CELOS'S APPEAL WITH THE OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

Over the past year or so, members of The Centre for Local Research into Public Space (CELOS) have devoted much of their time to the uphill battle of trying to obtain information about municipal spending from the City's Corporate Access and Privacy Office, which is the office in charge of granting (or disallowing) access to information under the province's *Municipal Freedom of Information and Protection of Privacy Act*. One particular area of interest for CELOS has been the "playground upgrades" (removal of entire playgrounds and replacement with cheaper equipment in 49 parks, removal and occasional replacement of components in may other parks) that have taken place over the last few years in an attempt to bring all playgrounds into compliance with two new standards (1998 and 2003) released by the Canadian Standards Association (CSA). CELOS members have encountered considerable resistance from the City in their attempts to obtain information on this matter.

On November 15, 2004, CELOS filed a request for access to information relating to the costs incurred by the City for repairs to Dufferin Grove Park and Huron Park, and for costs incurred by the City for the playground upgrades program in general (this was actually a revised version of an earlier access to information request which had gone unanswered). The City responded to this request by saying that it would cost CELOS $12,960 to obtain this information. CELOS members than filed an appeal with the province's Office of the Information and Privacy Commissioner (IPC), as well as applying for a fee waiver from the City. On April 28, 2005, the City of Toronto's Corporate Access and Privacy Office sent back a letter denying the application for a fee waiver; they followed this, however, by stating that the fee was now a moot point, because they had determined that no records existed which responded to the request, and that they had no obligation to generate a record in response to a request. They supported this argument with a quote from the *Annotation*, published by the Access and Privacy Office of the Management Board Secretariat, stating that "requesters have no right, subject to the regulation dealing with machine-readable records, to require an institution to create a record in response to a request. Requests are for information contained in a record existing at the time the request was made." They gave no citation for this *Annotation*, and no indication of where it might be found.

Our appeal to the Province moved through mediation, unresolved, and from there into a formal inquiry, on June 22 2005. In preparation, after hunting for the "Annotation" referred to, our researchers searched for previous orders issued by the IPC Office. These orders gave a somewhat different view of a citizen's right to access to information than that put forward by the Corporate Access and Privacy Office.

Although it does appear to be the law that an organization cannot be forced to generate a record in response to a request, this does not, as the City suggests, free the organization of all responsibility to give access to information that will answer the requester's questions. It simply means that the organization has no responsibility to disseminate the information from various records which are partially responsive to a request for information, and consolidate this information into one list. Therefore, access must be granted to the various records that are responsive to the request; it is then up to the requester to go through these records and extract the desired information.

Here are some excerpts from provincial legislation and previous IPC orders seem relevant to our appeal:

- *Municipal Freedom of Information and Protection of Privacy Act*, R.R.O. 1990, REGULATION 823, *Amended to O. Reg. 480/97*: **S 1.** A record capable of being produced from machine readable records is not included in the definition of "record" for the purposes of the Act if the process of producing it would unreasonably interfere with the operations of an institution.
- ORDER 50: ""Unreasonable interference" must be decided on a case-by-case basis. It is clear that the section is intended to impose limits on the institution's responsibility to create a new record."
- ORDER 99: "While it is generally correct that institutions are not obliged to "create" a record in response to a request, and a requester's right under the *Act* is to information contained in a record existing at the time of his request, in my view the creation of a record in some circumstances is not only consistent with the spirit of the *Act*, it also enhances one of the major purposes of the *Act* i.e., to provide a right of access to information under the control of institutions."
- ORDER 50: **"**In cases where a request is for information that currently exists, either in whole or in part, in a recorded format different from the format asked for by the requester, in my view, section 24 of the Act imposes a responsibility on the institution to identify and advise the requester of the existence of these related records. It is then up to the requester to decide whether or not to obtain these related records and sort through and organize the information into the originally desired format."
- ORDER 50: "When a request relates to information that does not currently exist in the form requested, but is "...capable of being produced from a machine readable record..." [paragraph (b) of the definition of "record" under subsection 2(1)], the Act requires the institution to create this type of record, "subject to the regulations"."
- ORDER 50: "It appears that, subject to the Regulation, the Act does place an obligation on an institution to locate information and to produce it in the requested format whenever that information can be produced from an existing machine readable record, and providing that to do so will not unreasonably interfere with the operation of the institution."
- ORDER M0-1726: "The fact alone that the retrieval of information from "machine readable" records may require an institution to employ measures which are not part of its ordinary records retention and control procedures is not enough to exclude information from the *Act*. It is not difficult to imagine the potential breadth of such an exclusion from the *Act*, and I am not convinced that such an interpretation is required."
- ORDER P-99: "In my view, one of the purposes of the Act as set out in subsection 1(a) is not fulfilled when an institution responds in almost "rote" fashion that "no record exists" when at least some of the information that the requester is seeking is readily available.
- ORDER P-231: "The Act requires the institution to provide the requester with access to all relevant records, however, in most cases, the Act does not go

further and require an institution to conduct searches through existing records, collecting information which responds to a request, and then creating an entirely new record in the requested format. In other words, the Act gives requesters a right (subject to the exemptions contained in the Act) to the "raw material" which would answer all or part of a request, but, ... the institution is not required to organize this information into a particular format before disclosing it to the requester."

- *ANNOTATION*: "While there is, generally, no duty to "create" a record in response to a request, creation of a record is sometimes consistent with the spirit of the Act, and enhances the purpose of the Act in respect of access. The Commissioner, however, has no power to order the institution to create a record when no record exists. (However, in Order M-18 the Commissioner ordered an institution to create a record containing salary range.) (Order #P-99)." Order M-18 cited the "public interest" as its reasoning for the decision to compel the institution to create salary ranges for various officials.
- ORDER P-324, ORDER M-655: "Reasons contained in a notice of refusal would be sufficient if they were accompanied by a more detailed description or index of records. An appropriate index also speaks to the reasonableness of the search conducted by the institution."
- ORDER M-191: "Institutions are required to provide more than a bare statement that the record does not exist or could not be located to put the requester in a reasonable position to decide whether or not to appeal the institution's decision. Institutions are required to provide a full explanation to the requester as to the nature of the search and that the search was conducted by knowledgeable staff."
- ORDER P-350: "It is not acceptable … for members of the public to be denied access to records that they would otherwise be entitled to receive, solely on the basis that the institution's records management systems are inadequate or deficient."
- *Municipal Freedom of Information and Protection of Privacy Act*, R.R.O. 1990: **S. 45(4)** A head shall waive the payment of all or any part of an amount required to be paid under subsection (1) if, in the head's opinion, it is fair and equitable to do so after considering,
  (b) whether the payment will cause a financial hardship for the person requesting the record;
  (c) whether dissemination of the record will benefit public health or safety…

On June 22, CELOS had its appeal at the Office of the Information and Privacy Commissioner. At the appeal, the City put forward the argument that they could not give us the information that we had requested because they did not keep records of how the playground upgrades money was spent. They said that they knew the amount that was spent on playground upgrades, but that no breakdown of these costs existed in the City's records. In other words, the City knows how *much* of your money was spent, but not *how* it was spent. Following this argument, the City can announce broad spending initiatives,

but it cannot be held accountable for how effectively these initiatives were carried through.
On July 5 2005, we received a written decision from the adjudicator at the hearing, Beverley Caddigan, upholding the City's denial of our request. The adjudicator's decision read as follows:

> I listened carefully to the oral representations of the parties, and have carefully reviewed the appellant's written representations.
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> 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.
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> 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 record keeping of expenditures perhaps ought to exist; however, I make no findings in this regard. As indicated previously, the *Act* does not require the City to prove with absolute certainty that records do not exist. In Order M-909, Inquiry Officer Laurel Cropley found:
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> > [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.
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> In my view, the City has met its obligation 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.
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> **Order MO-1940:**
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> **I uphold the City's search for responsive records and dismiss the appellant's appeal.**

Discussion: It was obviously disappointing to us that we lost our appeal. On the other hand, the City's position – that they can't say where they spent $4.3 million playground repair funds because they don't have a record – put them in the unenviable position of having to demonstrate that they don't keep their books properly.

This argument was made in some detail and we asked for the recording afterwards, so we could go over some of the City staff's and lawyers' points. Unfortunately, the Information and Privacy Commission's recording equipment was defective, and their tapes were mostly blank. On the basis of our notes, though, we have now submitted the following new Access to Information requests to the City:

1. Access Request: All purchase orders for 2000 to 2005 with the following playground equipment companies: Henderson; Crozier (Game Time); Blue Imp; Little Tykes; ABS (Landscape Structures); Belair. *This request was because City*

staff said they may have standing orders with playground companies to supply playground replacement parts

2. Access request: Estimates of percent completion and money allocated for CSA upgrades for the years 2000, 2002, 2003, 2004. *This request was because a City staff witness at the inquiry brought along the "percent completion" report for 2001 for CSA playground upgrades in downtown Toronto, which was $373,978. So we hope to get numbers that are just as precise for other parts of Toronto, and for the other years.*
3. Access request: All documents which show how the number $373,978 in the 2001 CSA upgrade report were arrived at. *A number right down to the dollar must be based on some other documents, even if the City says they don't have any.*
4. Access Request: Monthly playground inspection reports for seven selected playgrounds for 2004. *City staff made the argument that they knew how to proceed with the CSA playground upgrades even in the absence of specific financial reporting because they conduct monthly inspections of every city playground and can therefore trace their progress. This surprised us, since these inspectors are not in evidence in the playgrounds of our local parks. However, the freedom of information laws say that we can only look at existing reports, not ask for new ones. If the monthly inspection reports are the main way that Parks and Recreation staff traced their CSA upgrade progress, we want to see some samples.*

By law, the City must respond (with the relevant information or a specific denial of information) within 30 days of receiving the access requests. We mailed the requests on July 8, 2005. We will call Corporate Access and Privacy in the middle of August if we haven't heard, and begin with appeals if necessary.

On the other hand, when Information and Privacy Commissioner Ann Cavoukian recently admonished the City bureaucracy to stop being so secretive, Toronto Mayor David Miller applauded her order.

"Mayor David Miller has responded positively by saying Toronto's departments should routinely release information needed by the public. He also noted the city recently appointed a new director of corporate access and privacy to help make that happen." Jul 27/05 Lift city hall's veil of secrecy. *Toronto Star*

The new director is Suzanne Craig. Before we file many more information requests, we'll ask her if she can meet with us. Perhaps she can use her influence to persuade the City staff that they can answer our questions directly. So much time and also money can be saved if we don't have to take our simple, commonsense questions all the way up through formal procedures with lawyers and adjudicators.

As Commissioner Cavoukian wrote in her recent order against the City of Toronto: "Citizens cannot participate meaningfully in the democratic process, and hold politicians and bureaucrats accountable, unless they have access to information held by the government."

Summary by Luke Cayley and Jutta Mason