



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-2104

Appeal MA-050187-1

The Corporation of the Town of Hawkesbury



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NATURE OF THE APPEAL:

The Corporation of the Town of Hawkesbury (the Town) received a request submitted under the *Municipal Freedom of Information and Protection of Privacy Act* (the Act) for access to the following information:

- Copies of sections 4.22, regulations concerning parking areas, and 26, administration enforcement and penalties of By-Law 34-78;
- Copies of documents relating to six documents that were attached to the request;
- Copies of written permission and authorization from the owner of [a named property] giving authorization for building permits and the licence of occupation for the tenant [a named individual] and/or his companies;
- Copies of all building permit applications and occupation permits and the issuance of those permits for [a named property] or [alternatively identified named property] for the period from April 1990 to May 1996.

[Translation]

The Town issued a letter notifying the requester of its intent to extend the time limit for issuing a decision by an additional 14 days.

The Town subsequently granted access to all responsive records that were located. However, in its decision letter, the Town advised that it was unable to respond to three components of the request. First, the Town advised that it could not locate any of the reports of the Planning Advisory Committee for the period of October 22, 1991 to October 12, 1993, some of which formed part of the request. Second, the Town referred the requester to its legal counsel for all information sought that related to the lawsuit between the Town and the requester. Third, the Town advised that it does not have any correspondence regarding the issuance of business licences as in 1992 these licences were issued by the Hawkesbury Municipal Police.

The requester and the Town exchanged subsequent correspondence in relation to the request. During this time, the requester advised the Town that he was of the view that additional records should exist and also requested the opportunity to view the original building permit application of a named company dated September 2, 1992. The requester had previously been granted access to a copy of this building permit application.

The Town issued a decision letter advising that all files where the building permit application could have been filed were searched and that they were unable to locate the original document.

The requester (now the appellant) appealed the Town's decision.

During the course of mediation, the appellant clarified that he is of the view that additional records exist. In particular, the appellant seeks access to reports of the Planning Advisory Committee for the period of October 22, 1991 to November 8, 1993. The appellant also advised the mediator that he is concerned that some of these records may have been destroyed contrary to the Town's retention schedule.

The Town maintains that all reasonable efforts were made to locate all responsive records, including the reports of the Planning Advisory Committee for the period outlined by the appellant. Accordingly, the question of whether the Town conducted a reasonable search under section 17 of the *Act* remains at issue in this appeal.

The appellant also advised the mediator that he continues to seek access to the original building permit application of a named company dated September 2, 1992. He has been granted access to a copy of this record by the Town, in response to his request. The Town maintains that the original version of this record cannot be located. Accordingly, the issue of access to the original record under section 23(2) is also at issue in this appeal.

As no further issues were resolved in mediation, the file was transferred to the adjudication stage of the process.

I began my inquiry by sending a copy of a Notice of Inquiry, setting out the facts and issues on appeal, to the Town. The Town provided representations in response. I then sent a copy of the Notice of Inquiry to the appellant, along with a complete copy of the Town's representations. The appellant responded with representations.

DISCUSSION:

SEARCH FOR RESPONSIVE RECORDS

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

Town's representations

The Town was asked to provide a written summary, in affidavit form, of all steps taken in response to the request. The Town submitted an affidavit, sworn by the Acting Clerk. In the affidavit the Acting Clerk first explains how permanent records are kept at the Town:

All of our permanent records are retained and kept in a safe place: in the vault, under lock and key in our offices or in the basement. There is no destruction register for permanent records because these records must be retained.
[Translation]

The records that are at issue in this appeal are considered permanent records.

In the portions of the affidavit which deal specifically with the Town's search for the records that the appellant submits must exist, specifically, the reports of the Planning Advisory Committee for the period of October 22, 1991 to November 8, 1993 and the original of the building permit application dated September 2, 1992, the Town provides some background on the history of the filing of such reports and explains that some of them cannot be found for the following reasons:

The reports of the Planning Advisory Committee were prepared by the Clerk's Department until November 1991. All of these reports are available. Subsequently, the Chief Administration Officer at the time ... changed the procedure and the reports were no longer given to the Clerk's Office for filing with the permanent records. Moreover, this portfolio was under the sole supervision of the Chief Administration Officer of the time ... until his departure in 1995, and the data does not appear to have been incorporated in the central filing system. For your information, since 2000, all original reports have been given to the Clerk's Office and filed with the permanent records.

Considerable searching failed to locate either the original building permit application dated September 2, 1992 (a copy of which was sent to him) or some of the reports of the Planning Advisory Committee for the period of October 22, 1991 to November 8, 1993, notwithstanding all the steps taken and the searches conducted both by me and by the personnel to attempt to locate these records, and I advised [the appellant] that if we located them, I would contact him. [Translation]

In the affidavit, the Acting Clerk outlines the searches that have been conducted in an attempt to locate the missing records:

After exhaustive searching, four of the reports were located. They were filed in the Public Works report registers. The dates of the meetings were February 9, 1993, August 17, 1993, September 7, 1993 and October 18, 1993 ... [N]one of the four reports discussed the [appellant's] matter ... A few days later, I located two other reports, for October 21, 1991 and November 19, 1991. The [appellant's] matter was not discussed at these meetings...

I searched [the litigation file that relates to the appellant's claim against the Town]. None of the records at issue was filed therein.

The records kept by ... [the] Administrative Secretary ... [of the] Chief Administration Officer of the Corporation of the Town of Hawkesbury during this period were also searched. [The Chief Administration Officer] was hired on September 30, 1991 and he left in 1995. I consulted all of the records [of the Chief Administration Officer] with the assistance ... [of the Administrative Secretary (Technical Services)]. We also consulted the records of the Mayor of the time ... We did not locate any Planning Advisory Committee reports, nor the original building permit application dated September 2, 1992.

At my request, [the] Clerk-Typist III in the Clerk's Department also searched the reports and minutes for 1991, 1992 and 1993 and the registers for the previous and following years to make sure they had not been filed there by mistake. None of the reports sought was filed there.

I also searched some of the records archived in the basement, to no avail.

I asked ... [the] Information Systems Coordinator to search our computer system and to check whether we had any diskettes for 1991-1992 and 1993. None of the records at issue was located on the diskettes.

The question at issue is whether the Town conducted a "reasonable search." I sincerely believe that all possible steps were taken and searches were conducted by me and by the personnel of the Corporation of the Town of Hawkesbury to locate the records.

After all my searching, I have come to the conclusion that the records clearly did exist at one time, because they were approved by the Municipal Council at regular meetings of the Council, but they cannot be located. There is no register indicating they have been destroyed and, in fact, permanent records are not destroyed.

...

This affidavit is made in support of the decision by the Corporation of the Town of Hawkesbury that it cannot give him the records listed below because all possible steps have been taken to locate all the pertinent records and after countless searches, we have not located them:

- Planning Advisory Committee reports for:
February 5, 1992 – March 24, 1992 – April 14, 1992 –
May 12, 1992 – June 10, 1992 – August 10, 1992 –
September 8, 1992 – April 13, 1993 – May 11, 1993 –
June 8, 1993; and

- The original of a building permit application dated September 2, 1992.

[T]his is the sole purpose of this affidavit. [Translation]

Appellant's representations

The appellant submitted two sets of representations, first when he received a letter advising that a Notice of Inquiry was sent to the Town, and second, when a Notice of Inquiry and a copy of the Town's representations were sent to him inviting representations. In his second set of representations, the appellant requests that his initial letter, submitted before he received the Notice of Inquiry and reviewed the Town's representations, also be considered as part of his representations.

In his first set of representations, the appellant outlines the background of some of his dealings with the Town that gave rise to his request. He outlines what he submits to be some of the contradictory statements made and questionable actions taken by the Town which lead him to believe that additional records responsive to his request should exist.

First, the appellant submits that his own research from the summaries of the annual reports indicates that 14 reports of the Planning Advisory Committee for the years 1992 and 1993 are missing. In a press release, the Town would only confirm that 5 reports of the Planning Advisory Committee could not be located despite the fact that they were classified as "permanent" records and should not have been destroyed.

The appellant submits that media reports on that press release state that Town officials also indicated that the records had not been destroyed because there are no destruction registers which conclusively confirm that they have been destroyed. The appellant submits that he asked the Town for the opportunity to view the destruction registers and the Town explained that there were none. The appellant questions how the Town can say, on one hand, that there is no evidence in destruction registers that the documents in question were destroyed, and on the other, that no such registers exist.

The appellant also questions how, if no documents were destroyed, why they cannot allow him to view a copy of the original of the building permit application dated September 2, 1992 and why the Town can only find a fraction of the documents that should exist.

The appellant has provided me with a copy of the building permit application dated September 2, 1992 which has been marked that it has been received by the Town on September 3, 1992.

The appellant also submits:

The Town of Hawkesbury thus maintains that [the] meeting of September 8, 1992 with the Planning Advisory Committee is one of the reports that cannot be located

but that has not been destroyed. In my letter dated November 4, 2005 to [named individual], Municipal Councillor of the Town of Hawkesbury, I requested that he “confirm whether as a municipal councillor and a member of the Planning Advisory Committee he was present at the meeting on September 8, 1992.” Even though the record cannot be located, the Town confirmed to me in its letter dated November 18, 2005 that [named Councillor] “attended the meeting on September 8, 1992.” This is additional evidence that the Town possesses the report and refuses to hand over a copy of it, in view of its significance in the case. One cannot confirm a person’s attendance at a Committee meeting without having to consult the report and verify the list of those present. [Translation]

In his second letter, the appellant states:

The Municipality manipulated the information by stating that it “did not locate any register recording the destruction of the originals of the reports,” given that the originals of these records must be permanently retained and should never appear on the destruction register, but it maintained ambivalence by failing to mention that for over 16 years, it had been guilty of contravening the requirement in its By-law No. 22-88 to maintain a destruction register for non-permanent records.

...

Pursuant to its By-law No. 22-88, the Town of Hawkesbury must permanently retain the originals of Planning Advisory Committee reports. The enclosed copies of the reports of October 13, 1992 and December 9, 1992 correspond to our audit of the registers. Some pages of the original reports are illegible and are missing the required signature of the Committee Chair! These are just a few examples among countless others that illustrate the Town’s lack of organization as the lawyer noted ... in concluding his letter dated March 10, 1999: “...particularly in the face of substantial confusion on the part of the Town”.

...

[Translation]

Analysis and finding

In my view, there is persuasive evidence to suggest that additional records responsive to the appellant’s request might exist. From the appellant’s representations, as well as those submitted by the Town, it is clear that additional reports of the Planning Advisory Committee during the period of October 22, 1991 to November 8, 1993 should exist and be accessible by the Town. Similarly, as the appellant has a copy of the building permit application, it is clear that at some

point in time an original building permit application dated September 2, 1992 existed and was received by the Town, therefore, it should also be kept among Town records.

Based on the information provided in the Town's affidavit, all permanent records of the Town are kept on site, in the Town's basement, and are not destroyed. As the records at issue are classified as permanent records there is strong evidence to indicate that additional records responsive to the request might exist. The Town does not deny that any of these records exist but takes the position that the records sought by the appellant simply cannot be located.

As set out above, in appeals involving a claim that additional responsive records exist, the issue to be decided is whether the Town has conducted a reasonable search for the records as required by section 17 of the *Act*. The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the Town must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [Order P-624].

In the circumstances of this appeal, the Town has provided a clear and detailed description of the extensive efforts it undertook to locate the missing records responsive to the appellant's request. The Town provides an explanation as to why the records for a lengthy period of time cannot be located and why these records do not appear to have been filed with permanent records, as was done prior to and since that time period. The Town also outlines a number of people that were consulted in an attempt to locate the missing records, identifies the different locations that were searched and advises that additional searches were conducted through all the reports and the minutes of meetings for the years 1991, 1992 and 1993. Finally, although the Town has subsequently managed to locate some reports of the Planning Advisory Committee from the relevant time period, the affidavit makes it clear that those reports were randomly found in various files related to other departments or committee meetings, which, in my view, supports a conclusion that the search conducted by the Town has been very thorough.

I find it troubling that the Town is unable to locate a number of records over a lengthy period of time that are classified as "permanent" despite a number of extensive searches on their part. The Town's failure to locate these records has resulted in the integrity of the access procedure being compromised. However, I have no evidence before me to suggest that the additional responsive records cannot be located because of any act of bad faith on the part of the Town. Based on the information provided by the Town, which I find credible and convincing, I am satisfied that the Town has provided me with sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate additional responsive records. Accordingly, I find that the Town's search for records responsive to the request was reasonable in the circumstances.

REQUEST TO VIEW ORIGINALS

Section 23(2) of the *Act* states:

If a person requests the opportunity to examine a record or part and it is reasonably practicable to give the person that opportunity, the head shall allow the person to examine the record or part.

There are two ways in which access to a record may be given: by allowing inspection of the actual record and by providing a copy of it. This section indicates that the choice is primarily that of the successful requester. However, an institution may decline to accept the requester's choice if it would not be reasonably practicable to comply with it. Some examples of why it might not be reasonably practicable to comply are:

- if a record is very large;
- if the reproduction of a record may be unduly burdensome on the institution; or
- if only part of the record is subject to disclosure and it is not feasible to allow inspection without disclosing the protected parts of the record as well.

Section 23(2) is a mandatory provision, subject only to the requirement of reasonable practicability. In other words, unless an institution has determined that it is not reasonably practicable to give the requester the opportunity to examine an original record, the head *must* do so, upon request [Order PO1679].

In the current appeal, the appellant seeks access to the original building permit application of a named company dated September 2, 1992. The Town submits in the affidavit, as described above, that the original of the building permit could not be located despite numerous and extensive searches.

Given that the appellant has in his possession a copy of this building permit which has been stamped by the Town as "received" on September 3, 1992, it is clear that at one point in time the Town located this building permit. As noted above, I find it troubling that despite extensive searches, the record cannot be located.

Nevertheless, in light of my finding that the Town has conducted a reasonable search for records responsive to the request, including the original of the specific building permit dated September 2, 1992, I am satisfied that the Town simply cannot provide the appellant with the opportunity to view the original record under section 23(2). Accordingly, this portion of the appeal has been rendered moot and no useful purpose would be served by making a determination on the issue of whether the appellant should be granted access to the original record.

ORDER:

I find that the Township has conducted a reasonable search for records responsive to the request and dismiss the appeal.

Original signed by: _____
Catherine Corban
Adjudicator

_____ October 19, 2006