



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

ORDER MO-1221

Appeals MA-980324-1 and MA-980264-1

**Town of Amherstburg and the
Amherstburg Police Services Board**



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NATURE OF THE APPEALS:

On September 8, 1998, the appellant submitted a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) to the Town of Amherstburg (the Town) for the following information:

1. Copies of any and all correspondence from May 1, 1998 to [the date of the request] from the Town and the [Amherstburg] Police Services Board (the Police) to the Ontario Civilian Commission on Police Services (OCCPS) and the Ministry of the Solicitor General and Correctional Services (the Ministry) pertaining to the delivery of police services in the Town.
2. Copies of the actual 1997 police budgets for the Amherstburg Police Service and the Anderson Police Service.
3. The dollar amount of any and all legal fees incurred by the Town as a result of the civil suit filed by the appellant's husband against the Amherstburg Police Chief and the Police; including, but not limited to, advice, court appearances, motions, correspondence, preparations, etc.
4. The dollar amount of any and all legal fees associated with the judicial review of March 19, 1998.
5. The dollar amount of any and all legal costs incurred by the Town pertaining to the PSA hearing of the appellant's husband, including, but not limited to, preparation, appearances, prosecutor's fees, prosecutor expenses including travel.
6. The dollar amount of any and all costs associated with the internal investigation conducted by the London Police Service in the fall of 1997.
7. The 1998 contract between the APA and the Police.

Appeal MA-980264-1

On October 15, 1998, prior to receiving a decision from the Town, the appellant received a decision from the Police indicating that they considered her request for records to be frivolous and vexatious. The appellant appealed this decision and Appeal MA-980264-1 was opened.

This appeal was streamed directly to Adjudication. At that time, the appellant advised that she had yet to receive a decision from the Town. The Town subsequently issued its decision letter on December 4, 1998. Appeal MA-980324-1 was opened to address the issues relating to this decision. As a result of the issues which arose out of the Town's decision (which I will discuss in detail below), Appeal MA-980264-1 was put on hold pending their resolution.

Appeal MA-980324-1

With respect to part 1 of her request, the Town provided the appellant with its correspondence to the OCCPS and the Ministry. The Town indicated that it did not have copies of correspondence from the Police and advised her to direct her request to that body.

The Town granted access to records responsive to part 2 of the request.

Finally, the Town notified the appellant that, if records exist which are responsive to parts 3-7 of the request, the Police have a greater interest in them. Therefore, the Town decided to transfer these parts of the request to the Police pursuant to section 18(3) of the Act.

The appellant appealed the following aspects of the Town's decision:

- the Town's decision that the records provided to her in response to part 2 of the request were responsive;
- the Town's decision to transfer parts 3-7 of her request to the Police.

During mediation, the appellant indicated that the Town had provided her with "proposed" budgets for the two police services referred to in part 2 of the request whereas she had requested the "actual" budgets. This issue was clarified with the Town which provided the appellant with the documents she was seeking. Therefore, the responsiveness of the records relating to part 2 of the request is no longer at issue.

However, with respect to the Town's decision to transfer her request to the Police, the appellant took the position that the transfer was not made in accordance with the provisions of section 18 of the Act, in that it was not made within 15 days and that she was not notified of the transfer until almost three months after the request was made. The appellant believed that this decision was only made after she initiated an appeal of the decision made by the Police in response to the transferred request and that it was, therefore, an "afterthought".

The issues to be determined

In approaching these two appeals, I concluded that before I am able to address the decision of the Police in this matter, I must first determine whether the Town's decision to transfer the request to the Police was made in accordance with section 18 of the Act. If I find that it was made in accordance with the Act, I will go on to consider the decision of the Police. If I find, however, that the Town's decision to transfer the request was not made in accordance with the Act, then any subsequent decision made as a result would be null and void.

I sent a Notice of Inquiry to the Town and the appellant concerning the issues relating to Appeal MA-980324-1. Representations were received from the Town and the appellant. In her representations, the appellant raised two new issues for the first time. In particular, she indicates that the decision to transfer the request to the Police was made by the Mayor who is also the Chair of the Police Services Board. In this regard, it appears that the appellant believes that the Mayor is in a conflict of interest position in making this decision. Also, with respect to the Mayor, the appellant claims that, at the time he made this decision, he had not yet been duly appointed as “head” of the institution. Therefore, she argues that the decision to transfer the request was invalid.

Although she raised these issues late in the process, in my view, they are directly related to the authority of the institution to issue the decision at first instance. The proper delegation of the “head” of an institution is a crucial first step in a valid decision. Therefore, I decided that I must address this issue. I sent a Supplementary Notice of Inquiry to the Town and the appellant. Supplementary representations were received from both parties.

DISCUSSION:

DELEGATION OF THE “HEAD”

In section 2(1) of the Act, “institution” is defined, in part, as:

- (a) a municipal corporation, including a metropolitan, district or regional municipality of the Country of Oxford,

Section 2(1) also provides that:

In this Act,

"head", in respect of an institution, means the individual or body determined to be head under section 3; ("person responsible")

Section 3 of the Act states, in part:

- (1) The members of the council of a municipal corporation may by by-law designate from among themselves an individual or a committee of the council to act as head of the municipal corporation for the purposes of this Act.

...

(3) If no person is designated as head under this section, the head shall be,

(a) the council, in the case of a municipal corporation;

The appellant states that the Mayor was not delegated as “head” of council until a December 14, 1998 by-law had been passed. She attached a copy of By-Law No. 1998-84 to her representations, which is “a Bylaw to designate a head of the Municipal Corporation for the purposes of the [Act]”. The by-law indicates that it is to come into force on the final date of passage which was December 14, 1998. The appellant argues, therefore, that when the Mayor issued his decision to her on December 4, 1998, he did so without the proper delegation and authority. As a result, she submits that the Mayor’s decision to transfer the request to the Police was invalid.

The Town acknowledges that it did not have a designation of “head” prior to December 14, 1998, when By-Law No. 1998-84 was passed and the Mayor was so delegated. The Town indicates that prior to that time, the town council was the “head”. The Town submits, however, that even though the Mayor had not been delegated at the time the decision letter was issued, he was speaking on behalf of council, as the head of council. The Town indicates further that:

In the course of addressing this matter, the Town did formalize the designation of “head” as contemplated by the Act, for the very purpose of addressing concerns the appellant may have.

In my view, the Act does not require that a “head” of a municipal council be designated pursuant to section 3(1) of the Act. Section 3(3)(a) clearly contemplates that this function may be carried out by council as a whole. Moreover, in general, it would be reasonable for the Mayor, as head of council, to pen and sign the decision on behalf of council. However, in order for a decision made by council to be valid, the decision should clearly identify who is responsible for making the decision, ie. that the decision is, in fact, the decision of council as a whole.

I have reviewed the decision letter signed by the Mayor. At no time throughout this letter does he indicate that he is reflecting the decision of council, or that he is simply signing the letter on behalf of council. Rather, he uses such phrasing as “I am responding to your request ...”, “... it is my position that if indeed the requests reflected in the above items are records that exist ...” and “I am transferring your request for those matters ...”.

In objectively assessing the content and intent of this letter, the only conclusion that I am able to draw is that the Mayor has treated this matter as though he were the “head” of the institution. In my view, it is not sufficient that he simply be “head” of council, and thereby able to respond on its behalf to an access request without the requisite and evident authority of council to do so. It also appears to me, although I

acknowledge that this may be more in appearance than in fact, that the Town has attempted to rectify the invalidity of the Mayor's December 4, 1998 decision by very quickly enacting the by-law. While this action deals with any question of the authority of the "head" for future requests, in my view, it cannot save a decision which was invalid at the time that it was made.

Consequently, at the time the Mayor issued his decision transferring the appellant's request to the Police, he was not properly delegated as "head" of the town council and his decision is invalid. Consequently, any decisions flowing from that initial decision cannot stand, and I find that they are null and void.

As a result of this decision, the Town is now in a deemed refusal situation pursuant to section 22(4) of the Act. In order to avoid any further delay in the processing of the appellant's access request, I will order the Town to issue a new decision.

ORDER:

1. I do not uphold the decision of the Town in Appeal MA-980324-1.
2. I order the Town to provide the appellant with a decision in response to her request dated September 8, 1998 by **July 14, 1999**, without recourse to a time extension.
3. In order to verify compliance with Provision 2 of this order, I order the Town to provide me with a copy of the decision letter referred to in Provision 5 by **July 14, 1999**. This should be forwarded to my attention, c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.

Original signed by: _____
Laurel Cropley
Adjudicator

_____ June 29, 1999