



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

ORDER MO-1308

Appeal MA-000062-1

Town of Amherstburg



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NATURE OF THE APPEAL:

The Town of Amherstburg (the Town) received a five-part request under the Municipal Freedom of Information and Protection of Privacy Act (the Act). Part 5 of the request was for:

Access to view all reports, recommendations and documentation by the town treasurer and town auditor pertaining to the buy-outs for the [two] former police chiefs and the criteria for the Municipal Restructuring Fund. This would include all documentation to Town council regarding same.

The Town provided the appellant with a copy of the criteria for the Municipal Restructuring Fund in response to Part 5 of the request and stated:

Access cannot be provided to view reports, recommendations and documentation by the Town Treasurer and Town Auditor as the records do not exist.

The appellant appealed this decision.

This office sent the appellant and the Town a Notice of Inquiry informing them that an oral inquiry would be held to determine whether the Town conducted a reasonable search for records which responded to the request.

The inquiry was held at this office via teleconference. Both the appellant and the Town provided oral representations. The Town was represented by its Chief Administrative Officer (CAO) who also acts as the Freedom of Information Co-ordinator. The Town's Treasurer was also present and gave evidence.

DISCUSSION:

REASONABLE SEARCH

Where an appellant provides sufficient details about the records which she is seeking and the Town indicates that records do not exist, it is my responsibility to ensure that the Town has made a reasonable search to identify any records which are responsive to the request. The Act does not require the Town to prove with absolute certainty that further 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 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 her evidence, the appellant stated that she based her belief that additional records should exist on the following:

- A reference to an exemption claim relating to Part 5 of her request in three letters received by the appellant from the Town. In each letter the Town stated that section 12 of the Act (solicitor-client privilege) might apply to records responsive to Part 5.
- In the adjudication of a fee appeal that related to the five-part request, the Town argued that it would take 15 minutes to retrieve the information responsive to Part 5 of the request and to determine what could be released. The fee appeal resulted in Order MO-1250.
- A letter received by the appellant from the former Minister of Municipal Affairs, Al Leach with respect to Municipal Restructuring Fund. In the letter, Mr. Leach stated that labour adjustments are an eligible expense under the Fund and that the Treasurer and the Auditor of a municipality must satisfy themselves that an expense is eligible under the Fund. Therefore, the appellant believes that there must be documentation to support the application for these funds that was made.
- Her belief that the Town Council would not approve substantial pay outs without receiving some kind of report or recommendation.

I find that the appellant has provided a reasonable basis for concluding that records responsive to the request may, in fact, exist.

The Town addressed each of the issues raised by the appellant.

In response to the first two points raised by the appellant, the CAO for the Town stated that, in retrospect, when he responded to the appellant's request, he should have added the phrase, "if records exist" when referring to a claim of solicitor-client privilege. He submitted that this explanation also applies to the representations that were made during the fee appeal that resulted in Order MO-1250. He stated that this omission was due to his limited experience with the Act. The CAO stated that it is now his understanding that there are no records that are responsive to Part 5 of the request.

With respect to the letter from Mr. Leach, the CAO stated that so-called "labour adjustments" such as buy out packages are eligible expenses under the Municipal Restructuring Fund. The Municipal Restructuring Fund provided funds for municipalities to assist with recent changes enacted by the provincial government. The Town made an application for these funds in 1998. The CAO explained that the statement made in Mr. Leach's letter that the Treasurer and Auditor must satisfy themselves does not mean that a report must be written. He stated that there are no specific instructions on how this is to be done. According to the CAO, the amounts for the two chiefs and other buy outs were simply listed under the category of "Labour Adjustments" in the application to the province. The CAO stated that this application in 1998 was the only "report" to Council.

The appellant submitted that this information in the application is responsive to her request and she should be provided with a copy. The Town agreed to provide her with a copy.

Both the CAO and the Treasurer stated that the amount of the buy out is determined by the terms of each chief's original employment contract. It does not reflect a new agreement negotiated at the time of departure.

The CAO stated that the package for the former chiefs was determined by the Police Services Board and the Board's solicitor in reference to the original employment contracts. He indicated that the Town receives instructions from the Police Services Board and verifies the amount to be paid out through the Town's Payroll Department. He stated that the amount to be paid out is presented to Council in a list of other payments to be made. No report is made to Council and it is up to the members of the Town Council to raise any questions they may have about specific items. The CAO indicated that if there are no questions and Council approves the list, the cheques are sent out.

In my view, because the buy out package is based on the original employment contract, it would appear that the original employment contract is a record that is responsive to the request. Further, based on the CAO's description of the process, any communications between the Police Services Board and any notations and calculations associated with the pay out also appear to be records which respond to the first part of Part 5 of the appellant's request. The first part asked for "all reports, *recommendations and documentation* by the Town treasurer and town auditor pertaining to the buy-outs for the [two] former police chiefs..."(my emphasis).

The Treasurer provided additional detailed information with respect to the process that is followed when determining a buy out based on an employment contract. However, I found his evidence somewhat confusing with respect to how the process for a pay out is begun. In addition, he seemed uncertain as to whether any of the instructions or communications that were given or received or the calculations that were made were in a recorded form. It did not appear that he had turned his mind to conducting a search for written information which might respond to the request. Therefore, I am ordering the Town to conduct a further search for records responsive to the general part of the request for "all reports, recommendations and documentation by the Town treasurer and Town auditor pertaining to the buy out for the [two] former police chiefs...".

With respect to the second, more specific part of the appellant's request for "documentation to Town Council", I accept the explanations provided by the Town about both the Fund application process and the accounts payable approval process. I agree that the 1998 application for funds that was submitted to Council contains information that is responsive to the request and that the Town has agreed to provide the appellant with a copy. Therefore, I am satisfied that the Town has conducted a reasonable search for information responsive to this part of the request.

ORDER:

1. I order the Town to conduct a further search for records which may be responsive to the appellant's request such as, but not restricted to, the original employment contract, any communications to or from the Police Services Board and any internal communications and notations and calculations associated with the pay out. The search should include but not be restricted to making inquiries to determine whether any individual employed by, connected to or

retained by the Town or any other institution, namely, the Police Services Board, has custody or control of responsive record(s).

2. I order the Town to inform the appellant of the further searches that it has conducted and the results of the searches no later than **June 23, 2000**.
3. I order the Town to provide the appellant with a copy of the responsive information contained in the 1998 application to the Municipal Restructuring Fund no later than **June 23, 2000**.
4. In the event that responsive records are located within the custody or control of the Town in the search referred to in Provision 1, I order the Town to render a final decision with respect to the records in accordance with the provisions of sections 19 and 22 of the Act, treating the date of this order as the date of the request, without recourse to a time extension under section 20 of the Act.
5. In the event that responsive records are found to be within the custody or control of another institution in the search referred to in Provision 1, I order the Town to forward or transfer the appellant's request to that institution pursuant to section 18(2) and (3) of the Act within fifteen (15) days of the date of this order.
6. I order the Town to provide me with a copy of the correspondence referred to in Provisions 2, 3, 4 and 5 (if applicable), within thirty-five (35) days of the date of this order. 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: _____
Marianne Miller
Acting Adjudicator

_____ June 8, 2000