ORDER M-1153

Appeal MA-980163-1

City of Kanata

NATURE OF THE APPEAL:

The City of Kanata (the City) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The request was for access to the following electronic records:

1. All electronic files relating to the proposed amalgamation of the City of Kanata and other surrounding municipalities.

2. Council minutes for the period January 1996 to the date of the request.

3. Any papers prepared concerning the amalgamation issue for public use by Council or staff.

4. Past, present and planned capital expenditures.

5. Descriptions of the physical assets of the City, including street maps, maps of the recreational facilities, zoning maps and photographs of the major civic facilities such as libraries, pools etc.

The City responded to the request by advising the requester that access to the information sought would be granted in paper format, but that records responsive to his request did not exist in electronic form. The requester, now the appellant, appealed the City's decision to deny access to the requested information in an electronic format.

A subsequent request was made by the appellant for access in electronic form to all existing City by-laws, together with a list of the by-law numbers for any such files that no longer exist. Again, the City advised the appellant that this information did not exist in electronic format, but that access to paper copies would be granted. The appellant appealed this subsequent decision. As the issues in the second appeal were similar to those raised in the earlier appeal, the parties agreed that the two appeals would proceed together.

The dispute between the parties revolves around whether the City is obliged to provide access to the requested information in the format requested by the appellant. Whether or not the appellant is entitled under the Act to access to information responsive to the requests as contained in the paper copies of the records is not in dispute, though the City advised the appellant that a fee may apply should he wish to have access to the paper copies of the records.

In order to address the issues raised in this appeal completely, the appellant and the City were asked to respond to a number of questions set out in the Notice of Inquiry which I provided to the parties. Representations were received from both parties.

DISCUSSION:

REASONABLENESS OF SEARCH

The first issue to be determined in this appeal is whether the City's search for responsive records **in an electronic format** was reasonable. Where an appellant provides sufficient details about the records which he or she is seeking and the City indicates that such records do not exist, it is my responsibility to ensure that the City has made a reasonable search to identify any records which are responsive to the request. The Act does not require the City to prove with absolute certainty that the requested records do not exist. However, in my view, in order to properly discharge their obligations under the Act, the City must provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request.

There is no dispute that paper copies of all of the requested information exist in the City's record holdings. I must determine whether the search undertaken by the City for the electronic versions of these records was reasonable.

The City has provided me with a memorandum from its Manager, Communications and Information Services Unit (the Manager), addressed to the City Manager. In this submission, the Manager describes in great detail the steps which he has taken to identify and locate the electronic versions of the requested records. The Manager also indicates that he has had a number of contacts with the appellant attempting to address the issues raised in his request and subsequent appeal.

The Manager submits that he has been managing the record holdings of the City for the past ten years and has a thorough knowledge of which records are maintained in an electronic format. He also describes in detail the searches and inquiries which he has made in response to the appellant's request and this inquiry. Copies of the City's records management policies and retention schedules were also submitted by the Manager.

I will now outline the results of the searches undertaken by the Manager in responding to each of the record categories requested by the appellant.

1. Council minutes, agendas and by-laws are all prepared electronically. However, once they are printed into hard copy and distributed, the electronic versions are deleted from the hard drive of the computer on which they were created, according to the City Clerk.

2. The City's Manager of Materials Management advised that no electronic records which describe the physical assets of the City exist.

3. The City's Capital Budget Officer and Manager of Financial Services informed the Manager that records relating to current, past and future capital expenditures, going back to 1990, are available in electronic format.

4. The City's Park Construction Technician and Landscape Architect advised the Manager that no digital photographs or documents relating to City facilities exist.

5. Other City staff indicated to the Manager that certain electronic drawings and maps of the City exist in the requested electronic format.

The appellant indicates that, in his view, all of the requested information was originally prepared electronically and must still exist in that format. He submits that it is, therefore, not necessary to transfer this information from a paper copy into an electronic version. The appellant states that although the electronic records which he has requested originate with several City departments, each of those departments share a common computer network.

I have reviewed the submissions of the parties with respect to this issue and have come to the following conclusions:

1. Some records responsive to Parts 4 (capital expenditures) and 5 (physical assets) are available in electronic format as requested by the appellant. As the City indicates that it has no objection to the disclosure of this information, it should be made available to the appellant in electronic format, as requested. The Manager states that he contacted knowledgeable staff within the City's staff and received detailed responses from them regarding the searches which these individuals conducted for responsive records. I am satisfied that the searches undertaken by the City with respect to these records was reasonable. I note that the City is not precluded from charging a fee in accordance with the Act and the regulations for providing access to this information in electronic format as requested by the appellant.

2. I am satisfied that records responsive to Part 2 of the original request (Council minutes) and the second request (City by-laws) do not exist in electronic form. I accept the evidence tendered in the submissions made by the Manager with respect to this information. I find that his submissions on this point are sufficiently detailed to enable me to reach the conclusion that while records responsive to this part of the request may have originally been created electronically, they no longer exist in that format.

3. The City has not, however, provided sufficient information to enable me to determine whether its search for electronic records responsive to Parts 1 and 3 of the appellant's request (amalgamation information) was reasonable. The City's submissions do not address any aspect of its search for electronic records relating to the amalgamation of the City with surrounding municipalities. Rather, the submissions simply state that such records are not available electronically.

4. Accordingly, I find that the City's search for electronic records responsive to Parts 1 and 3 of the request was not reasonable. I will, therefore, order the City to conduct a search for electronic records responsive to Parts 1 and 3 of the request. If responsive records are located, I will order the City to provide the appellant with a decision letter with respect to access to any such records

which are identified as responsive following this search in accordance with sections 19 and 22 of the Act and without recourse to a time extension under section 20.

MODE OF ACCESS

As noted above, the City indicates that it has custody of some records which are responsive to Parts 4 and 5 of the request in the electronic format sought by the appellant. However, the City indicates that other records, particularly those which concern the materials accompanying Council agendas, are available only in hard copy. Some of the materials that comprise these agenda items are received in the form of submissions from the public or deputations to Council and as such, were not created by City staff. The City submits that this information is not available electronically as it originated from outside the institution. The appellant clearly indicates that he is not seeking access to any paper records which may exist.

The City states that it does not have the technological capability in-house to "scan" each of the responsive records in their hard copy form in order to create the requested electronic records. It submits that it would be required to send this work out to be scanned by a commercial firm, at great expense. As a result, the City submits that it would not be "reasonably practicable" to provide the information to the appellant in the electronic format which he has requested, within the meaning of section 23 of the Act.

The City's submission raises the application of section 23 to the information sought by the appellant, which does not presently exist in an electronic format. This section states:

> (1) Subject to subsection (2), a person who is given access to a record or a part of a record under this Act shall be given a copy of the record or part **unless it would not be reasonably practicable to reproduce it by reason of its length or nature**, in which case the person shall be given an opportunity to examine the record or part.
>
> (2) 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.
>
> (3) A person who examines a record or a part and wishes to have portions of it copied shall be given a copy of those portions unless it would not be reasonably practicable to reproduce them by reason of their length or nature.
>
> [my emphasis]

In Order P-820, I reviewed the interpretation placed on the equivalent section which governs a request for personal information under the provincial Act.

In Order P-233, Commissioner Tom Wright outlined the obligations of institutions and appellants in situations where access is requested to records which may be voluminous or difficult to copy. The order dealt with a request for personal information under section 48 of the Act and the wording of section 48(3) which deals with the manner in which access is to be granted to personal information.

In that order, Commissioner Wright made the following general observations:

> Where the person who is given access to his or her own personal information requests a particular method of access, the head must establish why it would not be reasonably practicable to comply with the preferred method of access.
>
> Therefore, in my view, any doubt as to the reasonableness of an institution's decision to require a requester to attend at an institution to examine his or her own personal information, as opposed to providing copies, should be resolved in accordance with one of the main purposes of the Act - that individuals should have access to their own personal information.

The issue addressed in this portion of Order P-233 was the reasonableness of the Board's position that the requester should attend in person to view the records, as opposed to being given copies of them. However, I find that the principles expressed by the Commissioner apply equally where an institution asserts that it is unreasonable to provide a requester with a copy of a record in the format requested.

I note that section 23 of the Act applies to both requests for general records and requests for personal information under the municipal Act, unlike the situation in the provincial Act where sections 48(3) and 30 govern requests for personal information and general records respectively.
In accordance with the views expressed by former Commissioner Wright in Order P-233, I find that the City bears the onus of demonstrating that it is not reasonably practicable for it to provide access to the information sought by the appellant in the electronic format which he has requested.

In my view, it would be reasonably practicable for the City to identify the paper records which are responsive to Parts 2, 4 and 5 of the first request and the second request and make them available to an outside firm, as referred to in its representations, to effect the transfer from paper copies to the desired electronic format, through the use of scanning technology. Although the issue of fees is not before me and I cannot, therefore, make a finding in this regard, the City may wish to take the position that it is entitled to rely on the fee provisions of the Act and the regulations, and on this basis provide the appellant with an interim fee estimate of the cost to effect the transfer of the records in accordance with the principles in Order 81 of this office, prior to actually incurring this expense.

One of the purposes of the Act, as set forth in section 1(a), is to provide the public with a right of access to information under an institution's control. Where a requester seeks access to records in a format different from that in which the records now exist, and it is reasonably practicable for the institution to effect the change in format, the institution is required to do so. By way of summary, I find that, in the absence of some extraordinary circumstances, it is reasonably practicable for an institution to provide electronic copies of records which exist only in paper form through the use of scanning technology.

ORDER:

1. I order the City to conduct a further search for electronic records responsive to Parts 1 and 3 of the request and to advise the appellant in writing of the results of this search, within twenty-one (21) days of the date of this order.

2. In the event that additional responsive electronic records are located during the search referred to in Provision 1, I order the City to render a final decision on access to such records in accordance with the provisions of sections 19 and 22 of the Act, treating the date of this order as the date of the request, without recourse to a time extension under section 20.

3. I order the City to provide me with a copy of the correspondence referred to in Provisions 1 and 2 (if applicable), within thirty-five (35) days of the date of this order. This should be forwarded to my attention, c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.

4. The City's search for records responsive to Part 2 of the first request and the second request for City by-laws was reasonable and I dismiss this part of the appeal.

5. I order the City to disclose to the appellant those electronic records which it has identified as responsive to Parts 4 and 5 of the request within thirty-five (35) days of the date of this order.

6. I order the City to provide the appellant with access to the electronic versions of the paper records which it identified as responsive to Parts 2, 4 and 5 of the first request and the second request within thirty-five (35) days of the date of this order.

Original signed by: October 16, 1998
Donald Hale
Adjudicator