



**Information and Privacy  
Commissioner/Ontario**

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

# **FINAL ORDER MO-2056-F**

## **Appeal MA-050272-1**

### **Township of Georgian Bay**



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## **NATURE OF THE APPEAL:**

This is my final order in respect of the outstanding issues from Interim Order MO-2009-I.

## **BACKGROUND:**

In Interim Order MO-2009-I, I found that I was unable to conclude that all reasonable efforts had been made to identify and locate responsive records. Questions remained as to whether any records had been created by the various individuals involved in the Township's building projects and whether the Township had conducted a reasonable search for such records.

For the purposes of this order I will assume knowledge of the factual background of this appeal, as outlined in Interim Order MO-2009-I.

In that decision, I ordered the Township to provide me with affidavits from Mayor Kennedy, Councillor Larry Braid, Councillor Jackson, Councillor Keall and CAO Bonnie Munro, attesting to the following:

- Whether they had knowledge of the existence of any records relating to the Committee described in Resolution C-167-2005, or the Steering Committee referred to in the invoices or records showing dates on which these committees met and who was present.
- Whether they had knowledge of any records that would have been generated in closed meeting sessions relating to appointments of Councillors Braid, Jackson, Keall and the CAO to assist the Project Manager in his review.
- Whether they attended **any** meetings dealing with building matters as a group or separately and whether they recorded the dates or took notes or minutes.
- Whether they created any records responsive to the request either prior to, during or following any meetings with the Project Manager or one or more of the above individuals or as a group.
- Whether they were provided with any responsive records created by others prior to, during or following any meetings with the Project Manager or one or more of the above individuals or as a group.
- Whether they had knowledge of the existence and location of any records that may be responsive to the request and what steps they took to search for responsive records.

In addition, I asked Councillor Braid to also attest to whether he was part of a formal or informal "Committee" or "Steering Committee" dealing with building matters, which included Councillors Keall, Jackson, the CAO and the Project Manager.

## **DISCUSSION:**

### **Township's Affidavits and Appellant's Response**

The Township responded to my Interim Order and provided affidavits from the named individuals.

The Mayor, the CAO and the three Councillors all attested that there were no records relating to the Committee described in Resolution C-167-2005 or to a Steering Committee or to the appointments of Councillors in closed sessions of Council. With respect to appointments, the CAO explained that "[t]he Procedural By-law directs that no minutes will be recorded of Closed Sessions."

The Mayor, the CAO and two of the Councillors attested to the fact that they did not record the dates or take notes or minutes of **any** meetings they attended either as a group or separately dealing with building matters. One Councillor stated that she circled the dates on her calendar. All of the individuals attested that they did not create any records responsive to the request; that no responsive records were created by others and provided to them; and that they were not aware of the existence of any responsive records.

In response to my question as to what steps were taken to ensure that responsive records do not exist, three individuals attested that they relied on memory as to whether records were created or existed. Councillor Braid stated that he searched his day-timer for entries of any meetings and found none. The Mayor stated he was kept informed by the Councillors who were assisting the Project Manager and since there was no committee, there were no responsive records.

In the affidavit provided by Councillor Braid, he stated that he was not part of a "Committee" or "Steering Committee", formal or informal, which consisted of or included Councillors Keall, Jackson, the CAO and the Project Manager to deal with building matters. He also attested that he was not aware of the existence of any records relating to such formal or informal committee. In his affidavit he stated:

The aforementioned individuals volunteered to work with the CAO and with the Project Manager on an ad-hoc basis and to report back to Council in closed Session as to the nature of any discussions. These **verbal reports** would be discussed with all Council members in Closed Session. Apart from the formal Closed Session meetings there were no occasions upon which all the individuals were present at the same time. I do not consider providing this assistance to have been work undertaken as part of any "Committee" or "Steering Committee".  
[emphasis added]

I shared a copy of the affidavits with the appellant, who provided comments in response. The appellant claimed that there was a conflict of interest because the individual who commissioned the affidavits was also a councillor. The appellant objected to the statement in the affidavits that they were made in support of the Township's decision that no building committee existed for the

administration building project. The appellant stated that the Township had no authority to make a decision stating that no Building Committee existed regarding the new administration building project.

With respect to Councillor Braid's statement that "... individuals volunteered to work with the CAO and with the project manager on an ad-hoc basis to report back to the council in closed session", the appellant pointed out that the councillor had stated to the District Council that he was the Chair of the Building Committee and in this regard she questioned Council's legal authority "... to establish, or conduct secret, or "ad hoc" committee meetings, discussions or reports regarding this capital project for the new administration buildings, and to allow Council to waive compliance with the Township's Procedural By-law requirements for notice of meetings, minutes, etc..."

The appellant stated that there was at least one planned meeting following a tour of the old administration building on February 18, 2005 and that "the CAO-Clerk was seen to be taking notes of our discussions" at the above meeting. She indicated that because one of the councillors circled the dates of meetings on her calendar, this confirmed her knowledge of a planned meeting regarding this Building Committee/Steering Committee. The appellant asked to be provided with a copy of these records.

The appellant stated that the CAO did not elaborate on the other records related to the building of the new administrative complex that would have been presented in closed session meetings of the Council such as drawings, cost estimates, timelines, building permit applications, demolition contracts, construction design detail, building material choices, site plans and design proposals.

#### **PRELIMINARY ISSUES:**

The appellant has raised several points which I will address. The appellant claimed that a conflict of interest exists because the individual who commissioned the affidavits is a councillor. She stated that this councillor would have participated in the Township's decision that no Building Committee exists. The appellant submitted that the Township had no authority for making a decision that no Building Committee exists and that the affidavits should not support such a decision.

The Township's decision was in response to a request made under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The head of a municipal institution is responsible for issuing a decision under the *Act*, and in this case, the head is the Mayor. Furthermore, in accordance with section 49(1) of the *Act*, a head may in writing, delegate a power or duty vested in the head to an officer or officers of the institution. In this case, the Township's decision was issued by the Township's Freedom of Information Coordinator. I note that the appellant has not provided any evidence that the councillor who commissioned the affidavits had a personal vested interest in the issues of a building committee or responsive records or any other evidence of conflict. In any event, I have no jurisdiction to make a finding on conflict of interest and therefore, I will not address this issue any further.

The appellant contends that voluntary participation or work on an ad-hoc basis with the project manager should be considered to be committee meetings and that the Township had failed to conduct them in accordance with its by-laws. I have no jurisdiction to deal with this issue. The issue before me is whether the Township's search for responsive records was reasonable.

The appellant stated that the CAO was seen to be taking notes during the tour of the old administration building. As the appellant is aware, the CAO has provided this office with her sworn testimony that she did not "take notes or minutes responsive to the request" nor did she "create any records responsive to the request either prior to, during or following" any meetings with the project manager. I accept this sworn testimony and not the appellant's assertions.

With respect to the affidavit of the councillor who testified that she did "circle" meeting dates in her calendar, I agree with the appellant that these records are responsive to the request and I will address this in the order provisions below.

The appellant also referred to other types of records that may have been presented to the Council in closed sessions such as drawings, cost estimates, timelines, building permit applications, demolition contracts, construction design detail, building material choices, site plans and design proposals. These records are not part of the original request. However, there is nothing to preclude the appellant from submitting a new request for these records.

## **REASONABLE SEARCH**

In appeals involving a denial of access on the basis that no responsive records exist, the sole issue to be decided is whether the institution has conducted a reasonable search for responsive records, as required by section 17 of the *Act*.

Where a requester provides sufficient detail about the records that she or he is seeking and the institution indicates that records do not exist, it is my responsibility to ensure that the institution has made a reasonable search to identify any records that are responsive to the request. The *Act* does not require the institution to prove with absolute certainty that records do not exist. The institution must, however, provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request (see Orders P-535, M-909 and PO-1920).

I have carefully considered all of the oral and written representations of the parties.

In my view, a great deal of confusion could have been avoided had the Township acknowledged that a group of Councillors were working on "building matters" and that these individuals were collectively referred to as a "building committee". However, the Township chose to deny, for whatever reason, the existence of such a working group.

Despite the position taken by the Township, the evidence shows that the individuals named above met with the Project Manager to provide their assistance with the building project. Consequently, in Interim Order MO-2009-I, I stated:

It is clear that the records the appellant is seeking are any records generated or created by the individuals involved with the building project. These individuals are the group of people charged with assisting the Project Manager in this project. Their meetings with the Project Manager may have been as a group or separately in a formal or an informal committee.

The question remains as to whether any records were created by the involved individuals or as a result of the meetings...

While there is conflicting evidence before me as to whether a councillor was the "Chair of the Building Committee" and whether others were involved in assisting with the building project and whether notes were taken or not, the sole issue before me is whether the Township has conducted a reasonable search for records responsive to the request. Previous orders have identified that a reasonable search is one where an experienced employee expends a reasonable effort to locate records which are reasonably related to the request. In light of the questions that remained, I decided to ask the Township to provide evidence from those individuals identified as having involvement with the building project and therefore, direct knowledge of the subject matter of the request. I directed the Township to provide me with affidavit evidence from each of these individuals. The Township provided affidavits as directed. Each of these individuals provided sworn testimony that there are no records which are responsive to this request. The exception is the one councillor who stated that she "circled the dates on my calendar". The records containing the circled dates are reasonably related to the request and I will address this in the order provisions below.

### **FINDINGS:**

Based on all of the evidence before me, I find that the Township has made a reasonable effort to search for responsive records. I also find that the dates circled on the councillor's calendar that relate to meetings dealing with building matters are reasonably related to the request.

### **ORDER:**

1. I order the Township to issue a decision on access to the circled parts of the councillor's calendar that relate to meetings dealing with building matters, pursuant to sections 19, 21, 22 and 23 of the *Act*, using the date of this order as the date of the request and without recourse to a time extension.
2. I find that the search undertaken by the Township for records responsive to the request was reasonable and I dismiss this part of the appeal.

Original Signed By: \_\_\_\_\_

June 19, 2006

Susan Ostapiec  
Acting-Adjudicator