



**Information and Privacy
Commissioner/Ontario**

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

INTERIM ORDER MO-2009-I

Appeal MA-050272-1

Township of Georgian Bay



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NATURE OF THE APPEAL:

The Township of Georgian Bay (the Township) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) from the President of a taxpayers association (the appellant) for information regarding a building committee. The request included the names of its members, their roles, date the committee was established, dates the committee met, agenda and minutes of all meetings, and any and all records to confirm compliance with Township procedures and by-laws.

The Township issued a decision advising that no formal building committee was formed by Council, and that no records exist that are responsive to the request. The Township also advised that any discussions or reports regarding the current administration and fire/public works building projects that were presented during open sessions of Council, as well as the names of members of Council or Committee of the Whole, dates of meetings and minutes of meetings of Council or Committee of the Whole were available on the Township's webpage.

The appellant appealed the Township's decision that records do not exist.

In her letter of appeal, she provided the following information to substantiate her belief that the records she is seeking must exist:

- an excerpt from Minutes of District Council Meeting June 13, 2005 which states "Councillor Braid advised that he was the chair of the building committee ..."
- an excerpt from Resolution C-167-2005 dated June 20, 2005 which states:

AND WHEREAS Council established a committee consisting of Councillors Braid, Jackson and Keall and the CAO to assist in the review being conducted by the project manager;

AND WHEREAS the committee re-examined past proposals for renovations and or additions to the old building;

- Copies of three invoices sent to the Township by [the Project Manager] dated January 31, 2005, February 28, 2005 and April 30, 2005 showing charges described as: "meeting with steering committee"; "attend coordination meeting with steering committee"; and "Provision of Project Management Services ... including Coordination meetings with staff and the steering committee".

The appellant stated that she believes that references to the "steering committee" are, in fact, references to the building committee.

In appeals such as this, 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*.

In accordance with procedures established for sole-issue reasonable search appeals, I sent a Notice of Inquiry to the parties. The Notice of Inquiry identified the background and the issue raised in the appeal, confirmed that a Mediator was assigned to the appeal, and indicated that, in the event the appeal was not resolved through mediation, an oral inquiry would be held to determine whether the institution's search for responsive records was reasonable. The Notice of Inquiry also identified certain information that I would be seeking from the parties in regard to the issue raised by the appeal.

The oral inquiry was held on October 4, 2005 via teleconference. The appellant was present together with the Vice President of the taxpayers association and the Chair of a taxpayers study group. The attendees for the Township were the Freedom of Information Coordinator (the FOI Coordinator), the CAO/Clerk Treasurer, the Project Manager, and Councillor Braid. The Township was also represented by legal counsel.

DISCUSSION:

General principles

As set out above, 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*. A reasonable search is one in which an experienced employee expends a reasonable effort to identify any records which are reasonably related to the request [Order M-909].

Where a requester provides sufficient detail about the records that 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. However, in my view, in order to properly discharge its obligations under the *Act*, the institution must provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request.

If, after hearing all evidence and arguments by the parties, I am satisfied that the searches carried out were reasonable in the circumstances, the institution's decision will be upheld. If I am not satisfied, further searches may be ordered or other appropriate steps taken.

Representations

Prior to the oral inquiry, both parties provided written representations to this office and to the other party.

Appellant's representations:

The appellant submitted that a building committee existed. In support of her submission, the

appellant referred to Resolution C-167-2005 dated June 20, 2005 which states that Council established a committee consisting of three named Councillors and the CAO to assist in the review being conducting by the Project Manager and that the Resolution was read out before 200 people who had attended the Council Meeting. She further submitted that a public announcement had been made and the newspapers had reported it.

The appellant pointed out that the invoices sent to the Township show that the Project Manager charged for meetings he attended with the Steering Committee. The appellant asserted that references to the steering committee were, in fact, references to the building committee. She also referred to the statement in the January 24, 2005 Council Minutes that "Mayor Kennedy suggested that a steering committee be formed with respect to this project that would include Council, ratepayers and the CAO".

The appellant also submitted that a proper search has not been conducted because the records she is looking for would have been generated at Council Meetings held in closed sessions and the Deputy clerk confirmed she did not sit in on all closed session meetings of Council. The appellant stated that the Deputy Clerk therefore would not know whether a formal or an informal committee was established.

Township's representations

Prior to the oral inquiry, the FOI Coordinator explained that the building projects proposed by the Township represent significant infrastructure and therefore Council dealt with the matter directly and did not refer it to a committee. She pointed out that a committee would have to be officially appointed under section 18 of the Township's By-law [Special or Ad Hoc Committees].

At the oral inquiry, the FOI Coordinator stated that there are no minutes, no agendas, no meetings of a building committee, and that no Resolution had been passed by Council to establish a building committee. Further, that no By-law had been passed to establish a building committee, and that a committee could only be established by by-law in accordance with sections 238 and 239 of the *Municipal Act, 2001*.

The Township's solicitor submitted that a building committee was not struck because Council and Committee as a Whole dealt with the matter of the new building both in closed sessions and in open council meetings and that all records relating to this matter have been published on the Township website.

In response to the appellant's claim that the records she is looking for would have been generated at the Council meetings held in closed sessions, both the FOI Coordinator and the Township's solicitor explained that if a building committee were recommended to be formed in a closed session of Council, a Resolution would have to be passed in an open session of Council to establish that committee, and its members would then have to be appointed by Council in an open session.

The Township was asked to explain the statement in Resolution C-167-2005 "WHEREAS Council established a committee consisting of [three named Council members] and the CAO to assist in the review being conducted by the Project Manager". The Township's solicitor stated that this statement was made in the recitals [i.e. the Whereas portions] of the Resolution. He stated that recitals are factors leading up to the approval of the proposal and are intended to give background information. He also stated that, in this case, that portion of the Resolution is not accurate, the reference to appoint a committee is not accurate and the reference in this recital was not a formal appointment of a committee. He stated that Council overlooked the inaccuracy with respect to the Committee and attributes this to the volume of material that Council deals with. The Township's solicitor also submitted that it is not the case that a committee was formed and that Council did not disclose this.

The Township was also asked to explain the statement in the June 13, 2005 Council Minutes where Councillor Braid advised that he was Chair of the building committee. The FOI Coordinator submitted the following e-mail sent to her by Councillor Braid in which he states that his actual words were: "I am the Chair of the Committee looking into the building issue". He also explains that:

... the easiest way to convey to the other District Councillors the long process we had traversed in the shortest time and in the simplest terms for them to understand without going into great detail or divulging discussions we had in Closed Session was to indicate the fact that I headed up the group or "committee" working on the building issue.

The minutes don't reflect the appointment of Braid and Jackson to work with [the Project Manager] on the building issue, nor do they reflect the fact that Keall and CAO were appointed to work with [the Project Manager] on the space needs. Sometime after that it was decided that I would head up this "committee" because of my building knowledge

The structure was also noted in C-167-2005 on June 20th, 2005. That particular point was approved by all.

It was pretty general knowledge (in the public) that we were working together on the building issue, with all of the reports in public prior to moving the issue into Closed when advised by two lawyers.

At the oral inquiry, Councillor Braid submitted that he stated he was Chair of a Committee on building issues because he had 40 years experience in the building trades and he was therefore considered the expert as far as building matters are concerned.

In order to clear up any confusion regarding the existence of a building committee, the FOI Coordinator submitted the following Addendum made to the June 13, 2005 Council Minutes:

Councillor Larry Braid advised that he may have misspoken at the June 13th Council meeting. The detailed situation is that Councillors Braid and Jackson were requested by the Township of Georgian Bay Council to work with the project manager in order to assist with the Township's Building project. Christine Mintoff Deputy Clerk of the Township of Georgian Bay, has advised that there was no official Building committee established by Township Council.

The FOI Coordinator stated that there also was no informal building committee. She submitted that the word "committee" has been misinterpreted and that there were no meetings or get togethers regarding building matters. She stated that the Project Manager consulted with staff members and that he met separately with the persons named as having been part of a committee. She stated that he met with different people at different times. She also submitted copies of Council Minutes, which state in part:

December 20, 2004

Mayor Kennedy introduced [the Project Manager] stating that Design Connection submitted the successful proposal as a result of the tender process for a Project Manager. He noted that Council had asked Councillors Braid and Jackson to take [the Project Manager] through the old administration building in order for [the Project Manager] to be able to complete phase one of the process. Mayor Kennedy also noted that Councillor Keall was asked to work with the CAO with respect to assessing space needs and have that information provided to [the Project Manager].

[The Project Manager] thanked the Mayor and Council for the opportunity to work with them and thanked Councillors Braid and Jackson for meeting with him.

June 20, 2005

Councillor Bowden expressed special thanks to Councillors Braid, Jackson and Keall indicating that each has worked with the Project Manager on different aspects of this project.

The Township's solicitor submitted that Council had parceled out the duties of the building project and that this "approach" was considered to be a "committee".

With respect to the reference to meetings of a "Steering Committee" in the invoices, the FOI Coordinator submitted an e-mail sent to her by the Project Manager:

The term "Steering Committee" is used in a generic sense, not a definitive one. Councillors Braid and Jackson have provided involvement in construction issues and Councillor Keall has provided involvement in office layout. Mayor Kennedy has monitored the project. The CAO has provided involvement with all issues and certain staff members have provided involvement to issues that may come under their areas of expertise. This combination of Council and staff are referred to as the Steering Committee.

At the oral inquiry, the Project Manager stated that, in his invoices, he was not referring to a formal steering committee meeting. He also stated that he did not attend any specific formal committee and he did not generate any minutes of a formal committee.

The Township's solicitor confirmed that the Mayor had suggested the formation of a steering committee to deal with building matters but he also stated that this was never acted upon and such a committee was never formed.

In concluding the Township's submissions, the solicitor submitted that the issue in this appeal is whether the search for records was reasonable. He stated that regardless of how a building committee is characterized, there is no such committee, there were no meetings of such a committee except by Council or Committee as a Whole, and he submits that the search conducted by the Township supports that no records responsive to the request exist.

Conclusions

It is important to re-iterate that the *Act* does not require an institution to prove with absolute certainty that records do not exist. What is required of institutions in reasonable search appeals is to provide sufficient evidence to show that reasonable efforts were made to identify and locate responsive records.

I have carefully considered the evidence and submissions from both the appellant and the Township. I have also reflected on the request and the records sought by the appellant, i.e. any and all records relating to the Township's building project. 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.

After hearing the representations of the parties on October 4, 2005, I find that the evidence submitted in this inquiry is contradictory. The Township's FOI Coordinator and its solicitor submit that building matters were discussed in open and in closed sessions of Council only and that no formal building committee was established by Council. They submit there is no evidence of a Resolution of Council which establishes a building committee nor is there evidence of minutes of an open Council meeting appointing members of such committee. However, the appellant has provided a copy of the June 20, 2005 Council minutes showing that the Mayor signed Resolution C-167-2005 on that date. The Resolution states that Council established a committee consisting of three named Councillors and the CAO to assist the Project Manager with his review. Council minutes show that the Project Manager met with the individuals named in the Resolution and the appellant has provided copies of invoices showing that the Township is being charged by the Project Manager for attending meetings of a Steering Committee.

The question remains as to whether any records were created by the involved individuals or as a result of the meetings, and consequently, whether the search conducted by the Township was

reasonable. As a result, I am unable to conclude that all reasonable efforts have been made to identify and locate responsive records.

In view of the above, I conclude that significant questions remain unanswered, and I have therefore decided to ask the Township to provide me with additional information in affidavits and attesting to its search.

ORDER:

1. I order the Township to provide me with affidavits attesting to its search and sworn by each of the individuals listed below and answering the following questions:

Mayor Kennedy
Councillor Larry Braid
Councillor Jackson
Councillor Keall
CAO Bonnie Munro

- Are there any records relating to the Committee described in Resolution C-167-2005, or the Steering Committee referred to in the invoices?
- If so, are there any records which show on what dates the Committee described in Resolution C-167-2005 or the Steering Committee described in the invoices met, who was present at the meetings, and including but not limited to agendas and/or minutes?
- Are there any records relating to appointments of Councillors Braid, Jackson, Keall and the CAO to assist the Project Manager in his review and that would have been generated in closed meetings?
- If you attended **any** meetings dealing with building matters as a group or separately, did you record the dates of such meetings or take notes or minutes?
- Did you create 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?
- Were any records responsive to the request created by others and provided to you either prior to, during or following any meetings with the Project Manager or one or more of the above individuals or as a group?
- What steps did you take to assure yourself that you do not have records responsive to the appellant's request?

- Are you aware of the existence of any responsive records that may have been created and/or maintained by other individuals that are responsive to the appellant's request, and if so, where would they be located?

The affidavit from Councillor Braid should also answer the following questions:

- Were you part of a "Committee" or "Steering Committee", formal or informal, which consisted of or included Councillors Keall, Jackson, yourself, the CAO and the Project Manager to deal with building matters?
- Are you aware of the existence of any records relating to such formal or informal committee, including agendas or minutes?

I will accept affidavits from the Co-ordinator on behalf of any individuals listed provided that the deponents of the affidavits give their evidence based solely on first hand, direct conversations with the listed individuals not providing personal affidavits.

The affidavits must be submitted to me by **January 12, 2006**.

The affidavits provided to me may be shared with the appellant, unless there is an overriding confidentiality concern. The procedure for the submitting and sharing of representations is set out in IPC Practice Direction 7.

2. If, after contacting the various individuals listed, and conducting searches for responsive records that stem from the answers to the various questions, the institution identifies records responsive to the request, I order the institution to provide a decision letter to the appellant regarding access to these records in accordance with sections 19, 21 and 22 of the *Act*, considering the date of this interim order as the date of the request and without recourse to a time extension.
3. The affidavits referred to in Provision 1 should be forwarded to my attention, c/o Information and Privacy Commissioner/Ontario, 2 Bloor St. East, Suite 1400, Toronto, Ontario, M4W 1A8.
4. I remain seized of these matters with respect to compliance with this interim order or any other outstanding issues arising from this appeal.

Original signed by: _____
Susan Ostapiec
Acting Adjudicator

December 16, 2005 _____