



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-1940

Appeal MA-050045-1

City of Toronto



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NATURE OF THE APPEAL:

A request was submitted to the City of Toronto (the City) under the *Municipal Freedom of Information and Protection of Privacy Act* (the Act) for access to the following information in relation to \$4.2 million spent on CSA-related playground repairs since 1999:

...how much was actually spent in each ward for these CSA playground repairs, compared to the projected amount to be spent?

How was the 15% projected contingency money spent (included in the projected amount approved by council, for playground repairs)?

What was the dollar value of repair parts money that went to Henderson Playground Co.?

What was the dollar value of repair parts money that went to Belair playground equipment co.?

Which two playground companies sold the most repair parts to the City, and what was the dollar value of what each sold?

...

How much repair money (parts, base material, labour) was spent at Huron Playground? [A]nd how much repair money (parts, base material, labour) was spent at Dufferin Grove Park? (Please include dates of repairs, itemized by tasks, with actual costs. These costs were first projected in lists in the Toronto Playground Inspection reports, 1998, access request number #04-1319. Now we need these two specific examples of what was actually spent).

What was the 15% contingency money spent on, at these two locations? If it was not spent at those locations, please inform us at what location(s) it was spent instead, and what it bought there. [Emphasis in original.]

The City responded to the request by issuing an interim access decision and fee estimate for search time, and asked the requester to pay a deposit of 50% of the estimated fee. The City also advised the requester that some information may be withheld under the exemptions at sections 11 (economic and other interests) and 14 (personal privacy) of the Act. The requester, now the appellant, appealed that decision to this office.

During the mediation stage of the appeal, the appellant submitted a fee waiver request to the City.

In the meantime, efforts were made to narrow the scope of the request and the City disclosed a number of records to the appellant, who advised the mediator that these records were not responsive to her request.

The City eventually issued a decision denying the fee waiver request. In the decision, the City also indicated that as a result of further consultations with its Parks and Recreation department, it had been determined that no record existed in hard copy or electronic format that responded to the request. The appellant advised the mediator that she took issue with this response and was of the view that records responsive to the request exist.

Accordingly, as confirmed in the Mediator's Report, the issues of the fee estimate for search time and fee waiver are no longer at issue in this appeal. However, reasonableness of search has been added as an issue in dispute, and is the sole remaining issue in this appeal.

The appeal was moved to the adjudication stage for an oral inquiry on the issue of whether the City had conducted a reasonable search for records responsive to the appellant's request.

On May 30 2005, I provided the appellant and the City with a Notice of Inquiry outlining the Commissioner's approach to the issue of reasonableness of search, including a number of questions, and informing them that the oral inquiry would be held at the Commissioner's office in Toronto on June 22, 2005.

On June 15 2005, the appellant forwarded to me a 6-page document which she advised was in response to questions posed in the Notice on Inquiry. I confirmed at the outset of the inquiry, which took place as scheduled, that the appellant shared the document with the City in advance.

The appellant was represented by an agent. Two observers also attended. The City was represented by Counsel. Co-Counsel for the City was also present and evidence on behalf of the City was provided by the Policy Project Advisor to the General Manager of Parks, Forestry and Recreation and the Supervisor of Parks, Maintenance and Construction for the City of Toronto Department of Parks, Forestry and Recreation.

Also in attendance at the inquiry were a Mediator and Adjudication Review Officer from this office. Neither the Mediator nor Adjudication Review Officer participated in the hearing. The Mediator was present in case the parties wanted to recess and discuss settlement with one another. The Adjudication Review Officer was present to provide any assistance I might require.

The parties did recess during the oral inquiry in an attempt to settle the appeal. Settlement through mediation was not possible, however, and the oral inquiry resumed.

DISCUSSION:

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.

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.

Where a requester provides sufficient detail about the records that he is seeking and the Ministry indicates that records do not exist, it is my responsibility to ensure that the Ministry has made a

reasonable search to identify any records that are responsive to the request. The *Act* does not require the Ministry to prove with absolute certainty that records do not exist. However, in order to properly discharge its obligations under the *Act*, the Ministry must provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request [Order P-624].

A reasonable search would be one in which an experienced employee, expending reasonable effort, conducts a search to identify any records that are reasonably related to the request [Order M-909].

Appellant's written representations

As previously stated, the appellant forwarded a 6-page document which she advised was in response to questions posed in the Notice on Inquiry. The document was a chronology of the appellant's requests for the records at issue and the City's responses.

Appellant's oral representations

The appellant's representations at the hearing identified several issues of concern to her. The appellant takes issue with the City's handling of her attempts to access information and, rather than addressing the reasonableness of search according to the criteria outlined above, and in the Notice of Inquiry, she focused on why, in her opinion, the records ought to exist.

Summary of concerns

The appellant stated that the City had not put forth a "good faith" effort and questioned the City's compliance with section 17(2) of the *Act*. The appellant explained in some detail the considerable time she had spent, and her repeated attempts to access the information sought. The appellant was confused by what she considered to be an overly time-consuming, bureaucratic and unhelpful process at the City. The appellant repeatedly referred to the process as "David and Goliath" and expressed outrage that the City appeared to frustrate access requests with delays and indifference.

The appellant stated that she was incredulous at the City's response that there were no records responsive to her request. It was the appellant's position that records of the nature she requested should exist.

The appellant expressed concern about remedies. The appellant stated:

...As a result, we are most concerned that unless there is a very clear message from the IPC to the [the City], [the City] will continue to play a shell game with us. This is entirely unfair. The city has all of the information and (comparatively) limitless resources at its fingertips, and we have only our

energy and commitment as volunteers. We are looking for some help here today in leveling the playing field.

While I appreciate that the appellant feels frustrated by the process, the issue before me is the relatively narrow question of whether the City conducted a reasonable search for records. The Notice of Inquiry set out clearly that:

An oral inquiry will be held to determine whether the City of Toronto search for responsive records was reasonable. The *Act* provides that the parties involved in an inquiry are entitled to make representations to the Office of the Information and Privacy Commissioner (the IPC).

The appellant was advised in the Notice of Inquiry that:

An important factor in assessing the reasonableness of the search will be whether the [appellant] provided sufficient identifying information to assist the institution in its search.

Therefore, [the appellant] will be asked to inform the Adjudicator of any details [the appellant is] aware of concerning records which have not been located, or any other information to indicate that the search carried out by the [City] was not reasonable.

Summary of Reasonable Search Representations

The appellant stated that she did not believe that the City conducted a reasonable search because, due to the amount of money involved, it was not believable that the City could have searched and not found the records she was looking for.

The appellant stated that she had seen references to plans, letters and audits concerning the records and repeated that it was not believable that the City would not have records to account for the expenditures of public monies as a result of the plan.

The City's oral representations

The City stated that they "took issue" with the appellant's assertions that they had not cooperated with her and that there had been a history of contact to "deal with" and "communicate with" the appellant in an "attempt to mesh the records with the request". The City stated that, in fact, there had been ongoing discussions with the appellant in an endeavour to resolve her access requests.

The City stated that records have been disclosed to the appellant, namely capital budget reports, variance reports and a CD-ROM of playground audit reports, but none of these records were considered by the appellant as responsive to her request.

Employees from the City gave evidence as to their activities in response to the appellant's access request. The Policy Project Advisor to the General Manager of Parks, Forestry and Recreation stated that when she receives a freedom of information request, she determines which staff is appropriate to "get information from". She did so in this instance and held a meeting with the supervisors of the appropriate departments in which she asked if the information the appellant requested was available. Initially she was advised by staff that the search would require that each would have to search through "boxes" of material, by district, but that the staff did not know "exactly" if they would find the information as requested, by individual park.

The Supervisor of Parks, Maintenance and Construction for the City of Toronto Department of Parks, Forestry and Recreation provided evidence as to the type of records kept in each of the City districts and as to his records search activities. The Supervisor clarified that there are three types of records: (1) a 1999 playground audit, (2) hard documents for "big ticket" items for replacement and (3) documents for repairs. The Supervisor stated that the funds were allocated by and accounted for by district because purchases were made in "bulk" for cost savings. Repairs and/or replacement costs were not recorded per site.

In summary, the City submitted that the matter I have to decide is whether they conducted a reasonable search, and that the City is not required to prove with absolute certainty that the records do not exist, rather, the City must show that it made a reasonable effort to search for records responsive to the request.

The City submitted that the appellant sought access to "various types" of information and that the City attempted to clarify and provide the information. The City submitted that the appropriate staff was engaged in the searches and that records considered at least partially responsive were located and disclosed.

The City concluded by submitting that it had provided evidence that the search was detailed, hands on and extensive and that it should be considered reasonable in keeping with previous orders from this office.

Analysis and findings

I listened carefully to the oral representations of the parties, and have carefully reviewed the appellant's written representations.

There is no doubt that the appellant has a genuine concern for playgrounds and that she is also concerned about the City's spending on parks and what she perceives as a lack of openness and cooperation by the City in dealing with her information access requests.

While I understand the City's methods of record-keeping as described at the oral inquiry, in my view, it is arguable that a more detailed recording keeping of expenditures perhaps ought to exist; however, I make no finding in this regard. As indicated previously, the *Act* does not

require the City to prove with absolute certainty that records do exist. In Order M-909, Inquiry Officer Laurel Cropley found:

[A] reasonable search would be one in which an experienced employee expending reasonable effort conducts a search to identify any records that are reasonably related to the request.

In my view, the City has met its obligations under the *Act* by providing experienced employees who expended a reasonable effort to conduct the searches and that the searches were conducted in the areas where the responsive records were likely to be located. I am therefore not persuaded, on the evidence before me, that further searches could reasonably be expected to produce additional records in the manner requested.

ORDER:

I uphold the City's search for responsive records and dismiss the appellant's appeal.

Original signed by: _____
Beverly Caddigan
Adjudicator

July 5, 2005 _____