the [record] is a programme or data model in which information is contained. The [record] was created by [the affected party's] scientists/engineers who are specifically educated, trained and experienced in the area of hydrogeology. The [record] is a programme which is developed for clients, for remuneration, as part of the affected party's consulting services. The [record] consists of information obtained from third parties (which may be subject to confidentiality obligations), and information which is specific and proprietary to [the affected party], and was used in the completion of [its] hydrogeological evaluations for the City of Guelph. The [record] itself does not specifically contain raw factual data, but rather an interpreted mathematical representation of a physical system, with inherent limitations in its application, and subsequent interpretation of its results.

[27] The appellant submits that the record contains the electronic input data files for the computer model runs. He states that:

> That data is not a concept, product or process that is patentable or capable of trademark within the meaning of section 1.06. The appellant is not seeking access to the actual computer model developed by the city's consultant but only the electronic input data…
>
> Furthermore, the groundwater model in the Report was not wholly developed by [the affected party]. Rather, it was simply an update of, or in the city's words, "the same model", as that developed for the Guelph-Puslinch Groundwater Protection Study. As acknowledged by [the affected party] itself in the Report, the model for the Guelph-Puslinch Groundwater Protection Study was not developed by [the affected party] but by EarthFx, which also supported [the affected party] in its work on the Guelph Lime Project…

[28] In reply, the city reiterates its original submissions and again relies on the terms of its contract with the affected party.

[29] As stated above, I also asked the parties to provide representations in response to the findings in Order MO-2416. In that Order, the record at issue was the calibrated hydrogeological model and accompanying input data that were prepared by the County of Simcoe's external consultant. Adjudicator Colin Bhattacharjee determined that the following factors were relevant in determining whether the County had control over the model and input data files for the purposes of section 4(1) of the *Act*:

> (1) Did the County have a statutory or any other legal duty that resulted in the creation of the model?
>
> (2) Who paid for the creation of the computer model?
>
> (3) Does the consultant operate at arm's length from the County?
>
> (4) Does the County have the right or power to obtain the computer model and input data from the consultant?

[30] In response, both the city and the affected party submitted that Order MO-2416 does not support a finding that the record is under the control of the city. The appellant, relying on Order MO-2416, submits that the record is under the city's control.

[31] In this appeal, the record was not created by the city but was created by the affected party. The record is in the affected party's possession, and has not ever been within the possession or custody of the city.[2] Therefore, as the record is not within the custody of the city, I will consider in this order whether the record is under the city's control.

Control of the Record

[32] As there is a contract between the city and the affected party, I will first consider a factor which I sought representations on, which asks:

- *Are there any provisions in any contracts between the institution and the individual who created the record in relation to the activity that resulted in the creation of the record, which expressly or by implication give the institution the right to possess or otherwise control the record?* [*Greater Vancouver Mental Health Service Society v. British Columbia (Information and Privacy Commissioner)*, [1999] B.C.J. No. 198 (S.C.)]

[33] This factor is the similar to factor 4 in Order MO-2416, which asks:

[2] Orders 120, MO-1251, PO-2306 and PO-2683.

Does the city have the right or power to obtain the electronic data input files from the affected party?

[34] The city submits that section 1.06 of the contract contains the city's acknowledgement that the record is owned by the affected party.

[35] The affected party submits that section 1.06 of the contract expressly provides that its professional work product was to remain at all times its property. The affected party states that:

> ...there is a further contractual provision in the agreement, which provides that the contract supersedes any previous agreements, arrangements or understandings, whether written or oral.

[36] In response, the appellant provided submissions about the model, rather than the record at issue. The latter consists of the input data files. The appellant states that the city has both the explicit as well as the implicit right and power to obtain the model from the affected party as it obtained funds from the city to create the Report, and consequently the model.

[37] The appellant further submits that section 1.06 of the contract:

> ...only stipulates that the city does not have a proprietary interest in the products created by affected party. That provision does not limit the city's ability to otherwise exercise control over or have access to products that are specifically created for it by the affected party. … [Section 1.06 of the contract] makes it clear that the city has a permanent right to use the model created by [the affected party]. Given its right to use the model, the city clearly has the right to compel production of the Model to be able to use it.
>
> In any event, the city cannot circumvent its access obligations under the Act by entering into a contract with a third party consultant whereby it foregoes control of records which would otherwise be subject to the *Act*. In Order MO-1289, in the context of a request received by the Township of Edwardsburgh for access to a copy of the "Township of Edwardsburgh Waste Disposal Site 1998 Monitoring Report", which was in the possession of the Township's third party consultant, it was argued that the Report was produced in accordance with a contract and the Township had "no contractual rights explicit or implied to access the consultant's working files, preliminary assessments, or rejected documents." In that case, Assistant Commissioner Tom Mitchinson held that the Township had an obligation to ensure that it retained control over records in the possession of contractors so that it would be able to comply with the access provisions of the *Act* and a contractual provision giving the Township

explicit control over records in the possession of its consultants was not necessary in order for the Township to have control over those records:

> ...the same principles would require the Township to ensure, by contract if necessary, that it retains control over records where a contractor is engaged to perform functions on its behalf, in order to be in a position to comply with the general right of access provisions of the *Act*. The Township cannot avoid access provisions of the *Act* by entering into arrangements under which a third party holds custody of the records that would otherwise be subject to the provisions of the *Act*. Accordingly, the absence of a specific contractual provision giving the Township explicit control over the May 1999 version of the report does not assist the Township and the consultant in asserting that the Township does not have the requisite control over this record. The Township is required to ensure that its contractual arrangements are in compliance with its obligations under the *Act*.

Accordingly, the city has both the right and the power to obtain the model from [the affected party]. Indeed, in light of the contractual provisions discussed above, the city has a much clearer right to obtain the record at issue than the County had in Order MO-2416. Further, there is no evidence that the city has actually sought to obtain the model from [the affected party] and [the affected party] has refused to provide it, which reinforces the fact that the city has the power to obtain the model from [the affected party].

[38] In reply, the city submits that it has a license to use products or processes resulting from the Project in connection with the Project but for no other purpose or project. It states that:

> The data file for the model is owned by the [affected party] and, based on its interpretation of the contract, while the city has a "non-exclusive royalty free license" to use the data file for the Project, the city does not have the right to give away the property of the affected party. [The affected party] retains ownership and all other control of the data file for the model, including the right to potentially collect license fees or royalties from others.
>
> It should also be noted that since the completion of the project in 2006, the city has not requested the use of the data file nor has it had occasion to exercise its rights to use the data file since it does not have either the expertise or the required software to use the file.

[39] In reply, the affected party submits that the appellant has not referred in his representations concerning section 1.06 of the contract to the wording "but for no other purpose or project", which language supports the restricted nature of the license provided to the city. It submits by the terms of the contract that the electronic data input files are owned by it and that the limited license provided to the city has clear restrictions thereon. Accordingly, the city does not have the right to compel production.

Analysis/Findings re: Control of the Record

[40] In Order MO-2586, Senior Adjudicator John Higgins found that the London Public Library Board (the Board) did not have custody or control of computer code relating to a software product that it had used under licence where a contractual term provided that the Board had no access to the computer code. Senior Adjudicator Higgins stated:

> I note that these records, if they exist, were created by the affected party and not the Board and are related to the affected party's internet filtering product, which is available for use by interested parties for a licensing fee.
>
> In addition, the rights of the Board in relation to the software, supporting tools and any other records in the possession of the affected party or in its own possession are limited by the contract referred to above. The contract provides that the user shall have no right of access to source code and other proprietary information related to the function of its system and that the user only has the use of its database. The contract is clear and unambiguous in that respect.
>
> Before leaving the analysis of the factors relating to custody or control, however, I also note that the appellant's representations focus to a significant degree on his view that information about internet filtering relates to a "core," "central" or "basic" function of the Board. I agree that the question of what content should be provided in a library relates to a core function of the Board, but the appellant has already been provided with significant information in this regard. In my view, the technical means used by the affected party to accomplish its filtering of internet content is separate from the question of what content to filter, and I am not satisfied that the technical aspect of the system does, in fact, relate to the Board's core functions.
>
> Having considered the circumstances of this appeal, I find that, even applying a broad and liberal interpretation, the Board has no more than bare possession of any additional responsive records that may exist. In that regard, the terms of the contract are significant, and I also accept the evidence of the affected party that any additional information that has not

> previously been disclosed would qualify as proprietary information to which the Board does not have access.
>
> I would also not characterize the contract between the Board and the affected party as "contracting out of the *Act* because, as already noted, the technical means of accomplishing the filtering does not relate to the Board's core functions.

[41] Similarly, in this appeal, the record was created by the affected party and not the city and consists of electronic input data files created by the affected party as part of a computer-modeling tool. The record was not specifically created for the city by the affected party, but was a modification of other electronic input data files created for the GRCA. The city does not have custody of the record. As indicated in its representations, the affected party has refused to provide a copy of the record to the city to comply with the access request.

[42] The electronic data input files contain key proprietary information of the affected party. The city does not have the authority to regulate the record's content, use and disposal. The affected party has the option of modifying the record for use with other municipalities or organizations in the future. The affected party has the right to potentially collect license fees or royalties from others for use of the record.

[43] Significantly, the rights of the city in relation to the record in the possession of the affected party are limited by section 1.06 of the contract referred to above. The contract provides that all concepts, products or processes produced by or resulting from the services rendered by the affected party shall be and remain the property of the Consultant. The city was granted a nonexclusive license to use these concepts, products or processes only in connection with the study that is the subject of the contract.

[44] Section 1.06 of the contract provides that all concepts, products or processes rendered by the affected party which are developed by it which are patentable, capable of trademark *or otherwise* (emphasis added), is the property of the affected party. The record is a concept, product or process within the meaning of section 1.06.

[45] The content of the record (electronic input data files) does not relate to a core function of the city. In my view, the technical means used by the affected party to accomplish the computer model used in the study of groundwater undertaken by it on behalf of the city is separate from the content of the study.[3] I am not satisfied that the technical methodology of the study or the associated raw data relates to the city's core functions (see also *City of Ottawa v. Ontario*, 2010 ONSC 6835). I would also not

[3] Order MO-2586.

characterize the contract between the city and the affected party as "contracting out of the *Act*" because the record does not relate to the city's core functions.

[46] In this appeal, the record was created and derived from the affected party's knowledge and expertise in hydrogeology and in the locale being studied. The record does not specifically contain raw factual data, but rather an interpreted mathematical representation of a physical system developed by the affected party. I have reviewed a representative sample of the record. The sample record consists of nine pages of computer code and does not contain information that is readable other than by the affected party's specialized computer software. The city also states that it does not have the software or expertise to use the electronic data input files. The entire record contains over 28,000 pages of this type of computer code. The content of the record does not relate to the city's mandate and functions.

[47] The activity that resulted in the creation of the record was the combining of data from the city and the GRCA and adaptation of this data by the affected party. The data was compiled by the affected party in order to generate computer models. The models were used by the affected party to generate the Report, which was a report on the groundwater conditions in a certain locality. I find that the city did not have a statutory or other duty to carry out the activity that resulted in the creation of the record.

[48] Unlike in the case in Order MO-1289 (referred to above by the appellant) and the *OCCRB* case, the city was not obligated to enter into a contract with the affected party to conduct the study that was the subject of the Report.

[49] In Order MO-1289, the activity that resulted in the creation of the record by the Township was the completion of an environmental monitoring program and submission of the summary report to the Ministry of the Environment which was a requirement to obtain a Certificate of Approval for the Township's landfill site.

[50] In *OCCRB*, the institution (the Board) had an obligation to enter into a contract with the court reporter to record its proceedings as part of its obligation to record its proceedings. In *OCCRB*, in determining that the Board had control of the record, the Court stated:

> First, the sole purpose for creating the backup tapes was to fulfill the Board's statutory mandate to keep an accurate record. Next, it is within the Board's power to limit the use to which the backup tapes may be put. The Board has the broad discretion to exclude the public from hearings or portions of them, and to limit the disclosure of disposition information to the public or to an accused. It follows that orders of this nature require the Board to exercise control over all the records of a proceeding, including backup tapes. That level of control is implicit in the powers conferred upon the Board by the Criminal Code.

> It is reasonable to expect that the Board would ensure, by contract if necessary, that any records of proceedings, backup records included, be used solely for the purposes of the Board. The Board can and should exercise control over the use of all records made by court reporters of its proceedings.
>
> Third, the Board must have access to all of the records prepared by the court reporter in the event that an issue arises about the accuracy of either the record or a transcript. In either event the Board would require access to all of the records, including backup tapes if any existed, that could be of assistance in order to satisfy itself that the record or transcript is accurate. For this purpose, the Board must have access to the backup tapes regardless of who has physical custody of them.

[51] In this case, there was no statutory mandate to create the record. Nor can the city limit the way the record, the input data files, could be used. The input data files were modified from a previous project undertaken by the affected party and could be further modified by it on a subsequent project.

[52] There is no provision in the contract that the record be used solely for the city's purposes. The city also does not have the software or expertise to use the record and the city could not be of assistance in order to satisfy itself that the information in the record is accurate.

[53] Furthermore, section 1.06 of the contract provides that all concepts, products or processes rendered by the affected party are the property of the affected party. The city has permanent non-exclusive royalty free license to use the record in connection with the Project and for no other purpose or project. As stated in *David v Ontario (Information and Privacy Commissioner) et al* [4].

> The purpose of the *Act* is not so broadly phrased as to support an interpretation that information cannot be collected by those who are not institutions, for their own purposes, even though they are engaged in completing a contract with the City to supply their services to it…
>
> Nothing in *MFIPPA* leads me to conclude that everyone who does business with the City is thereby bound to submit to the *MFIPPA* regime. Had this been intended, it would have been easy to have said so.

[54] Therefore, I find that the city does not expressly by the terms of the contract have the right or power to obtain the electronic data input files from the affected party. Nor does the city have the right to possess or otherwise control the record. It only had

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[4] *David v Ontario (Information and Privacy Commissioner) et al* (2006), 217 O.A.C. 112 (Div. Ct.)

the right "to use the record in connection with the Project". As the Project has been completed by the completion of the Report in 2006, the city also does not have the right to use the record under section 1.06 of the contract.

[55] Therefore, by the terms of the contract, the city does not have control of the record. Accordingly, it is not necessary for me to explicitly consider factors 1 to 3 in Order MO-2416. I do note concerning factors 1 and 2 that Adjudicator Bhattacharjee focused his analysis on whether factors 1 and 2 applied to the computer model, whereas in this appeal the record is the electronic input data files and not the computer model.

[56] Nevertheless, with respect to factor 1, the activity that resulted in the creation of the record was the combining of data from the city and the GRCA and adaptation of this data by the affected party. The data was compiled by the affected party in order to generate computer models. The models were used by the affected party to generate the Report, which was a report on the groundwater conditions in a certain locality. I find that the city did not have a statutory or other duty to carry out the activity that resulted in the creation of the record.

[57] With respect to factor 2, as to who paid for the creation of the record, in this appeal the record contains an interpreted mathematical representation of a physical system developed by the affected party. Therefore, the evidence suggests that not all of the information in the record was paid for by public funds. Although the electronic input data files were partly paid for by the GRCA and the city, the affected party updated and improved its existing data files with new information. The city also did not specifically pay for the record in that the deliverable for the project was the final report, not the input data files.

[58] With respect to factor 3, as to whether the affected party operates at arm's length from the city, I find that the affected party was not an agent but an independent consultant. Unlike the situation in the case of *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 4072, the affected party does not have a statutory power or duty to carry out the activity that resulted in the creation of the record. The affected party does not play an integral part in fulfilling the mandate of the city. Similar to the situation in *Walmsley v. Ontario (Attorney General)*, (1997), 34 OR. (3d) 611 (C.A.), the affected party's function is not part of the city's function. As a professional engineering consultant operating under the explicit terms of a contract that provides that everything produced by it remains its property, I find that in the circumstances of this appeal that the affected party operated at arm's length from the city.

[59] In conclusion, I find that the city does not have control of the record. As the city does not have custody or control of the record, the electronic input data files, it is unnecessary for me to consider whether this record is exempt under the *Act*.

B. WHAT IS THE SCOPE OF THE APPELLANT'S REQUEST CONCERNING ITEM 2 AND HAS THE CITY CONDUCTED A REASONABLE SEARCH FOR RECORDS RESPONSIVE TO ITEMS 2 AND 4?

[60] I will now determine what the scope of the appellant's request is concerning item 2 and whether the city conducted a reasonable search for records responsive to items 2 and 4 of the request.

[61] Section 17 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
>
> (a) make a request in writing to the institution that the person believes has custody or control of the record;
>
> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record; and
>
> . . . . .
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[62] To be considered responsive to the request, records must "reasonably relate" to the request (Order P-880].

[63] 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.

[64] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records (Order P-624].

[65] 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.

[66] The city was asked to provide a written summary of all steps taken in response to the request. In particular, the institution is asked to respond to the following:

1. Did the institution contact the requester for additional clarification of the request? If so, please provide details including a summary of any further information the requester provided.

2. If the institution did not contact the requester to clarify the request, did it:

   (a) choose to respond literally to the request?

   (b) choose to define the scope of the request unilaterally? If so, did the institution outline the limits of the scope of the request to the requester? If yes, for what reasons was the scope of the request defined this way? When and how did the institution inform the requester of this decision? Did the institution explain to the requester why it was narrowing the scope of the request?

3. Please provide details of any searches carried out including: by whom were they conducted, what places were searched, who was contacted in the course of the search, what types of files were searched and finally, what were the results of the searches? Please include details of any searches carried out to respond to the request.

4. Is it possible that such records existed but no longer exist? If so please provide details of when such records were destroyed including information about record maintenance policies and practices such as evidence of retention schedules.

[67] As stated above, items 2 and 4 of the request sought:

> …all records in the possession of the City of Guelph, including without limitation correspondence, reports, internal memoranda, notes, records of telephone conversations and published data relating to the letter dated November 29, 2007, from the Mayor of the City of Guelph to [name] at the Ontario Ministry of Natural Resources and its attachment, a letter dated November 29, 2007 from [name], Water Supply Program Manager for the City of Guelph to [name at the Ontario Ministry of Natural Resources] including:

> (2) the boundary conditions for the model runs presented on Figures 3 and 4 of the [Water Supply Program Manager's] letter;
>
> (4) the well head protection area and related supporting documentation for the Membro, University and Downey wells under current quarry conditions, quarry license limits and the current quarry rehabilitation proposal

[68] The appellant submits that:

> The city has only disclosed two records to date in response to the appellants' broad request. Moreover, those records do not provide the actual model runs or the input and output files for the model runs. The appellant submits that additional records, beyond those identified by the city to date, exist in the possession or control of the city, including the model runs, modeling reports, and the input and output data. Those additional records ought to be disclosed.

[69] In both its initial and reply representations, the city submits concerning item 2, that the model runs in Figures 3 and 4 were generated by the affected party under a consulting assignment to the city. The deliverables from the consulting assignment were the Report and the technical memorandum "Draft - River Valley Developments - PTTW Review". Both of these documents were provided in response to the request. The city states that:

> Pages 46 to 50 of the …Report …describe the groundwater flow model used to prepare Figures 3 and 4 of the [Water Supply Program Manager's] Letter. Pages 46 to 50 describe the model boundary conditions…
>
> Other than the information/reports described above, the city has no other information on the boundary conditions…
>
> With respect to items 2 and 4 of the request, searches of the city's record holdings were conducted by:
>
> - [name] Water Supply Program Manager
> - [name] Manager of Waterworks
>
> The search conducted by the City of Guelph included the Guelph Lime Project files (hard copies), Waterworks library, Waterworks bookshelves, electronic project files, email files, and email archive files. The city has provided records in its possession that are responsive to the request. No records have been destroyed.

> In the city's initial decision dated May 26, 2008, the applicant was advised that Item # 2 was provided to him [the Report]. On June 24, 2008, the applicant wrote to the city advising that the record released under the earlier request did not provide the boundary conditions for the model runs presented on Figures 3 and 4 of the [Water Supply Program Manager] Letter. No information was provided by the applicant as to why the record was not responsive, nor was any further explanation offered as to what other types of information might be responsive to his request. The city responded to the applicant on July 3, 2008, directing his attention to [section] 5.0 of the …Report. This section of the …Report speaks specifically to the boundaries of the groundwater model for the Guelph Lime Area and the extent of the groundwater model is shown on Figure 5.1 of the report. …The city received no response to its July 3, 2008 letter.
>
> With respect to item # 4, the city initially denied access in its decision letter dated May 26, 2008. The city issued a second decision letter dated August 19, 2008 in which full access to item # 4 was granted, the fee for which was waived. The [appellant] has made no submissions to the city indicating that the record released with respect to Item # 4 was not responsive to his request, or that additional records existed beyond those disclosed by the city

Analysis/Findings

[70] Based upon my review of the parties' representations, I find that the scope of item 2 of the appellant's request was limited to the boundary conditions for the model runs presented on Figures 3 and 4 of the Water Supply Program Manager's letter, which request was satisfied by the provision of the Report.

[71] With respect to the search issue concerning both items 2 and 4 of the appellant's request, the appellant has indicated that the model runs, the modeling reports and the input and output data should exist. As indicated, the city has provided the modeling reports and the model runs in the Report. The input data is the record at issue in this appeal. After considering all of the representations, I find that the city has made reasonable efforts to locate the remaining record, the responsive output data files.

[72] Therefore, I find the city has conducted a reasonable search for records responsive to items 2 and 4 of the request as required by section 17 (Orders P-85, P-221 and PO-1954-I]. In particular, I find that the city has provided sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records and that the appellant has not provided a reasonable basis for concluding that

additional records exist (Order P-624). Accordingly, I uphold the city's search for records.

ORDER:

I uphold the city's decision and dismiss the appeal.

Original Signed By: November 17, 2011
Diane Smith
Adjudicator