



**Information and Privacy
Commissioner/Ontario**

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

ORDER M-1087

Appeal M-9700318

Township of Horton



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NATURE OF THE APPEAL:

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

- (i) All records, notes, recommendations, planning opinions The Township of Horton has in relation to the development of all Official Plans, Draft Official Plans, Background Studies, Draft Comprehensive Zoning By-Laws, and Comprehensive Zoning By-Laws, dating from 1986 to present. (NOTE: the date of the request was May 16, 1997)
- (ii) Records with the public that comment specifically on asphalt plants, and/or mineral aggregate resources, the Official Plan, and Comprehensive Zoning By-Law for Horton Township.
- (iii) Records with the following agencies that comment specifically on asphalt plants, and/or mineral aggregate resources, the Official Plan, and Comprehensive Zoning By-Law for Horton Township.
 - Ontario Ministry of Natural Resources
 - Ontario Ministry of Environment and Energy
 - The County of Renfrew
 - Ontario Ministry of Transportation
 - Municipal Affairs
- (iv) Records and notes in relation to attempts made to resolve the appeal to the Township of Horton By-Law 94-07.
- (v) All records, documents, notes, planning opinions and recommendations, zoning opinions and recommendations, including changes of property ownership, public and agency correspondence the Township of Horton has regarding [several named companies and properties].
- (vi) Financial Information Returns, Schedule 4, filed by the Township of Horton with Ontario Ministry of Municipal Affairs for 1994, 1995, 1996.
- (vii) All Auditors letters, correspondence and recommendations in connection with the preparation of Financial Statements for the Township of Horton for 1994, 1995 and 1996.
- (viii) Itemized accounting of all monies paid to [a named lawyer] and/or [a named law firm] from January 1, 1992 to present.

The Township denied access to several of the records pursuant to sections 7(1) and 12 of the Act and advised the appellant that all responsive records had been located. The Township further advised the appellant that access would be granted to 641 pages of records upon payment of a fee of \$698.20. This fee consisted of \$570 for 19 hours of search time at \$30 per hour and \$128.20 for photocopying 641 pages at 20 cents per page. The Township provided the appellant with an index of those records to which access was denied, including a general description of each record and the exemption(s) being claimed for each.

The appellant subsequently asked the Township for a fee waiver, which was denied.

The appellant paid the requested fee but appealed the amount of the fee, the Township's decision to deny a fee waiver and also claimed that further responsive records should exist. The appellant indicated that she would defer any appeal regarding the Township's exemption claims pending the outcome of the issues in this inquiry.

A Notice of Inquiry was provided to the Township and the appellant. Representations were received from both parties. In her representations, the appellant indicates that she no longer disputes the amount of the Township's fee. I will not, therefore, address this aspect of the appeal in this order.

DISCUSSION:

FEE WAIVER

The appellant submits that the requirement for the payment of a fee in the circumstances of this appeal should be waived under section 45(4)(c) of the Act. This section reads:

A head shall waive the payment of all or any part of an amount required to be paid under subsection (1) if, in the head's opinion, it is fair and equitable to do so after considering,

whether dissemination of the record will benefit public health or safety;

It has been established in a number of previous orders that the person requesting a fee waiver must justify the request and demonstrate that the criteria for a fee waiver are present in the circumstances (Orders 10, 111, P-425, P-890, P-1183 and P-1259). I am also mindful of the Legislature's intention to include a user pay principle in the Act, as evidenced by the provisions of section 45.

The appellant argues that the dissemination of the requested information will benefit the public health and safety of the residents of the Township. She submits that the zoning by-law which is the subject of the request allows asphalt manufacturing as a permitted use in certain areas (in particular gravel pits) of the Township without taking into account various health and safety considerations which may be present for the surrounding properties, some of which are residential. She adds that the by-law was enacted without sufficient input from the ratepayers in the Township and, therefore, failed to incorporate controls

to protect these health and safety concerns. She argues that there are about twenty gravel pits in the Township and, therefore, the by-law, as it exists, could impact significantly on all the residents of the Township.

The Township submits that the records relate to planning, zoning and financial matters and its disclosure would not benefit public and safety in such a way as to warrant the waiving of fees on that ground.

In Order P-474, former Assistant Commissioner Irwin Glasberg found that the following factors are relevant in determining whether dissemination of a record will benefit public health or safety under section 57(4)(c) of the provincial Freedom of Information and Protection of Privacy Act, which is the provincial equivalent to section 45(4)(c) of the Act:

1. Whether the subject matter of the records is a matter of public rather than private interest;
2. Whether the subject matter of the records relates directly to a public health or safety issue;
3. Whether the dissemination of the records would yield a public benefit by a) disclosing a public health or safety concern or b) contributing meaningfully to the development of understanding of an important public health or safety issue; and
4. The probability that the requester will disseminate the contents of the records.

I agree with former Assistant Commissioner Glasberg's interpretation and I adopt these factors for the purposes of this appeal.

In my view, it is likely that the appellant will disseminate the contents of the records. In addition, I am satisfied that concerns about the environmental impact of asphalt manufacturing plants on the Township and its residents are a public, rather than a private interest. In my view, however, the subject matter of **these records** does not relate directly to a public health or safety issue. The records address in detail the political process whereby the by-law was promulgated and relate primarily to the zoning and planning issues surrounding its subject matter.

Further, in my view, the records do not contain information whose disclosure is likely to yield a public benefit by disclosing a public health or safety concern or contribute to public understanding of the environmental issue surrounding the manufacturing of asphalt. While residents of the Township may find the information regarding the political process which gave rise to the enactment of the by-law to be of interest, I cannot agree that their dissemination would yield the necessary benefit to public health or safety described in section 45(4)(c). Accordingly, I find that the appellant has not established the application of section 45(4)(c) to the records which are responsive to this request.

I find that the appellant has not established that it would be fair and equitable for the fee to be waived in this particular case, as the dissemination of the records has not been shown to benefit public health or safety.

REASONABLENESS OF SEARCH

Where a requester provides sufficient details about the records which she is seeking and the Township indicates that such records do not exist, it is my responsibility to ensure that the Township has made a reasonable search to identify any records which are responsive to the request. The Act does not require the Township to prove with absolute certainty that the requested records do not exist.

However, in my view, in order to properly discharge its obligations under the Act, the Township must provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request.

Although an appellant will rarely be in a position to indicate precisely which records have not been identified in an institution's response to a request, the appellant must, nevertheless, provide a reasonable basis for concluding that such records may, in fact, exist.

In the present case, the appellant has provided me with a list of specific records which she believes should exist, as well as her reasons for believing that these records exist. In addition, she indicates that she attended the Township's office in February 1997 and reviewed a large number of records. Later, when she submitted her access request under the Act, many of these same records were not identified as responsive to her request.

The Township submits that all the responsive records were located in files maintained in the office of its Clerk-Treasurer and that these files were searched by both himself and the Clerk-Receptionist. The Township also submits that the Township's auditor was contacted regarding part eight of the request. As a result, the Township submits that it is satisfied that all of the records in the Clerk-Treasurer's files relating to the request have been released to the appellant, unless exempted, and that no records have been destroyed.

Having reviewed the representations of both parties, it is my view that the Township has failed to provide me with sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the records which are responsive to the request. It has only provided submissions regarding files in the Clerk-Treasurer's office. There is no indication that any other areas of the Township's offices were searched; nor was any explanation provided as to why the records could not be located elsewhere. In addition, while it submits that its auditors were contacted, it does not indicate the results of that communication. In my view, the submissions of the Township are not sufficiently detailed to allow me to find that the searches which it has undertaken for records responsive to the appellant's request were reasonable.

In a four-page schedule dated January 30, 1998 which was attached to the representations made in response to the Notice of Inquiry, the appellant has listed a large number of records which she indicates

were not included in the records which she viewed in February 1997 or in the index which the Township provided to her in the context of this request and appeal. In order to ensure that the Township is provided with all of the available information to assist it in responding to the appellant's request in a comprehensive fashion, I will require that the appellant share this list (Schedule A to her submissions) with the Township.

Under these circumstances I will, therefore, order that additional searches be undertaken for responsive records following the Township's receipt of the information described in Schedule A to the appellant's representations.

ORDER:

1. I order the Township to conduct a further search for additional records responsive to the appellant's request, following the receipt from the appellant of Schedule A to her submissions.
2. Within 30 days of its receipt of Schedule A to the appellant's submissions, I order the Township to communicate the results of this search to the appellant by sending her a letter summarizing the search results.
3. If additional responsive records are located, I order the Township to issue to the appellant a decision letter respecting access to any such records, treating the date of its receipt of the appellant's Schedule A information as the date of the request, in accordance with sections 19, 21 and 22 of the Act.
4. I order the Township to provide me with copies of the correspondence referred to in Provisions 2 and 3 by sending a copy to my attention c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario M5S 2V1.
5. Until such time as the issues surrounding the Township's search for responsive records has been resolved to my satisfaction, I remain seized of this matter.

Original signed by: _____
 Donald Hale
 Inquiry Officer

_____ March 19, 1998