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

# ORDER MO-1357

## Appeal MA-000071-1

## Town of Kapuskasing

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## NATURE OF THE APPEAL:

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

- all reports, briefing notes, memos, e-mail and written correspondence, sampling or monitoring results, certificates of analysis, and any other relevant information produced by the Town or received by the Town from any source with respect to a spill which took place at a named plant in Kapuskasing in 1986;

- all reports, briefing notes, memos, e-mail and written correspondence, sampling or monitoring results, certificates of analysis, and any other relevant information produced by the Town or received by the Town from any other source with respect to the quality of the soil or water between the Plant and the Kapuskasing river from the time of the spill in 1986 to the present. This should include any such material produced by the Town or received by the Town from any source relating to the potential contamination of a named property in the Town;

- all reports, briefing notes, memos, e-mail and written correspondence, sampling or monitoring results, certificates of analysis, and any other relevant information produced by the Town or received by the Town from any other source with respect to clean up operations which have been and are taking place at and in the vicinity of the Plant over the past two years. This should include any such material produced by the Town or received by the Town from any source relating to the clean up operations at a named property;

- all reports, briefing notes, memos, e-mail and written correspondence, sampling or monitoring results, certificates of analysis, and any other relevant information produced by the Town or received by the Town from any source with respect to contamination of domestic wells at the named property in 1999-2000.

The Town identified ten responsive records, and denied access to all of them in their entirety pursuant to section 10(1) of the *Act*.

The requester, now the appellant, appealed the Town's decision.

During mediation, the appellant raised the possible application of the public interest override contained in section 16 of the *Act*, and also maintained that other responsive records could exist. The appellant pointed out that all identified records were from either 1998 or 1999, and the request covers the time period back to 1986.

The Town subsequently identified other records and disclosed them to the appellant. However, the appellant continued to maintain that additional responsive records should exist.

I sent a Notice of Inquiry initially to the Town and two organizations whose interests might be affected by the outcome of the appeal (affected parties #1 and #2). The Town provided representations to support its position that it had taken reasonable steps to identify all responsive records, but did not provide representations on the sections 10(1) or 16 issues. Both of the affected parties confirmed that they would not be submitting representations. I determined that it was not necessary for me to solicit representations from the appellant before reaching my decisions in the appeal.

**RECORDS:**

The following records are at issue in this appeal:

1. October 28, 1999 cover letter from affected party #1 to affected party #2 summarizing the contents of the attached Record 2.

2. October 28, 1999 report prepared by affected party #1 and submitted to affected party #2 concerning the monitoring of remedial activities on the property adjacent to the property owned by affected party #2 in the Town.

3. Fax cover sheet and attached table concerning soil testing results sent by affected party #1 to the Town on June 2, 1999.

4. May 13, 1999 letter from affected party #2 to the appellant concerning access to the appellant's property.

5. May 11, 1999 letter from a construction company to the appellant concerning remediation work to be undertaken in the area of the appellant's property.

6. February 26, 1999 letter from affected party #1 to the Ministry of the Environment concerning proposed amendments to the remediation plan for the area on or around affected party #2's property.

7. April 14, 1999 cover letter to the Town from a law firm representing the Town, together with an attached draft agreement between the Town and affected party#2 concerning clean up activities to be undertaken by affected party #2 on property owned by the Town.

8. March 1, 1999 cover letter to and from the same individuals as Record 7 concerning the same draft agreement.

9. November 20, 1998 letter from a law firm representing affected party #2 to the law firm representing the Town concerning the same draft agreement.

10. June 8, 1998 report from affected party #1 to affected party #2 on the assessment of a road allowance in the Town.

## DISCUSSION:

### THIRD PARTY INFORMATION

### General Principles

For a record to qualify for exemption under sections 10(1)(a), (b) or (c), the Town and/or the affected parties must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; **and**

2. the information must have been supplied to the Town in confidence, either implicitly or explicitly; **and**

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in (a), (b) or (c) of subsection 10(1) will occur.

(Order 36. See also Orders M-29 and M-37)

The Ontario Court of Appeal discussed the interpretation of the equivalent exemption contained in the provincial *Freedom of Information and Protection of Privacy Act* (section 17(1)) in upholding my decision in Order P-373. The Court stated as follows:

> With respect to Part 1 of the test for exemption, the Commissioner adopted a meaning of the terms which is consistent with his previous orders, previous court decisions and dictionary meaning. His interpretation cannot be said to be unreasonable. With respect to Part 2, the records themselves do not reveal any information supplied by the employers on the various forms provided to the WCB. The records had been generated by the WCB based on data supplied by the employers. The Commissioner acted reasonably and in accordance with the language of the statute in determining that disclosure of the records would not reveal information supplied in confidence to the WCB by the employers. Lastly,

> as to Part 3, the use of the words **"detailed and convincing"** do not modify the interpretation of the exemption or change the standard of proof. These words simply describe the quality and cogency of the evidence required to satisfy the onus of establishing reasonable expectation of harm. Similar expressions have been used by the Supreme Court of Canada to describe the quality of evidence required to satisfy the burden of proof in civil cases. If the evidence lacks detail and is unconvincing, it fails to satisfy the onus and the information would have to be disclosed. It was the Commissioner's function to weigh the material. Again it cannot be said that the Commissioner acted unreasonably. Nor was it unreasonable for him to conclude that the submissions amounted, at most, to speculation of possible harm. [emphasis added]

(*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 (Div. Ct.))

In the present appeal, I have been provided with no representations on the requirements of section 10(1) by either the Town or the affected parties. Consequently, I will base my decision on a review of the records themselves, the Town's decision letter responding to the request, and the Report of Mediator prepared at the end of the mediation stage of the appeal.

**Part One of the Test**

Having reviewed the records, I find that none of them contain trade secrets or commercial, financial or labour relations information, as those terms have been interpreted by this Office in past orders.

The terms "technical" and "scientific" information were defined by former Assistant Commissioner Irwin Glasberg in Order P-463 as follows:

> "Scientific information" is information belonging to an organized field of knowledge in either the natural, biological or social sciences or mathematics. In addition, for information to be characterized as scientific, it must relate to the observation and testing of specific hypotheses or conclusions and be undertaken by an expert in the field.
>
> "Technical information" is information belonging to an organized field of knowledge which would fall under the general categories of applied sciences or mechanical arts. Examples of these fields would include architecture, engineering or electronics. Technical information will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing.

Applying these definitions, I find that Records 1, 4, 5, 7, 8, 9 and 10 do not contain any technical or scientific information. Some of these records contain information relating to activities which have a technical and/or scientific component, but the information itself is not technical or scientific in nature.

Records 2, 3 and 6, on the other hand contain information which relates specifically to soil testing and monitoring activities taking place in the Town. The records describe test results in terms which fall under the general category of applied science, and they were prepared by professionals in the field of environmental testing and remediation. Therefore, I find that Records 2, 3 and 6 contain "technical information" for the purposes of section 10(1).

**Part Two of the Test**

It is clear on the face of Records 3, 5, 7, 8 and 9 that they were supplied to the Town by affected party #1, or the construction company in the case of Record 5. The Town is either the recipient identified on these records or is listed as having received a copy of the record. The Town is not mentioned on Records 1, 2, 4, 6 and 10. However, given the nature of the relationship between the Town, the appellant and the two affected parties, as described in the records, I accept that these other records were supplied to the Town as part of the ongoing remediation work taking place in and around the property owned by affected party #2.

As far as the confidentiality aspect of part 2 is concerned, the parties resisting disclosure must demonstrate a "reasonable expectation of confidentiality" on the part of the supplier of the information, at the time it was provided. In Order M-169, some factors which were considered in determining whether an expectation of confidentiality is reasonable are whether the information was:

(1) Communicated to the institution on the basis that it was confidential and that it was to be kept confidential.

(2) Treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization.

(3) Not otherwise disclosed or available from sources to which the public has access.

(4) Prepared for a purpose which would not entail disclosure.

(See also Order P-561)

Neither the Town nor the affected parties have made any submissions on this issue. Accordingly, I am unable to determine whether there existed an implicit understanding between the Town and the affected parties that the information contained in the records was intended to be treated confidentially.

Record 10 is the only one that makes an explicit reference to confidentiality. The cover sheet attached to the assessment report prepared by affected party #1 contains a statement that the record contains confidential information, and that it has been supplied in confidence. However, Record 10 is a record prepared by affected party #1 for affected party #2, as its client, and it would appear that this statement reflects confidentiality expectations as between these two parties. Even if this expectation of confidentiality was intended to extend to the Town, which is not clear from the face of the record, in the absence of representations on the issue from either the Town or the affected parties, I am not satisfied that the requirements of a reasonable expectation of confidentiality as between the Town and affected party #1 have been established for Record 10.

**Part Three of the Test**

As noted above, the parties resisting disclosure are required to provide me with "detailed and convincing evidence" that the disclosure of the information contained in the records could reasonably be expected to result in one or more of the harms described in sections 10(1)(a), (b) or (c).

Clearly, this evidentiary standard has not been met in this appeal. Although the Town provided submissions in support of its search activities, it specifically declined to submit representations on the section 10(1) issue. Similarly, both affected parties advised this Office that they would not be providing representations.

In Order PO-1791, Adjudicator Sherry Liang made the following comments when faced with a paucity of evidence on the issue of harm in the context of section 17(1) of the provincial *Act*:

> ... As I have indicated, the affected party has chosen, as is its right, not to make representations on the issues. While I do not take the absence of any representations as signifying its consent to the disclosure of the information, the effect of this is that I have a lack of evidence on the issues raised by sections 17(1)(a), (b) and (c), from the party which is in the best position to offer it. This is demonstrated by the submissions from MBS [Management Board Secretariat, the institution in this case] which, while correctly identifying the conclusions reached in other cases, do not offer any evidence applying these general principles to the circumstances of this affected party.
>
> In the circumstances, I am unable to find that the submissions of MBS provide the "detailed and convincing evidence" which is required to support the application of section 17(1)(a) to this case.

(See also Orders MO-1312 and MO-1319)

The difficulty faced by Adjudicator Liang is compounded in the present appeal by the fact that the Town, as well as the affected parties, declined to submit representations on the section 10(1) exemption claim. I find that I have not been provided with the kind of "detailed and convincing" evidence required for me to make a finding that the records are exempt under section 10(1)(a). For the same reasons, I also find that the parties resisting disclosure have not established the harms component of sections 10(1)(b) or (c).

Therefore, I find that none of the records qualify for exemption under section 10(1) of the *Act*, and they all should be disclosed to the appellant.

Because of my finding, it is not necessary for me to consider section 16 of the *Act*.

**REASONABLENESS OF SEARCH**

The appellant's request covers the time frame 1986-2000. The ten records originally identified by the Town were from the 1998-1999 period. During mediation, the appellant questioned whether responsive records relating to the period 1986-1997 were in the custody and control of the Town, and the Town agreed to conduct further searches. As a result, additional records were located and disclosed to the appellant. However, the appellant continued to believe that more responsive records should exist, and I added the issue of whether the Town had taken reasonable steps to locate all responsive records to the scope of my inquiry.

In cases where a requester provides sufficient details about the additional records which he or she is seeking and the institution indicates that no more responsive records exist, it is my responsibility to ensure that the institution has made 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 records do not exist. However, in my view, in order to properly discharge its obligations under the *Act*, the Town must provide me with sufficient evidence to show that it has made a **reasonable** effort to identify and locate responsive records. A reasonable search is one in which an experienced employee expends a reasonable effort to locate records which are related to the request.

The Town submitted three affidavits sworn by the Director of Public Works/Deputy Town Manager, the Chief Building Official, and the Clerk/Freedom of Information Co-ordinator, attesting to the steps taken to locate responsive records. The searches included the files for these three departments covering the period of the appellant's request. Some additional records were identified by the Chief Building Official, and were disclosed to the appellant. The other two Town officials did not locate any additional records as a result of their searches.

In her affidavit, the Clerk offers the following explanation as to why certain responsive records may not exist:

> ... the Schedule of Retention for municipal documents, as per Schedule "A" of By-law 2138 provided for "OTHER" records such as correspondence, inter-office memos and reports to be scrutinized annually and destroyed as necessary. ...

I am satisfied, following my review of the affidavits provided by the Town, that the searches undertaken for records responsive to the request were reasonable and I dismiss this portion of the appeal.

## ORDER:

1. I order the Town to disclose all records to the appellant by **December 6, 2000** but not before **December 1, 2000**.

2. In order to confirm compliance, I order the Town to provide me with a copy of the records disclosed to the appellant under Provision 1, only upon request.

Original signed by: October 31, 2000
Tom Mitchinson
Assistant Commissioner