



**Information and Privacy
Commissioner/Ontario**

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

INTERIM ORDER MO-1599-I

Appeal MA-010064-2

Town of Caledon



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NATURE OF THE APPEAL:

This is an appeal from a decision of the Corporation of the Town of Caledon (the Town), under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*).

As background, the Town and the Regional Municipality of Peel (the Region) have been jointly engaged in a resource study surrounding an amendment to the Town's Official Plan. The amendment is to be the subject of a hearing before the Ontario Municipal Board (OMB), originally scheduled to commence in September of 2001.

The requester (now the appellant) made a request on October 17, 2000 for copies of all records (including notes, letters, memoranda, reports, council minutes and resolutions, studies, etc.) with respect to:

- the Caledon Community Resources Study;
- the development, consideration and approval of Caledon Official Plan amendment 161; and
- the aggregate policies of Caledon's Official Plan.

The appellant is a lawyer who acts as counsel to the Association of Aggregate Producers of Ontario (the APAO) in the OMB proceeding.

The Town responded to the request in a letter of January 31, 2001, in which it indicated that it was denying access to some of the records, based on specified exemptions under the *Act*, and outlined the fees it required the appellant to pay. By letter dated February 23, 2001, the appellant appealed, among other things, the Town's denial of access to records and the Town's assessment of cost for preparation of documents and research. During the course of mediation through this office, the Town issued a further letter outlining additional fees which it required the appellant to pay, and as well, took the position that it had not yet issued a final decision.

On my review of the matter, I decided to ask for representations on certain of the issues raised by the appeal initially, with a view to making some interim determinations. In particular, I asked for representations on the reasonableness of the Town's fees estimates, and on the issue of whether the Town's decision should be treated as an interim or a final decision. Subsequently, I issued Interim Order MO-1520-I. In that order, I found that the Town had issued a final decision, stating:

I conclude, therefore, that the Town intended to and did issue a final decision on January 31, 2001. As a result, I am satisfied that both the fee estimate and issues of denial of access are before me in this appeal.

Although I have reached the conclusion that the Town issued a final decision, I also find that its decision was incomplete, and that a supplementary final decision ought to be issued before any issues of denial of access are dealt with in this appeal. In issuing a supplementary final decision, the Town is directed to section 22(1)(b) of the *Act*, which provides:

22. (1) Notice of refusal to give access to a record or part under section 19 shall set out,

- (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.

Also relevant here is section 22(3.1) of the *Act* which states:

If a request for access covers more than one record, the statement in a notice under this section of a reason mentioned in subclause (1)(b)(ii) or clause (3)(b) may refer to a summary of the categories of the records requested if it provides sufficient detail to identify them.

I also urge the Town to refer to *IPC Practices* Number 1, which establishes guidelines for the contents of a decision letter.

Before concluding, I wish to address the issue of a deposit. Regulation 823 permits an institution that has given an estimate of an amount payable under the *Act* that is \$100 or more to request a deposit from a requester before taking further steps to respond to the request [see section 7(1)]. On the facts of this case, the Town did not request a deposit prior to providing its final decision of January 31, although it did request a deposit many months later, with its revised fee estimate of October 10. I find that by its conduct prior to January 31, the Town has in effect exercised its discretion under section 7(1) of Regulation 823. It decided to proceed to a final decision without requiring a deposit from the appellant. Since my direction simply requires the Town to do what should have been done in that final decision, the Town is not entitled to apply section 7(1) at this stage. It should be noted that the Town will be entitled to recover reasonable fees from the appellant in respect of this request (see below); it is merely disentitled from requesting a portion of them before completing its final decision in response to my directions.

I therefore directed the Town to issue a supplementary final decision in accordance with the provisions of sections 19, 21 and 22 of the *Act*. I also indicated in my order that following receipt of the Town's final decision, the appellant may request that the balance of the appeal proceed.

Following Interim Order MO-1520-I, the Town issued a supplementary final access decision, on April 3, 2002. It provided an Index of Records with its decision, which is 108 pages long and consists of 636 records. The Town stated that the "Index of Records deals only with the documents where access has been partially or completely denied" but that "over 400 documents [are] being released." The Town indicated that copies of the records to which the appellant has been granted access were available for review. It further stated:

Section 45(1) of the Act authorizes charging fees in connection with requests for access to government-held information. In this case, fees have been charged and approved by the IPC Adjudicator in the amount of \$1,875.00. We ask that these fees be paid before any further steps are taken dealing with this Freedom of Information request.

The appellant appealed from the Town's decision of April 3, 2002. Among other things, the appellant states that the Town has not adhered to the requirement of section 22(1)(b) of the *Act*. The appellant appeals from the Town's decision to deny access to the records, taking the position that none of the exemptions claimed by the Town are applicable. Further, the appellant claims the application of section 16 ("public interest override") of the *Act*. The appellant also appeals the Town's decision that certain records are "irrelevant or unrelated" to the request. In the Mediator's Report, it is also noted that the appellant wishes to dispute the amount of the fee ordered in Interim Order MO-1520-I.

The appellant's appeal, which is now before me, has been given the file number MA-010064-2.

During the course of mediation of this further appeal, the Town raised an issue about the timing of the fees payable by the appellant. The Town takes the position that the appellant must pay the fees approved in Interim Order MO-1520-I, or a deposit, prior to the Town taking further steps to respond to the request. In its submissions (see below), the Town has clarified that its position is that the appellant should be required to pay the fees, or a deposit, before there is an adjudication of his appeal.

I decided to treat the issue raised by the Town as a preliminary issue, and sought submissions from the Town, initially. In a sense, the Town is raising a preliminary objection, taking the position that the adjudication ought not to proceed until it receives a payment or part payment. In the Notice of Inquiry, I invited it to make submissions on two issues: whether the appellant is required to or whether he should be required to pay the fees approved by Interim Order MO-1520-I, or a deposit, in order to have an adjudication of this appeal; and if the answer is "yes", whether the amount of fees established in Interim Order MO-1520-I can or should be adjusted.

After reviewing the submissions of the Town, I found it unnecessary to invite the submissions of the appellant on these issues.

DISCUSSION:

The essential question before me is whether the Town may require the appellant to pay the fees as approved by Interim Order MO-1520-I, or a deposit, before the adjudication of the appellant's appeal.

I find that the Town may not require such a payment, and that the appellant is entitled to have this appeal proceed to adjudication without making a payment.

The Town submits that section 7(1) of Regulation 823 gives it the discretion to require the payment of a deposit before it takes further steps to respond to the request. By implication, the Town's position is that its participation in the adjudication of the appellant's appeal constitutes "further steps" for the purposes of section 7(1).

The Town also submits that the appellant is advantaged in that his appeal is advanced to adjudication without having to pay any ordered fees despite the provisions of the *Act* permitting the Town to require a deposit. The Town submits that further advantage will be gained by the appellant if there is an adjudicated decision on the substantive aspects of the appeal which denies the appellant access to the records. If such a decision is rendered, it is said, then there will be no mechanism by which the Town can collect the fees. It will have no ability to ensure that it receives the fees that the appellant "has been ordered to pay", and no ability to seek costs against the appellant under the *Act*. The Town refers to the portion of the Interim Order which states:

It should be noted that the Town will be entitled to recover reasonable fees from the appellant in respect of this request (see below); it is merely disentitled from requesting a portion of them before completing its final decision in response to my directions.

It appears that the Town interprets my findings on the issue of reasonable fees in Interim Order MO-1520-I as an "order to pay" to the appellant, effective on the Town's issuance of the supplementary final decision.

Analysis

I find that the appellant is not required by statute to pay the fees, or a deposit, in order to have an adjudication of his appeal. Further, nothing in Interim Order-1520-I requires such a payment at this point, and even if I had the discretion to order such a payment before proceeding with adjudication, I find no reason to make such a direction.

Other than the appeal fee required by section 39(1.1) (which is not in issue before me), there is nothing in the *Act* that requires the payment of fees as a precondition for the adjudication of an appeal.

With respect to section 7(1), and the Town's entitlement to require a deposit in certain cases, in Interim Order MO-1520-I, I specifically addressed the issue of a deposit. As set out above, I

found that the Town had not required a deposit prior to issuing its final decision of January 31, 2001. I further found that in not requiring a deposit prior to a final decision, it was not open to the Town to require a deposit prior to issuing the supplementary final decision required by my order. As I stated in that decision, “my direction simply requires the Town to do what should have been done in that final decision”.

I am satisfied that nothing has changed between the time that Interim Order MO-1520-I was issued and today, that warrants a change to those findings.

The significant developments between the time of that Interim Order and today are: 1) the Town has issued a supplementary final decision and 2) the appellant has confirmed that he wishes to pursue his appeal on denial of access. Neither of these developments, taken alone or together, lead to a conclusion that the Town may now require the payment that it was not entitled to at the time of the Interim Order.

Although it is not entirely clear from the representations, it seems that the Town may understand part of my reasons in Interim Order MO-1520-I to mean that it is entitled to require payment of its fees once it completed its final decision in response to my directions. Further, it appears that the Town interprets the discussion of reasonable fees in that order as a direction to the appellant to make payment at a specified time, i.e., following the supplementary final decision.

I am satisfied that there is nothing in that order which specifically finds that the appellant will have to pay the fees to the Town before he is entitled to ask for an adjudication on his appeal on denial of access. In the discussion about a deposit, I found that the Town could not require a deposit at that time. I made no affirmative finding about *when* the Town could require payment, nor did I *direct* the appellant to make payment.

Further, in the discussion in that order about the reasonableness of the fees, there are no directions about payment. In cases of this nature, where there is a dispute about the reasonableness of the fees submitted by an institution, a requester may appeal the amount of those fees and receive a determination from this office. It was in this manner that the reasonableness of fees was before me in Interim Order MO-1520-I. In that order, I reviewed the fees, and ordered them reduced. However, I made no findings on when the appellant might be required to pay those fees, apart from my finding that the Town could not require a deposit at that stage.

I am not unsympathetic to the Town’s position. It is true that the adjudication of the appeal on the denial of access may require it to devote further resources through the submission of representations to this office, without having received any compensation for its work in responding to this request. However, as has been noted in prior orders (see, for instance, Order MO-1380), responding to this office during the course of an appeal is a necessary part of an institution’s obligations in administering the *Act*, and is not a recoverable cost. Consistent with this, I reject the Town’s implicit argument that its participation in the adjudication of this appeal constitutes the “further steps” which it ought not have to take absent any payment under section 7(1).

In this whole context, even if it were still open to me to require the appellant to make a payment prior to adjudication of his appeal, I see no good reason to make such a direction.

As is apparent from the above and from my prior order, it was available to the Town to issue a fee estimate and interim access decision, accompanied by a request for a deposit under section 7(1), early in the process. It did not do so. If there is a disadvantage to the Town in proceeding to adjudication without that deposit, it is a disadvantage of its own making.

In conclusion, I find that the appellant is not required to pay the fees approved by Interim Order MO-1520-I, or a deposit, before proceeding with this appeal.

Because of my conclusion that the appellant is not required to pay fees or a deposit at this stage, it is unnecessary to address the second issue raised in the Notice of Inquiry, that is, whether the amount of those fees should be adjusted. However, the issue of the amount of fees is still in dispute, as is the appellant's entitlement to re-visit this issue. I will address these matters in the next phase of this appeal.

ORDER:

I do not uphold the Town's preliminary objection. The adjudication of the appeal is to proceed, and a Notice of Inquiry will be issued shortly dealing with the remaining issues.

Original signed by: _____
Sherry Liang
Adjudicator

_____ December 19, 2002