



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

ORDER MO-2633

Appeal MA09-177

Town of Gravenhurst



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NATURE OF THE APPEAL:

In February 2009, an article appeared in a local newspaper regarding the financial impact that certain legal proceedings involving the appellant and his family has had on the Town of Gravenhurst (the Town). At one point in the article, the author states:

Through a Freedom of Information (FOI) request, this newspaper learned the appeals and civil litigation cost the municipality an estimated \$201,910 in legal and related expenses as of May 2006, although in some OMB cases the [appellant and family] were one of several appellants.

On February 18, 2009, the appellant submitted a request to the Town under the *Municipal Freedom of Information and Protection of Privacy Act* (the Act) for access to information about legal and other costs related to Ontario Municipal Board (OMB) hearings or civil lawsuits that could be connected to the appellant or his family. The request specifically stated:

This is a request under the Municipal Freedom of Information and Protection of Privacy Act to access and review the records of the municipality in connection with the legal and other costs which it attributed to me as a party or to the [named] family collectively as parties, and the records forming the basis of the calculation, in any OMB appeal or civil lawsuit, including but not limited to:

- (a) the development known as the Lumberjack Inn;
- (b) the Town's comprehensive zoning by-law 94-54 and amendments thereto;
- (c) any other OMB appeal or any civil lawsuit against the municipality.

In response to the request, the Town did not issue a formal decision, but instead made arrangements for the appellant to attend the Town's office to review various records.

The appellant attended the Town's office on March 25 and 26, 2009 to review the records. The records he reviewed were Trial Balance Sheets dating back to 1995 showing fees paid for professional services, legal services and planning applications in which his family lodged appeals and copies of planning applications. In providing access to these records, the Town removed the personal information of other individuals that was contained in them.

After reviewing the records at the Town's office the appellant was not satisfied that these records provided him the information he was seeking. The appellant refined his request to include more specific information. In an e-mail to the Town dated April 23, 2009 the appellant refined his request, by seeking clarification regarding:

Whether there are any records in the possession of the municipality which reference the **total** figure of **\$201, 910** cited in the [newspaper] article.... [emphasis in the original]

In response, the Town issued a decision dated April 24 2009, which stated in part:

Further to your letter dated February 18th, 2009 and email dated April 21st 2009, we apologize for not formalizing our response subsequent to your reviewing the files on March 25th and 26th at our office.

I am replying to the above noted access request for information relating to access and review of "records of the municipality in connection with the legal and other costs which it attributes to me as a party or to the [named] family collectively as parties:

- (a) the development known as the Lumberjack Inn;
- (b) the Town's comprehensive zoning by-law 94-54 and amendments thereto; and
- (c) any other OMB appeal or any civil lawsuit against the municipality."

as identified in your request.

The documents requested were provided for your review on March 25th & 26th, 2009, and copies of the requested documents provided to you, however various documents were severed out due to section 2(1) and 14 of the Act;

- Copies of planning applications in which any of the above mentioned names have lodged appeals (sections severed under the above noted sections of the Act);
- Copies of Detailed Trial Balance sheets dating back to 1995 showing fees paid for professional services and legal services (sections severed under the above noted sections of the Act);

The appellant appealed that decision to this office on May 14, 2009 on the basis that the Town did not provide the records that addressed his request. Specifically, the appellant claimed that the Town did not address the second part of his request and his clarified request as defined in the email dated April 23, 2009. The appellant's position was that additional records should exist. In

his letter of appeal, the appellant refers to an e-mail sent to him from the Town on April 28, 2009 that appears to add to the decision previously issued. The appellant states:

I later requested the record upon which this total amount [the \$201, 910] was based. On April 28, 2009, the Town's FOI Coordinator replied by email, but not in the decision letter:

With regard to the figure mentioned, please be advised that there is no figure as no such record exists, as referred to in my e-mail of April 27th, 2009.

I am unable to advise how the [newspaper] arrived at the figure cited as 'no such record exists' in our files.

I am skeptical of this claim ... The newspaper has clearly stated that it received the figure in response to its FOI request of the municipality.

During the initial processing of the appeal in this office and after discussions with the analyst assigned to make preliminary inquiries regarding the search issue, the Town issued two subsequent decisions dated June 15 and 19, 2009 advising that the Town located one additional record — a letter dated May 30, 2006. The Town disclosed a copy of the letter to the appellant in part. The only information not disclosed was the name of the person the letter was addressed to.

The appellant confirmed that he was appealing the Town's decision not to disclose the complete record dated May 30, 2006 and he maintained his belief that additional records exist.

The file was then assigned to a mediator.

During mediation, the Town issued a further supplemental decision dated July 24, 2009. The Town advised that it contacted the individual whose name was not disclosed in the letter provided to the requester and this individual consented to release her name. As a result, the Town disclosed the record to the appellant in full. Consequently, access to that record is no longer an issue in this appeal.

As part of that decision, the Town also disclosed to the appellant a list of expenses incurred in relation to the Comprehensive Zoning By-law and its passage totalling \$201,910.73, which was the figure cited in the newspaper article.

The appellant advised the mediator that although the list was helpful it was not sufficient and he asked for a revised copy of the list with details about each individual expense.

In an attempt to continue the mediation process, the Town agreed to provide a revised copy of the list with more details. The Town issued a decision dated September 18, 2009 and attached a revised list with the expenses listed.

The appellant was not satisfied with the revised list and did not believe that the list was responsive to his request. Therefore, he asserted that the Town did not conduct a reasonable search for responsive records.

As further mediation could not be effected, the file was moved to the adjudication stage of the appeal process. The only matter at issue in this appeal is the reasonableness of the Town's search for responsive records. I sought and received representations from the Town and the appellant.

After reviewing the appellant's representations, I offered the Town an opportunity to reply to the issues raised by the appellant regarding the search that was conducted. I also noted in the Reply Notice of Inquiry that the Town's original submissions were not detailed. Accordingly, I asked the Town to provide greater detail of the searches that were undertaken to respond to the appellant's request. I also asked the Town to clarify certain portions of its original representations. The Town provided representations in reply and their response to my query is set out in the discussion below.

The primary issue in this appeal is the reasonableness of the search conducted by the Town for records responsive to the appellant's request. In order to determine this issue, it is necessary to also determine the scope of the appellant's request. I have addressed both issues below.

DISCUSSION:

REASONABLE SEARCH

Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17 [Orders P-85, P-221, PO-1954-I]. If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [Order P-624].

Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.

Representations

In its initial representations, the Town indicated that it did not contact the appellant for clarification of his request, noting:

The [Town] chose to respond literally to the request as the requester, in a subsequent e-mail to the Chief Administrative Officer of the Corporation,

clarified that he was seeking the same documents compiled in 2006. Further e-mails received from the requester confirmed that the request “replicates exactly the request of, and response to, the newspaper.” (e-mail from Appellant to Institution dated April 27, 2009).

The exact copies of minutes and detailed trial balance sheets provided for review to the [newspaper] through the period 2004 to 2006 were provided to the appellant.

According to the Town, searches were conducted by the Clerk and Deputy Clerk. Although the Town does not indicate where the searches that located records that were provided to the appellant informally were conducted, it notes:

When the requester confirmed that the request was for the identical information provided to the [newspaper], the search was conducted of the 2004 Information Request file only.

The Town indicates that it located the decision letter issued in response to the 2004 access request. Although initially withheld, this record was disclosed, in its entirety, to the appellant. The Town indicates further that it provided the appellant with a list of expenses related to costs incurred by the Town for various legal matters from 1995 to 2006, which had not been disclosed to the requester in the 2004 access request. The Town notes that it re-created this list to provide more detail, at the appellant’s request.

The Town confirms that none of the documents it has referred to have been destroyed, but notes that, “the [Town] is in the final stages of transitioning to a new financial accounting system and it is anticipated that any further re-creation of financial records from the previous system may not be possible.” In response to a request for clarification, the Town simply notes that the transition has now been completed and states that “the ability to re-create financial information from the previous system may require extensive time, expertise and expense or may not be possible.”

In his representations, the appellant reviews the history of his dealings with the Town regarding this access request. He notes that the Town, on several occasions, maintained the position that no records exist that contain the amount cited in the newspaper article or which would show how the amount was arrived at. The appellant questions the credibility of the Town’s position that it has conducted a reasonable search for records that would be responsive to his request. He refers to a number of statements made by the Town in its representations as being not accurate or truthful. With respect to the approach taken by the Town in locating and ultimately disclosing the decision letter that was sent to the author of the newspaper article, the appellant states:

[T]he Town’s response was entirely deceitful and unforthcoming, as it now claims that it ‘withheld’ the record while [the Clerk] asserted at the time that ‘no such record exists’ and that ‘I am unable to advise how the [newspaper] arrived at the figure cited as ‘no such record exists in our files.’

The appellant refers to several other apparently conflicting statements made by the Town Clerk in various e-mails that she sent to him as evidence that the Town's position that no further records exist is suspect. One of the areas of conflict pertains to the period of time covered by the access request relating to the newspaper article, as well as that in response to the appellant's request.

With respect to the scope of his request and the responsiveness of the records provided to him so far, the appellant states:

I am unable to see how the list of expenses would be captioned 'Comprehensive Zoning By-law' if it were not related to those expenses entirely. I am concerned that the labelling of the document 'Comprehensive Zoning By-law,' in handwritten form, was an ex post facto contrivance, and I believe there may be original records that do not contain that captioning. The Town needs to explain the origin of that notation appearing on the record and provide all records related to it, along with any other direction from the Clerk's office to the Town department that actually prepared the calculations leading to the creation of the record. I am also requesting an examination of the original record to determine if alterations were made subsequent to my request.

From the outset, I have been seeking records related to the basis for the calculation of the figure which the Town provided to the newspaper. While my request was at one point clarified as to the replication of the figure provided to the newspaper, because of misleading information provided by the Town, at no time did I withdraw the request for 'the records forming the basis of its calculation.'

There is also reference in the decision letter of May 30, 2006 to 'conversations' between the Town and the Banner in connection with the Banner's request. All records pertaining to those conversations, which also form the basis for the calculation, should be provided. None have been.

In addition, I have been looking for the record related to the direction given internally which led to the creation of the list of total expenditures, especially since there has been a conflict between what the Town initially asserted and the position it later adopted. This also pertains to the decision as to why certain costs were omitted from the calculation and others were included.

The appellant is clearly angry with the manner in which he has been treated by the Town and what he views to be the haphazard way in which his request has been dealt with from the time he initially made his request. His representations are very critical of the statements made in the Town's representations. He concludes:

Given the number and nature of the various contradictory statements made by the Town, it is impossible to have any confidence in its claims as to what records actually exist.

The appellant's representations were sent to the Town and I asked it to address a number of the appellant's allegations regarding the manner in which it dealt with his request. The Town was also asked to clarify the steps taken to locate responsive records as its initial representations provided insufficient information to enable me to determine what was done to respond to the appellant's request.

The Town submitted further representations, which I have quoted in detail below, as they appear to answer some of the appellant's concerns regarding some of the apparent conflicts arising from the numerous communications he has had with the Town. The Town responds to the appellant's allegations as follows:

During the period February 26th, 2009 and March 20th, 2009, there were a number of e-mails attempting to clarify the request and the time-period in which the records were being sought.

On March 17th, 2009, the Requester confirmed that the request was for the same records reviewed by the [newspaper] while a previous e-mail (Feb. 26/09) indicated that the request was for "all information for the period in which the municipality has records".

The Town recalled all information from its archives that had been the subject of a 2004 information request from a representative of the [newspaper], This information contained both public records as well as severed documents that had been reviewed by the representative of the newspaper during the period June 11th, 2004 and May 30th, 2006.

On March 25th, 2009, the Requester was advised that the same information that had been reviewed by the [newspaper] was available for review. On March 25th and 26th, 2009, the Requester and another family member attended the office and reviewed and requested copies of some of the records.

On April 23rd, 2009, an e-mail was received from the Requester inquiring "whether there are any records in possession of the municipality which reference the total figure of \$201,910 cited in the [newspaper]. A request for such record(s) was fully covered in my original FOI application of February 18, 2009...." The Requester also asked for reasons why the municipality failed to provide a decision letter.

The Town disputes that the request in the April 23rd, 2009 e-mail was part of the original request as was noted in an e-mail to the Appellant on April 24th, 2009. At no time during the period of February 18th, 2009 to March 26th, 2009 in which the records were provided to the Requester was the request for the dollar figure made. All of the same records that had been provided to the [newspaper] in its request were provided to the Appellant as the Applicant referenced in earlier correspondence "replicates exactly the request of, and response to, the newspaper."

With regard to failure to issue a decision letter, the Town acknowledged this and issued the decision letter on April 24th, 2009.

The Applicant is correct in that the author of this response advised that the figure cited by the newspaper was not contained in records held by the municipality. The response was based on the review of the same records in which the Applicant had reviewed and received copies of.

The [newspaper] initiated their request in 2004 and then reviewed the respective files over a period of two years, Throughout that period, the [newspaper] at various times attempted to extract more specific information for the various appeals in which the subject family had been involved. At no time did the Town release information that would be specific to the subject family.

By early 2006, after attempting in September of 2005 to close the file due to inactivity and the request to keep the file active, the [newspaper] amended the request (verbally) for the total cost to the Town for all actions in which the subject family was involved. At that time, the Finance Department was able to generate a list from the financial software program for amounts paid to lawyers and various other contractors (eg. planning consultants) for activities in which the subject family was involved. The [newspaper] was provided a total dollar figure, which was contained in the May 30", 2006 decision letter. A copy of the list containing the payees was not provided.

At no time during the initial request period did the Town understand or believe the 2004 Request and Decision Letter to the Banner to be responsive to the 2009 Request. The Town is of the opinion that Requesters submitting applications in accordance with the M.F.I.P.P.A. do so without the understanding that their request may become the subject of another request and therefore have always treated these requests as confidential. It is now understood, through recent mediation processes, that these records may be considered responsive and are prepared to treat such records in this manner.

As approximately three (3) years had lapsed between the completion of the request by the [newspaper] and the request made in 2009 by the Appellant, the [newspaper's] request file had been filed in the Town's archives. The list referred to above was located upon recalling this file from the archives once the Appeal had been filed and during the mediation process.

The list kept or the file of the request by the Gravenhurst Banner was identified as "Town of Gravenhurst Legal Costs". It was not until the 2009 request by the Requester, now the Appellant, during the mediation process that a random check of various numbers on the list, to assist with recalling the figures, which appeared to be costs attributable to the Town's Comprehensive Zoning By-law, were the words "Comprehensive Z/B/L" written on the list.

However, through the mediation process, when it was agreed to re-create the list to identify further detail, did it become apparent that the amounts contained more than the fees and expenses associated with the Town's Comprehensive Zoning By-law.

The Town also provided additional detail regarding the steps taken to search for records. In its initial representations, the Town stated that it did not contact the appellant, but rather, that it chose to interpret the appellant's request literally. However, on reply, the Town noted the numerous communications that were held with the appellant prior to issuing its decision letter, which is in accord with the information provided by the appellant and contained in the appeal file. In particular, the Town noted:

Clarification was sought between February 26, 2009 and March 20, 2009. The following lists the various correspondence:

- February 26, 2009 -- e-mail to requester requesting time-frame in which request pertains
- Feb 26/09 - Requester advises "all information for the period in which the municipality has records"
- March 11th & 16th - inquiries as to delay in responding ...March 11th e-mail referred to the request "is the same information which appears to have been provided previously to a local newspaper..."
- March 16th, 2009 - reply letter advising that the Town is reviewing files in which to provide an estimate
- Mar 17th, 2009 - e-mail from requester - clarification that the records requested have already been requested and provided to the [newspaper]
- Mar 18th – 20th, 2009 - series of e-mails to and from requester seeking confirmation of the time period in which the records were being sought (this was due to the time lapse between the 2004 request and a 2009 request)
- Mar 25th - e-mail to Requester advising files available for review
- Mar 25 & 26 - Requester and another family member reviewed the files and requested copies provided
- April 23rd, 2009 - e-mail from the Requester incorporating a request that was not part of the original request for information to include "whether there are any records in the possession of the municipality"

which reference the total figure of \$201,910 cited in the [newspaper]. A request for such record(s) was full covered in my original FOI application of February 18, 2009....." The Requester also asked for reasons why the municipality failed to provide a decision letter.

The Town indicates that it interpreted the April 23, 2009 e-mail as providing clarification of the original request. The Town submits that the appellant clarified his request to indicate that he was seeking the same documents compiled in 2006 in response to the newspaper's 2004 request. The Town takes the position that subsequent e-mails received from the appellant confirmed that the request "replicates exactly the request of, and response to, the newspaper". Accordingly, it decided to respond literally to the request, as clarified.

The Town states that the searches for records responsive to the clarified request were conducted by the Clerk and the Deputy Clerk. The Town indicates that "the search was conducted of the 2004 Information Request file from [the newspaper], and the file in which copies of all documents provided was contained." The Town notes that since the file had been completed in 2006, the Request File and the separate file containing copies of the records provided in response to it had to be retrieved from the Archives..."

The Town confirms that the information located as a result of this search was made available to the appellant for review and copies of requested documents were subsequently provided. The Town notes that the records it provided to the appellant consisted of the exact copies of minutes and detailed trial balance sheets that had been provided to the newspaper over the period stretching from 2004 to 2006.

With respect to the discrepancies in the evidence regarding the decision letter for the 2004 Request, the Town acknowledges that this record was initially withheld as noted earlier because the Town did not understand or agree that it was responsive to the request. The Town points out that through the mediation process, it agreed to disclose the decision letter.

The Town notes further that during the mediation process, a list of expenses related to costs incurred by the Town of Gravenhurst for various legal matters from 1995 to 2006 was provided to the appellant, which resulted in a more detailed listing of the expenses being re-created.

Analysis and Findings

I have considered the representations presented by both parties and have reviewed the appeal file, which contains copies of the numerous communications between the parties themselves and between the parties and this office. Although I recognize that the appellant is very angry at the manner in which this file was processed by the Town, I am not persuaded that there was any intentional plan to delay or to fabricate or alter either the information in any of the records or information provided to this office. I do find, however, that the Town's approach to the request was unclear, uncoordinated and somewhat careless. On the other hand, I find that the appellant's communications have also been unclear, complex and confusing, which clearly contributed to the

problems that arose in dealing with what, at first, appeared to be a relatively straightforward request.

Moreover, as I have discussed in detail below, I find that the ultimate approach taken by the Town in narrowly interpreting the appellant's request to include only "the same documents compiled in 2006 in response to the newspaper's 2004 request" was reasonable in the circumstances, and that the search undertaken for these records was reasonable.

Scope of the Request

The scope of the appellant's request was not raised as an issue during mediation or the adjudication process. In preparing this decision, it became apparent that there have been numerous discussions between the Town and the appellant (as noted above), and between the parties and the mediator. There have been, at a minimum, five formal decisions issued by the Town in response to this request, and very likely other decisions have been made along the way.

In order to determine whether an adequate search has been conducted, it is necessary for me to be clear about the exact request that was made. At times, it appears that the appellant expanded the scope of the request; at times it appears that the Town did not address the appellant's request; despite reviewing this file several times, it remains unclear to me what the appellant is actually seeking, what records have been provided to him and what records might be within the Town's custody and/or control.

At the end of the day, I have determined, after reviewing the entire file and all of the communications that were undertaken in relation to it, that one clear theme emerges. The appellant has made it very clear that he wants to know how the Town came up with the amount of \$201,910 that was cited in the newspaper article. He is seeking the same information that was provided to the newspaper. However, it is also apparent from the appellant's representations, that he did not intend his request to be restricted to only that information. As he stated in his representations, he is also seeking "the records forming the basis of its calculation".

It is very apparent that the parties are frustrated with each other and that much of the discussions between them have been at cross purposes. I do not lay the blame on only one party in coming to this conclusion, as noted above. Additionally, in my view, some of the confusion stems from the newspaper article itself, and the manner in which the expenses were described in it. However, because of the confusion created throughout the processing of this access request and appeal, and the only clear message that emerges from the evidence before me, I have decided that the Town's belief that the appellant had clarified his request to include only the information that was provided to the newspaper in response to its 2004 access request was reasonable.

Accordingly, I have decided that for the purposes of this order, I will only consider whether the Town has conducted a reasonable search for the same information that was provided to the newspaper in response to its access request it made in 2004, and which forms the basis of the newspaper article referred to above.

Reasonableness of search

In order to resolve this matter, I must only determine whether the Town's search for the same information that was provided to the newspaper in response to its 2004 access request was reasonable. The Town indicates that it retrieved the 2004 access request file and the documents file that contained the records that were disclosed to the newspaper over the two year span that the file was active from its Archives. These records were provided to the appellant for review and photocopies were made of any that he requested. As I noted above, the decision letter itself, which contained a reference to the \$201,910 amount, was provided to the appellant during mediation.

I am satisfied that the narrowed request was for records that were contained in the specific files identified by the Town and that the Town's search for them was ultimately conducted by knowledgeable individuals. Accordingly, I find that the Town's search for responsive records was reasonable.

I recognize that the appellant will not be satisfied with this result, as it is apparent that in his own mind he was seeking additional records. The appellant is not precluded from filing a new access request that clearly states the information he is seeking, and one that does not require multiple communications to clarify.

ORDER:

The Town's search for records was reasonable and this appeal is dismissed.

Original signed by: _____
Laurel Cropley
Adjudicator

_____ June 29, 2011