



**Information and Privacy
Commissioner/Ontario**

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

INTERIM ORDER MO-2278-I

Appeal MA07-87

Town of Petrolia



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This Interim Order addresses issues arising from the issuance of Interim Order MO-2259-I, with regard to Appeal MA07-87.

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

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

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

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

NATURE OF THE APPEAL:

A request was submitted to the Town under the *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. The Town did not indicate in its decision letter which exemptions it was relying on to deny access to the withheld information.

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

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

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

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

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

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

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

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

On December 5, 2007, I conducted a hearing via teleconference into the reasonable search issue. The appellant was self-represented at the hearing. Participating for the Town were its Clerk-Administrator and its Director of Operations who, according to the Clerk-Administrator conducted all of the physical searches for records responsive to the appellant's request.

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.

Pursuant to my decision, I made the following order provisions:

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

3. The affidavits referred to in Provision 1 should be forwarded to my attention, c/o Information and Privacy Commissioner/Ontario, 2 Bloor Street East, Suite 1400, Toronto, Ontario, M4W 1A8. The affidavits provided to me may be shared with the appellant, unless there is an overriding confidentiality concern. The procedure for the submitting and sharing of representations is set out in *IPC Practice Direction 7*, which is available on our website.
4. I remain seized of this appeal in order to deal with any other outstanding issues arising from this order.

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 Director of Operations and the 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 Association, c/o 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 and a Ministry employee, that addressed this issue.

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.

DISCUSSION:

The Town's submissions are contained for the most part in the January 24th letter that is co-signed by the Director of Operations and the Clerk-Administrator.

The Director of Operations states that he conducted a further search of records related to the construction of the Community Centre and the remediation of the day tank. He indicates that after completing his search he reviewed the results of it with the Clerk-Administrator. He and the Clerk-Administrator jointly submit that as of January 15, 2008 no other responsive records existed.

The Director of Operations states that since he administered the day tank remediation project from award to construction completion, he was able to access and compile all information from the project files in his office and the Town's municipal offices. The Director of Operations submits that all of the Town's files relating to the construction of the Community Centre and the remediation of the day tank were either kept in his office or a document storage vault located in the Town's municipal offices. The Director of Operations provides a detailed list of files he

searched between January 2007 and January 2008. However, it is not clear from his representations what specific files were searched in response to my interim order.

The Director of Operations and the Clerk-Administrator also submit that the Town has not destroyed any documentation related to the Community Centre or the remediation of the day tank.

The Director of Operations and the Clerk-Administrator state that on December 6, 2007, the day following the oral inquiry, the Town contacted affected party #2 and commissioned a “final report” relating to the day tank remediation project. The Director of Operations and the Clerk-Administrator submit that this “final report” was “presented to the [Town], on Friday January 18, 2008 at a special meeting, requested by [a named employee] of the Ministry, which was held in the Town Municipal Offices.” In attendance at the meeting were representatives of the Town, affected party #1, affected party #2 and the Ministry. The Director of Operations and the Clerk-Administrator state that the aforementioned Ministry employee was provided with a copy of the “final report” for his perusal. Subsequently, on January 24, 2008 a copy of the affected party’s Revised Report was hand delivered to the appellant.

As alluded to above, the appellant has expressed concerns regarding the characterization of this new record as a “Revised Report” and he questions the whereabouts of the original version of this report.

In response to the appellant’s concerns, the Director of Operations produced an email communication from a representative of affected party #2 to a Ministry employee in which he explains that the original draft version of the Revised Report had been presented at this special Town meeting on January 18, 2008. The representative goes on to state that the draft version was presented for comment to affected party #1 and the Town. The representative states that “a few typos may have been corrected for the [Revised Report].” The representative also states that the Revised Report included “additional manifests, summaries and appendices.” Nevertheless, the representative takes the position that the Revised Report is “virtually the same” as the draft report. The representative also states that he “does not have any reports prior to the draft issued for comment on January 17, 2008.” I note that the email from the representative of affected party #2 to the Ministry employee indicates that a copy of the draft report was sent as an attachment to that email.

In response, it is the appellant’s position that the Town did not complete a reasonable search after the December 5th hearing. In addition, he submits that the Town has not been forthcoming in the disclosure of information pertaining to the remediation of the day tank. He believes that the characterization of the Revised Report is a clear sign that other records, including possibly an earlier version of this report, drafted prior to the December 5th hearing, exists. He is adamant that there must be records in existence that document affected party #2’s soil test findings and that the Town would have received this information.

Having carefully considered the written representations presented by the parties in response to my initial interim order, I arrive at the following conclusions:

1. An earlier draft version of the Revised Report exists (a copy of it having been provided to the Ministry, as mentioned above) and, as it is a record that is responsive to the appellant's request, I will order the Town to make an access decision with regard to it, pursuant to section 19 of the *Act*.
2. The appellant's submissions and the information provided by the representative of affected party 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. Accordingly, I will order the Town to provide representations on whether or not it has custody or control of additional technical information responsive to the appellant's interest in records relating to the remediation of the day tank, within the meaning of section 4(1) of the *Act*. In particular, I will want to hear from the Town on whether it has control of further responsive records that may be in affected party #2's hands. As a starting point, the Town may wish to review Orders 120, MO-1251 for guidance on the interpretation of the custody or control issue. Depending upon what I receive from the Town, I may also decide to seek representations from the appellant and affected party #2 on the custody or control issue.

In light of having reached the above conclusions, I will hold my final decision on the reasonable search issue in abeyance pending my determination of these new issues.

ORDER:

1. I order the Town to make an access decision, pursuant to section 19 of the *Act*, with regard to the original draft version of the Revised 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 original 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.

Original Signed by: _____
Bernard Morrow
Adjudicator

February 21, 2008 _____