



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-2076

Appeal MA-050281-1

City of Ottawa



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NATURE OF THE APPEAL:

A requester filed the following access-to-information request with the City of Ottawa under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*):

I am writing ... to request a copy of all records relating to Hay West from 1st January 2002 to the present date. Some of these records are in the possession of Councillor Clive Doucet and former Councillor Phil McNeely and their staff, and others.

By way of background, Hay West was a relief campaign initiated in 2002 by two Ontario farmers in response to a drought in the Prairies that had led to a severe shortage of feed for farm animals. The objective of the campaign was to transport surplus hay from Ontario farmers to their counterparts in the West that could be used to feed these animals. Ottawa city councillors Clive Doucet and Phil McNeely became involved in the campaign and organized fundraising and other logistical efforts to transport surplus hay to Prairie farmers.

After locating records responsive to the request, the City issued a decision letter that granted the requester partial access. According to an index of records that the City submitted to this office, 24 pages of records were disclosed to the requester:

- Photocopy of a donation cheque from Bob Chiarelli, Mayor of the City of Ottawa, to the Hay West Initiative and a handwritten note on the same page (one page). The City withheld portions of the cheque pursuant to the exemptions at sections 11(a) and (d) of the *Act* (economic and other interests).
- Report to Council, enclosing an extract from Report 16 of the Agriculture and Rural Affairs Committee, relating to a motion to acknowledge the contributions of various parties to the Hay West Initiative (5 pages).
- E-mail from Bernadine Clifford, Protocol Office (one page), and attachments, including itinerary for a Key to the City presentation by the Mayor (2 pages) and speaking notes for the Mayor (15 pages).

These same records had also been disclosed to the requester in response to an earlier access request that he had made in 2004.

The City's decision letter to the requester in the present appeal stated that in addition to a search for records held by its corporate offices, members of Council were asked if they had any records responsive to his request. No additional responsive records were identified as a result of this search.

The requester (now the appellant) appealed the City's decision to deny access to the severed portions of the Mayor's cheque under sections 11(a) and (d) of the *Act* and also appealed the City's claim that no additional records exist.

During mediation, the appellant informed the mediator that he did not wish to pursue access to the withheld portions of the severed record (the Mayor's cheque). Consequently, sections 11(a) and 11(d) of the *Act* are no longer at issue in this appeal.

This appeal was moved to the adjudication stage for an oral inquiry, where the only issue remaining to be considered was whether the City had conducted a reasonable search for records responsive to the appellant's request.

Prior to the oral inquiry, the City provided me with sworn affidavits from the assistants to two Ottawa city councillors that it intended to rely on at the inquiry. These affidavits were also sent to the appellant. The first affidavit is from the assistant to Councillor Doucet. The second affidavit is from the assistant to Councillor Rob Jellett, who succeeded and now represents the same ward as former Councillor McNeely. At the time of the Hay West campaign, Mr. Jellett was the executive assistant to Councillor McNeely (who left municipal politics and is now a member of provincial parliament).

In addition, the City issued a supplementary decision letter to the appellant that notified him that it had located six pages of additional records in its Client Service and Public Information branch. It granted the appellant partial access to these records, which relate to the sale of Ottawa Renegades football tickets to raise money for the Hay West campaign. It withheld a portion of one page pursuant to the exemption at section 14(1) of the *Act* (personal privacy). The appellant did not appeal this decision.

On May 31, 2006, I conducted an oral inquiry by teleconference into the issue of reasonable search. The appellant represented himself at the inquiry. The City was represented by an access and privacy analyst but also had six other staff in attendance, including the manager of municipal elections and MFIPPA, the chief of protocol, the council co-ordinator, the manager of administrative services in the Mayor's office, and two program managers from its records management department.

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 of the *Act* [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].

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].

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.

Summary of the appellant's representations

The appellant submits that more than one million dollars in donations flowed through the offices of the two Ottawa city councillors who spearheaded the Hay West campaign, and that it would be impossible for there to be no records relating to those donations. In his view, donations were "sent to the councillors' offices, and to the best of our knowledge, then sent on to the Canadian Federation of Humane Societies, tax receipts were issued, and then the money was handed back to Hay West."

The appellant states that the types of records that should exist could include letters from donors and records relating to the daily shipment of hay to the West, for example. He submits that the Hay West initiative was an "extensive undertaking" and that there should be "filing cabinets" of records. He states that, "Mr. Doucet and Mr. McNeely were clearly in control of the program, they used taxpayer-funded resources to run it out of their offices and hire staff, and we believe, therefore, that they're subject to the access to information act."

The appellant further submits that Councillors Doucet and Jellett should have been in attendance at the oral inquiry, along with their assistants. He expressed concern that the City had not brought to the oral inquiry the individuals "who have the most direct knowledge of the campaign that they set up and ran out of their offices."

The appellant also acknowledged that the records he is seeking may no longer exist. In particular, he stated that, "the upshot is that we'd also like to know if the records did exist, why they were disposed or destroyed, at whose request, and when did that take place, and how extensive was it."

Summary of the City's representations

The City's access and privacy analyst started off her representations on behalf of the City by disputing the appellant's submission that donations for the Hay West campaign flowed through the offices of municipal councillors. She submits that the public could donate directly through the Canadian Federation of Humane Societies or at any Scotiabank branch, and that no donations went through the councillors' offices.

She then outlined the efforts that the City made to search for records responsive to the appellant's request.

The appellant's 2004 request

She states that she contacted the appellant after receiving his 2004 access request and explained that there is a dividing line between a councillor's constituency records and those that fall within city business. She further informed him that a councillor's constituency records do not fall under the City's records management policy and, therefore, councillors have the authority to destroy those records as they see fit.

Within the City's corporate offices, she found a record – a Key to the City presentation by the Mayor to the two Ontario farmers who initiated the Hay West campaign. This led her to ask the following city offices to conduct searches for further Hay West records: the Mayor's office, the Protocol office, and the Council and Committee Services office. These searches turned up additional records, including the donation cheque from the Mayor, the report to city council on the Hay West campaign, and the Mayor's speaking notes at the Key to the City presentation.

She also approached the offices of Councillors Doucet and Jellet, who both informed her that they had no responsive records relating to the Hay West campaign.

After discovering that the Mayor had made a financial donation to the Hay West campaign, the manager of municipal elections and MFIPPA conducted a search on the City's financial database for any additional records relating to donations to the Hay West campaign. This search did not produce any additional records.

In the end, the City disclosed 24 pages of responsive records to the appellant, with minor severances.

The appellant's 2005 request

In 2005, the appellant submitted the same request to the City, which is the subject of this appeal. This time, the City extended its search for records responsive to the appellant's request.

The City's access and privacy analyst states that a program manager from the records management department conducted a search of the City's records management database, which covers all records held by the City. This search did not turn up any official business records relating to the Hay West campaign.

She further states that the City conducted another search on its financial database for any additional records relating to donations to the Hay West campaign. This search did not produce any additional records.

The City also approached all city councillors (not just Councillors Doucet and Jellett) and asked them if they had any records relating to the Hay West campaign. No additional responsive

records were identified as a result of this search. Consequently, the same 24 pages of records were disclosed to the appellant as in 2004, with minor severances.

Additional searches

After the oral inquiry was scheduled in this appeal, the City's manager of municipal elections and MFIPPA met with the assistants to several councillors in their offices. He was told that Councillor Doug Thompson had organized an initiative to sell Ottawa Renegades football tickets to raise money for the Hay West campaign, and that the City's Client Service and Public Information branch was involved. The City's search of this branch turned up six pages of additional responsive records that were disclosed to the appellant, with a minor severance.

The City also asked the assistants to Councillors Doucet and Jellett to submit sworn affidavits with respect to the existence of any Hay West records in their offices. (As noted above, these affidavits were submitted to both me and the appellant before the oral inquiry.)

In the affidavit submitted by the assistant to Councillor Jellett (who succeeded Councillor McNeely), the assistant stated that although there were some records in former Councillor McNeely's office in 2002 and 2003 relating to the Hay West initiative, none of these records were retained and did not exist at the time of the appellant's request. With respect to the disposal of records, she stated the following:

In October 2003, Councillor McNeely was elected MPP for Ottawa-Orléans. As part of his departure from the office, he instructed me to clear out records in order to accommodate his successor, Councillor Jellett. In October and November 2003, I reviewed all of the office materials and destroyed any inactive files. As the Hay West initiative file was no longer active, it was destroyed.

In the affidavit submitted by the assistant to Councillor Clive Doucet, she stated that although there were some records in the councillor's office in 2002 (at the time of the Hay West initiative), none of these records were retained and did not exist at the time of the appellant's request. She further stated that an administrative assistant in Councillor Doucet's office in 2002 had principal carriage of the Hay West file. When this individual left her position in January 2003, all of her electronic records were destroyed. In July 2005, this individual was contacted and she confirmed that she had not retained any records relating to the Hay West initiative.

In summary, the City's access and privacy analyst submits that the City conducted a reasonable search for records responsive to the appellant's request. It made a reasonable effort to identify and locate all responsive records within the City's corporate offices. Moreover, although responsive records clearly existed in the offices of the two councillors at the time of the Hay West campaign, she submits that the affidavits of the two councillors confirm that these records were destroyed and therefore not in existence at the time of the appellant's requests in 2004 and 2005.

Additional representations from both parties

The City's records management system

At the conclusion of the City's representations, I asked the City's representatives to answer several questions, including whether the City's records management system applied to councillors.

A program manager with the City's records management department explained that the City has a records retention and disposition bylaw that applies to all records held by the corporation. She stated that different classifications of records have different retention periods that may be based on legislation and other requirements. For example, most financial records must be retained for at least seven years, whereas city bylaws and minutes of city council meetings must be retained permanently.

She further stated that the City has an in-house records management database that it uses to manage its corporate records. The city clerk's department provides councillors with guidelines on the types of records that they should declare as the official business records of the corporation. If the records are related to a councillor's constituency or personal records, they are not captured by the City's records management system.

Individuals attending the oral inquiry

I also asked the City to respond to the appellant's submission that the City should have brought Councillors Doucet and Jellett and their assistants to the oral inquiry to provide evidence and answer questions. The City's access and privacy analyst submits that the affidavits from the two assistants are sufficient. In her view, requiring the two councillors to attend would be "useless" because they did not conduct the searches.

Corporate vs. constituency records

I then asked the appellant if he had any questions or any matters that he wished to clarify with the City. The appellant then directed several questions at the City through me, and focused particularly on the City's submission that there is a dividing line between corporate records held by councillors that are subject to the *Act* and constituency records that are not. He asked the City to identify the legal authority that creates this distinction between the types of records held by councillors that are subject to the *Act*.

The City submits that it relied on a publication, *Working with the Municipal Freedom of Information and Protection Privacy Act – A Councillor's Guide* (November 2001), which was jointly prepared by the City of Ottawa and this office. In addition, it relied on previous orders of

this office that established criteria that should be considered in determining whether records held by municipal councillors are subject to the *Act*.

The appellant submits that the councillors operated the Hay West campaign out of their offices at city hall. Consequently, any records relating to Hay West that are held by a councillor's office cannot be characterized as constituency records and should be subject to the *Act*. He further submits that elected officials and public servants are aware of how to circumvent the requirements of the *Act*, and that the records relating to the Hay West campaign may have been destroyed because the councillors were aware that they could be subject to the *Act*.

Analysis and findings

I have carefully considered the parties' representations. As indicated above, 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]. 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].

In its representations, the City provided a thorough review of the efforts it made to identify and locate records that are responsive to the appellant's request, after receiving his original request in 2004 and following his second request in 2005, which is the subject of this appeal.

The City searched a number of its corporate offices where it believed that records relating to the Hay West campaign might be found, including the Mayor's office, the Protocol office, and the Council and Committee Services office. These searches produced 24 pages of responsive records that were disclosed to the appellant both in 2004 and 2005, with minor severances.

The City also conducted searches of its records management database, which tracks the creation and destruction of the City's official business records. Moreover, it searched its financial database to determine if any additional records relating to donations to the Hay West campaign existed in the City's corporate offices. Neither of these searches produced additional records responsive to the appellant's request.

After the oral inquiry was scheduled in this appeal, the City conducted a further search of its Client Service and Public Information branch that produced six pages of additional Hay West records that were disclosed to the appellant with minor severances.

The City also expended considerable efforts in determining whether any councillors held records relating to the Haywest campaign. After receiving the appellant's 2004 request, the City's access and privacy analyst approached the offices of Councillors Doucet and Jellet, who both informed her that they had no responsive records relating to the Hay West campaign. After receiving the appellant's 2005 request, the City approached all councillors and asked them if they had any

records relating to the Hay West campaign. No additional responsive records were identified as a result of this search.

Prior to the oral inquiry in this appeal, the City made further efforts to locate responsive records by approaching the assistants to Councillors Doucet and Jellett and asking them to submit affidavits with respect to the existence of any records in their offices relating to the Hay West campaign. Both assistants submitted sworn affidavits that stated that records relating to Hay West had existed in their offices but had been destroyed prior to the appellant's 2004 access request. In short, the City made substantial efforts to locate records that are responsive to the appellant's request.

As noted above, 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. In my view, the requester has not provided a reasonable basis for concluding that any other records relating to the Hay West campaign exist in the City's corporate offices or in the offices of Ottawa city councillors, particularly the offices of Councillors Doucet and Jellett.

With respect to the councillors' offices, the affidavits submitted by the assistants to Councillors Doucet and Jellett show that all Hay West records were likely destroyed. In fact, the appellant acknowledged that the records he is seeking may no longer exist when he stated in his oral representations that "the upshot is that we'd also like to know if the records did exist, why they were disposed or destroyed, at whose request, and when did that take place, and how extensive was it."

I have carefully considered the appellant's submission that I should compel Councillors Doucet and Jellett and their assistants to be in attendance at a further oral inquiry to answer questions relating to any records that may have existed with respect to the Hay West campaign. In my view, the affidavits submitted by the two councillors' assistants provide sufficient evidence with respect to whether any records relating to the Hay West campaign exist in the councillors' offices. Consequently, I will not be ordering the councillors nor their assistants to attend a further oral inquiry.

The appellant also submits that elected officials and public servants are aware of how to circumvent the requirements of the *Act*, and that the records relating to the Hay West campaign may have been destroyed because the councillors were aware that they could be subject to the *Act*.

In my view, the City has acted in good faith in attempting to structure its records management practices in a manner that complies with the requirements of the *Act* and the jurisprudence set down in the orders of this office. There is no evidence before me that records relating to the Hay West campaign were deliberately or wrongfully characterized as constituency records in order to evade the requirements of the *Act*, or were destroyed to prevent them from being accessed under the *Act*.

In my view, the City has provided sufficient evidence to show that it has made reasonable efforts to identify and locate responsive records. I am satisfied that experienced employees of the City expended reasonable efforts to identify and locate records relating to the Hay West campaign. In short, I find that the City has conducted a reasonable search for records as required by section 17 of the *Act*.

ORDER:

I uphold the decision of the City and dismiss the appeal.

Original Signed By:
Colin Bhattacharjee
Adjudicator

August 15, 2006