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

ORDER MO-1396

Appeal MA_990326_1

Town of Gravenhurst

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BACKGROUND:

The Town of Gravenhurst (the Town) and the appellant have a long and difficult history. Over the past eight to ten years, the appellant and several other individuals have made 15 requests for information regarding a proposed property development in the Town. Six of these requests have resulted in appeals to this office. The development has also been the subject of several proceedings before the Ontario Municipal Board (the OMB) and has resulted in the passage of a number of by-laws by the Town. The appellant, along with other individuals, has opposed the development strenuously and recently made a large number of requests for information under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) about the development and the manner in which the Town processed the development application. These requests have given rise to the present appeal to the Commissioner's office.

Unfortunately, since mid-1999, the appellant's efforts to secure information from the Town about the proposed development have met with serious difficulties. The relationship between the appellant and the Town has degenerated into one characterized by misunderstanding and, despite a veritable mountain of paper passing between them, a lack of communication on both sides. The nature of this relationship has deteriorated to the point where both the appellant and the Town's motives and actions are met by the other with cynicism and mistrust.

In this decision, I will address those issues raised by the appellant in his appeal which I have jurisdiction to adjudicate. I am not in a position to comment on many of the issues raised by the appellant.

NATURE OF THE APPEAL:

In July 1999, the appellant made a request to the Town under the *Act* for access to certain files maintained by the Town in relation to several OMB proceedings and the enactment of several by-laws. On August 12, 1999, the appellant broadened the scope of the initial request to include any other by-laws relating to the property development which was the subject of the OMB proceedings, as well as any Town records "which make reference to me" and records relating to the cost to the Town regarding the re-zoning of the development property since 1987. The next day, the appellant further clarified the nature of the information which he sought in his August 12th request. On August 17, 1999, the appellant modified his August 12th request yet again, requesting additional information which was unrelated to the earlier requests.

The Town responded to these requests by advising the appellant that the fee to be charged for obtaining access to the requested information would be $100. Access was granted to a memorandum of expenses incurred by the Town in relation to the property development since 1987 and to information regarding the legal fees incurred by the Town. Access to much of the other information sought by the appellant was granted, in its entirety, with the exception of certain information contained in an invoice for legal services. The Town withheld a portion of this record, claiming that because it contained the personal information of other identifiable individuals, it was exempt from disclosure under section 14(1) of the *Act* (invasion of privacy).

Following the issuance of the Town's decision, the appellant and the Town attempted to clarify the information which the appellant was seeking, and to determine how many requests were being made for the purpose of calculating the correct request fees to be charged.

On August 26, 1999, the appellant made an additional four requests for information in the form of questions to the Town and raised certain objections to the charging of a request fee for each of his earlier requests. Again, an exchange of e-mails, telephone conversations and letters between the parties ensued immediately thereafter. Throughout the fall of 1999, the flurry of requests, clarifications and responses between the parties continued unabated. I will not relate in any detail the nature of these communications as I am of the view that they will not assist in the understanding of the issues remaining in dispute in this appeal. Suffice it to say that they reflect the relationship of mistrust and misapprehension which has characterized their dealings for many years.

On December 1, 1999, the appellant filed an appeal with this office of the Town's decisions, raising a number of objections to the manner in which the Town responded to his requests. During the mediation stage of the appeal, the issues were narrowed to include only the following:

1. Whether the Town charged the appellant an excessive number of request fees.

2. The reasonableness of the fees charged for access to the requested records and whether the appellant was entitled to a fee waiver.

3. Whether the Town conducted a reasonable search for records responsive to each of the requests submitted by the appellant.

4. Whether the Town's record-keeping practices and request response procedures ought to be reviewed by this office

5. Whether the decision letters provided by the Town to the appellant were in accordance with its obligations under section 22(1) of the *Act*.

6. Whether the information not disclosed by the Town which was contained in certain legal accounts is properly exempt from disclosure under section 14(1) of the *Act*.

I provided a Notice of Inquiry to the Town seeking its representations on the issues identified as outstanding in this appeal. The Town made extensive representations in response to the Notice. The Town's submissions, along with a modified Notice of Inquiry, were then provided to the appellant. In the Notice which I provided to the appellant, I specifically asked that he clearly address each of the issues raised therein, due to the complexity and confusion surrounding the multiple requests, clarifications and the accompanying communications between the parties. I also advised the appellant that I would only address the issues set forth in the Notice and asked that he speak to each of them in his submissions. The appellant then provided me with detailed representations, which were shared, in their entirety, with the Town. Very brief representations were also provided by the Town by way of reply. I declined the appellant's request to allow him access to the reply submissions of the Town. However, I intend to quote the pertinent portions of the reply representations of the Town in the text of the order below.

DISCUSSION:

REASONABLENESS OF SEARCH

Where a requester provides sufficient detail about the records which he/she is seeking and the Town indicates that further 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 the Town's response to a request, the appellant must, nevertheless, provide a reasonable basis for concluding that such records may, in fact, exist.

The majority of the appellant's objections relate to the manner in which his request was processed by the Town and to the issue of whether the Town performed an adequate search for records responsive to each and every aspect of his often broadly-worded requests.

The Town has provided me with an exhaustive chronology of the steps which it has taken to respond to the appellant's requests. These include written responses and e-mails, along with telephone and in-person conversations with the appellant on an almost daily basis over several months in the summer and fall of 1999. The Town has also described how its record-holdings are maintained and the nature and extent of the searches which it has undertaken to locate and identify responsive records. I find that throughout the course of these contacts with the appellant, the Town made every reasonable effort to respond promptly and thoroughly to the appellant's requests, clarifications, variations and questions. Unfortunately, with each disclosure of documents, the appellant felt obliged to request additional information and pose further questions which have only served to complicate, obscure and delay the processing of his requests.

It must be noted that since the date of the initial request, the appellant has received a large number of records and that the vast majority of his requests appear to have been responded to by the Town to his apparent satisfaction. It would also appear that the appellant's main causes for concern lie in the lack of what the appellant describes as "background information" surrounding several of the records which were disclosed to him. Specifically, the appellant was provided with a number of summaries of legal fees incurred by the Town in relation to the property development. He argues, however, that he has not been given access to the actual invoices for the legal services provided by counsel to the Town which are summarized on the ledgers disclosed to him. However, in the disclosure made to him on August 30, 1999, the invoices supporting the legal accounts referred to in the ledger entries were provided. The appellant was also advised at that time that there were no supporting records available which would substantiate an estimate included in another record for the cost to the Town for its staff to respond to requests under the *Act*.

In addition, the appellant has expressed serious concerns about what he views as discrepancies between the information contained in several of the records as the basis for his belief that

additional records should exist. In its reply submissions, the Town has attempted to explain the reason for the discrepancies. It points out that the legal fees quoted in the Statement of Defence in a legal proceeding involving the Town included those fees charged by the law firm for its work on a Comprehensive Zoning By-law (By-law 94-54) for the Town which was not included in the items enumerated in the appellant's requests. The summaries of legal fees provided to the appellant did not, however, include the legal fees charged for this particular item.

It is important to note that the *Act* does not oblige the Town to create records which will satisfy the queries of the appellant regarding these perceived discrepancies. Rather, the *Act* is intended to provide requesters with a right of access to existing information, subject to the exemptions provided therein. If records which relate to the appellant's questions do not exist, the Town is not under any obligation under the *Act* to create them.

In the Notice of Inquiry which I provided to the appellant, I asked very specific questions as to the basis for his belief that additional records responsive to his requests should exist. I also asked that he advise me as to what documents he is seeking which have not been made available to him. I am unable to ascertain from the appellant's submissions any clear response to these questions.

Based on my review of the voluminous correspondence and records of contacts between the parties to this appeal and the description provided by the Town as to the searches which they undertook, I am satisfied that the Town has taken all reasonable steps possible to respond to the appellant's requests. I find that the searches which it has undertaken for records responsive to the requests have been reasonable, particularly in light of the constantly changing nature and scope of those requests. I further find that the appellant has failed to provide me with sufficient information which would assist me in making a finding that the searches undertaken by the Town for responsive records were anything but reasonable under the circumstances. Accordingly, this part of the appeal is dismissed.

ADEQUACY OF DECISION LETTERS

The appellant takes the position that the Town has not met its obligations under section 22(1)(a) and (b) of the *Act* with respect to the request made on August 12, 1999. These sections provide that:

> Notice of refusal to give access to a record or part under section 19 shall set out,
>
> (a) where there is no such record,
>
> (i) that there is no such record, and
>
> (ii) that the person who made the request may appeal to the Commissioner the question of whether such a record exists; or
>
> (b) where there is such a record,
>
> (i) the specific provision of this Act under which access is refused,

(ii) the reason the provision applies to the record,

(iii) the name and position of the person responsible for making the decision, and

(iv) that the person who made the request may appeal to the Commissioner for a review of the decision.

The appellant argues that the Town did not set out in writing whether or not records responsive to the August 12, 1999 request existed or whether specific exemptions under the *Act* may apply to them. In that request, the appellant sought access to records "which make reference to me" and "the municipality's records of all costs to the municipality for re-zoning of the [property development] since 1987."

The Town points out that the appellant modified his August 12, 1999 request on both August 13 and 17, 1999 and advised the Town on August 30, 1999 that he would not be seeking access to the records outlined in his original August 12, 1999 request. The Town responded to the requests of August 13 and 17, 1999 and provided records relating to the costs of re-zoning on September 8, 1999. The Town submits that the appellant and other individuals objecting to the development project have sought access to these records "fifteen (15) times in whole or in part over the last eight to ten years".

In my view, in light of the confusing and contradictory requests, clarifications and other correspondence received by the Town from the appellant during August and September 1999, it was reasonable for the Town to take the position that the appellant's requests of August 13 and 17, 1999 supplanted the August 12, 1999 request and that it was required only to respond to those which were received on the later dates. The Town attempted to clarify with the appellant what he was seeking and, in my view, never received a clear indication from him as to his position with respect to the status of the August 12, 1999 request.

I find that the Town fulfilled its obligations to advise the appellant under section 22(1) of the existence or non-existence of responsive records in the manner and the timeliness in which it responded to the post-August 12, 1999 requests and clarifications. In particular, I find that the decisions which were communicated to the appellant in response to his access requests were in accordance with those statutory obligations.

REQUEST FEES CHARGED BY THE TOWN

Again, there exists a measure of confusion over the nature of the decision which is being appealed with respect to the fees issue. The appellant has made extensive representations on the question of whether the Town was entitled to charge him the request fee of $5 for each of six of the requests which he made. He takes the position that because each of the requests were related, were made at the same time and all were assigned the same identification number by the Town, he should not have been charged a separate fee for each.

The Town does not address in any meaningful way this aspect of the appeal. I have reviewed each of the six requests referred to by the appellant and have attempted, on the basis of the scanty evidence provided, to determine whether the Town was entitled to treat them as separate

requests for the purposes of charging the mandatory request fee prescribed by section 17(1)(c) and section 5.2 of Regulation 823, as amended by Regulation 22/96. I find that each of the requests relate to discrete categories of information and are not so inter-related as to be considered as part of the same request. I find that the Town was justified in treating each of these requests as separate and distinct and charging the prescribed fee for them individually. Therefore, I dismiss this part of the appeal.

FEES UNDER SECTION 45(1) OF THE *ACT*/ FEE WAIVER

Fees

The charging of fees is authorized in section 45(1) of the *Act*, and more specific provisions regarding fees are found in sections 6 and 6.1 of R.R.O. 1990, Regulation 823.

The factors to be considered in reviewing a decision to charge fees include the following:

- the costs of every hour of manual search required to locate the record(s);
- the costs of preparing the record(s) for disclosure;
- computer and other costs incurred in locating, retrieving, processing and copying the record(s);
- shipping costs;
- any other costs incurred in responding to a request for access to the record(s).

The Town submits that the original fee which was communicated to the appellant in response to his modified request of August 13, 1999 was $100. After having made a determination that many of these records were easily located, as they had been the subject of other requests under the *Act* by the appellant and others, the Town decided to charge the appellant a fee of $50. The Town has provided me with a breakdown of the search time required to identify and locate records responsive to the first seven requests.

The appellant objects to the charging of any fees, other than for photocopying, but has not provided me with any reasons for taking this position.
I find that, in light of the sheer volume of records and the time required to locate the documents made available to the appellant, a fee of $50 is reasonable. The photocopy charges available to the Town for such a large number of documents far exceeds the $50 fee which it ultimately charged. Accordingly, I find no merit in the appellant's position and I dismiss this portion of the appeal.

Fee Waiver

Section 45(4) of the *Act* applies to situations where an appellant is seeking a fee waiver. These provisions state:

> 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,

> (a) the extent to which the actual cost of processing, collecting and copying the record varies from the amount of the payment required by subsection (1);
>
> (b) whether the payment will cause a financial hardship for the person requesting the record;
>
> (c) whether dissemination of the record will benefit public health or safety; and
>
> (d) any other matter prescribed in the regulations.

If one or more of the above-noted factors applies, section 45(4) of the *Act* also requires consideration of whether it would be "fair and equitable" to waive the fee. The following comments from previous orders may be helpful:

> Previous orders have set out a number of factors to be considered to determine whether a denial of a fee waiver is "fair and equitable". These factors are:
>
> (1) the manner in which the institution attempted to respond to the appellant's request;
>
> (2) whether the institution worked with the appellant to narrow and/or clarify the request;
>
> (3) whether the institution provided any documentation to the appellant free of charge;
>
> (4) whether the appellant worked constructively with the institution to narrow the scope of the request;
>
> (5) whether the request involves a large number of records;
>
> (6) whether or not the appellant has advanced a compromise solution which would reduce costs; and
>
> (7) whether the waiver of the fee would shift an unreasonable burden of the cost from the appellant to the institution.
>
> [Order M-408]

The appellant has not provided me with any evidence to substantiate that, in the present circumstances, he ought to be entitled to a fee waiver on the basis of any of the factors described above. Nor has he provided any information which would allow me to make a finding that it

would be "fair and equitable" to waive the fees in the circumstances of his appeal. I find that the appellant has taken an unreasonable position in requesting but providing no basis for his argument that a fee waiver be granted. This portion of the appeal is also dismissed.

PERSONAL INFORMATION

Under section 2(1) of the *Act*, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual [section 2(1)(h)].

I have reviewed the information which was severed from the legal accounts which were disclosed to the appellant and find that they contain the personal information of other identifiable individuals. The severed information consists of the last name of each of these individuals and the disclosure of this information would reveal that they were involved in various legal matters with the Town which necessitated the involvement of the Town's counsel. As such, I find that this information qualifies as the personal information of the individuals within the definition of that term in section 2(1)(h) of the *Act*.

INVASION OF PRIVACY

Where a requester seeks personal information of another individual, section 14(1) of the *Act* prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) through (f) of section 14(1) applies. The only exception which could possibly apply in the present appeal is that set forth in section 14(1)(f), which permits disclosure if "the disclosure does not constitute an unjustified invasion of personal privacy".

Sections 14(2) and (3) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 14(2) provides some criteria for the institution to consider in making this determination. Section 14(3) lists the types of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy. Section 14(4) refers to certain types of information the disclosure of which does not constitute an unjustified invasion of personal privacy. The Divisional Court has stated that once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in 14(2) [*John Doe v. Ontario (Information and Privacy Commissioner*) (1993), 13 O.R. (3d) 767].

A section 14(3) presumption can be overcome if the personal information at issue falls under section 14(4) of the *Act* or if a finding is made under section 16 of the *Act* that a compelling public interest exists in the disclosure of the record in which the personal information is contained which clearly outweighs the purpose of the section 14 exemption. [Order PO-1764]

If none of the presumptions in section 14(3) applies, the Town must consider the application of the factors listed in section 14(2), as well as all other considerations that are relevant in the circumstances of the case.

The Town submits that none of the considerations listed under section 14(2) which favour the disclosure of personal information are present in the circumstances of this appeal. It argues that the information relates to legal matters involving private individuals and the Town which are unrelated to the property development which is of interest to the appellant.

The appellant's submissions do not make any reference to the application of the section 14(1) exemption to the severed information contained in the records which were disclosed to him. He has not raised any considerations listed under section 14(2) or any other factors which may weigh in favour of the disclosure of this personal information.

In the absence of any considerations under section 14(2) which may favour the disclosure of the personal information contained in these records, I find that the disclosure of the severed information would result in an unjustified invasion of the personal privacy of the individuals who are named therein. In addition, I find that section 14(4) has no application in the present circumstances and the appellant has not raised the possible application of section 16. As such, I find that this information is properly exempt under section 14(1) of the *Act*.

ORDER:

I uphold the Town's decision.

Original Signed By: February 15, 2001
Donald Hale
Adjudicator