Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER MO-2280

Appeal MA06-275

City of Hamilton

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NATURE OF THE APPEAL:

The City of Hamilton (the City) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to:

> … information regarding notice of non-compliance with the property standards by-law issued against property located at [specified address]. This includes copies of **orders to comply** from January 2005 to the present issued by the City of Hamilton. For greater certainty I am not requesting any personal information contained in responsive records [emphasis added].

In a letter sent after a telephone conversation with City staff, the requester wrote:

> I am not seeking access to copies of complaints about a particular property. As stated in my request, I am requesting information regarding notice of non-compliance with the property standards by-law issued against property located at [same specified address]. This includes copies of **work orders** from January 2005 to the present, issued by The City of Hamilton… [emphasis added]

Enclosed with the letter was a typed version of the original handwritten request. Although it reflected the wording of the original request for the most part, the phrase "work orders" appeared in the place of "orders to comply" in the handwritten version. The City's access decision, which was based on the original wording, crossed the requester's clarification in the mail, and stated:

> You have requested access to Orders to Comply for the [specified address] for the period beginning January 2005 to the present day. In addition, your letter stated that you were requesting "…information regarding notice of non-compliance with the property standards by-law issued against [the] property…"
>
> Following my conversations with [you], my understanding of your request is that you are seeking access solely to any and all Orders issued against the named property [and] that access to complaints against the named property is not desired.
>
> Please be advised that Orders to Comply have been identified by the City's Building and Licensing Division as records that are routinely available to the public directly through their Division. As the Division routinely provides access to Orders to Comply, a request to access same will not be processed under the [*Act*].

The City referred to section 15(a) (information published or available) of the *Act* as the basis for its refusal to grant access and directed the requester to an individual in the City's Building and Licensing Division [the Building Division] to whom inquiries ought to be directed to obtain access to the record.

The requester, now referred to as the appellants, appealed the City's decision.

The letter of appeal sent to this office referred to the request as relating to work orders, and enclosed a copy of the typed version of the original request, which also referred to work orders.

The mediator appointed by this office sought to resolve the apparent difference in interpretation of the request. The City indicated that it had issued its access decision based on the understanding that the request was for Orders to Comply only, while the appellant took the position that the request included both Orders to Comply and work orders, along with any other responsive records related to non-compliance with the property standards by-law at the specified address. The appellant confirmed that access to complaint information about the specified address was not at issue.

During mediation, it was established that the City's Building Division processes requests for Orders to Comply, using a separate fee schedule established through a by-law. The City will issue an Order to Comply to a property owner whose property is not in compliance with property standards by-laws. If the property owner does not carry out the required repairs within a given time period, the City will issue a work order to a contractor to complete the repairs, and the cost is added to the property owner's City tax bill. Requests for work orders are processed by the City's Freedom of Information Unit under the *Act*.

As resolution could not be reached at mediation, the appeal was transferred to adjudication to address the possible application of section 15(a) of the *Act* to Orders to Comply. The parties understood and agreed that the City would issue an additional decision on the balance of the request following clarification from the appellants regarding access to work orders and other records of non-compliance at the subject property.

As the Adjudicator assigned to conduct an inquiry, I received a copy of the appellants' subsequent letter of clarification to the City. The letter reads, in part, as follows:

> We are requesting all records regarding non-compliance with the [City's] property standards by-laws with rental property located at [specified address]. This includes remedial action with timeline requirements by the said property to comply with property standard by-laws. Responsive records include and are not limited to related copies of work orders, inspection reports, e-mails/letters and other records created/generated by the [City's] property standards department and between the property standards department, Office of [named City councillor] and landlords of [specified address]. The timeline for our request is from January 2005 to present.
>
> For greater certainty we are not seeking access to copies of our complaints, orders to comply (currently under appeal), personal information and/or any information considered commercially confidential, e.g., unit pricing.

The appellants also identified the Coordinator of the Standards and Licensing Section of the Building Division as an individual who "should be aware of responsive records and their location".

In view of the contents of the appellants' letter, I decided to allow the City time to respond to it before initiating the inquiry. The following month, the appellants received another decision from the City in response to the clarified request, and appealed that decision to this office as well. The City's new decision letter stated:

> Please be advised that excluding the records that you have identified as non-responsive to your request, no responsive records have been identified.
>
> … the non-responsive records include three complaints initiated by [you] and the corresponding Amanda computer screens and an Order to Comply issued to the property owner of [specified address].
>
> As I have previously advised you, Orders to Comply have been identified by the City's Building and Licensing Division as records that are routinely available to the public through their Division. …

The new appeal correspondence I received from the appellants raised three issues, namely the application of section 15(a) of the *Act* to the Order to Comply, the scope of the request, and the adequacy of the City's search for responsive records.

I sent a Notice of Inquiry to the City, initially, in which I summarized the background of the appeal, set out the issues, and invited representations in response. I received representations from the City, as well as a copy of the Order to Comply issued for the specified property.

Next, I sent a modified Notice of Inquiry to the appellants, along with a copy of the non-confidential representations of the City, seeking representations. The appellants submitted representations which included reference to, and a copy of, a list of "non-compliant" properties for their ward obtained through their City Councillor; also enclosed was email correspondence between the appellants and City staff in the Building Division.

At this stage of the inquiry, and based on the representations received, it appeared that the parties were in agreement that the scope of the appellants' request was reflected in the October 6, 2006 clarification sent to the City at the end of mediation. Consequently, the scope of the request was removed as an issue in this appeal.

I then decided to seek representations in reply from the City on the appellants' submissions about the adequacy of the search, as well as the "regularized system of access" for Orders to Comply. After receiving the Reply Notice of Inquiry, the City requested copies of the non-compliant properties list and the email correspondence previously submitted by the appellants. I sent copies of these documents to the City after obtaining the appellants' consent. The City subsequently

submitted reply representations, and I sent a copy to the appellants inviting sur-reply representations, which I received.

RECORD:

The only record identified as responsive to the request is a one-page Order to Comply issued to the owner of the specified address.

DISCUSSION:

INFORMATION AVAILABLE TO THE PUBLIC

The City takes the position that section 15(a) applies because the Order to Comply can be purchased through its Building Division upon payment of a fee established under a by-law. The appellants disagree, stating that their experience with the Building Division indicates that the record is not publicly available within the meaning of section 15(a) of the *Act*.

General Principles

Section 15(a) states:

> A head may refuse to disclose a record if,
>
> > the record or the information contained in the record has been published or is currently available to the public;

For this section to apply, the institution must establish that the record is available to the public generally, through a regularized system of access, such as a public library or a government publications centre [Orders P-327, P-1387]. To show that a "regularized system of access" exists, the institution must demonstrate that a system exists; that the record is available to everyone; and that there is a pricing structure applied to all who wish to obtain the information [Order P-1316].

Examples of the types of records and circumstances that have been found to qualify as a "regularized system of access" include

- statutes and regulations [Orders P-170, P-1387]
- property assessment rolls [Order P-1316]
- septic records [Order MO-1411]
- property sale data [Order PO-1655]
- police accident reconstruction records [Order MO-1573]

The exemption may apply despite the fact that the alternative source includes a fee system that is different from the fees structure under the *Act* [Orders P-159, PO-1655, MO-1411, MO-1573]. However, the cost of accessing a record outside the *Act* may so prohibitive that it amounts to an effective denial of access, in which case the exemption would not apply [Order MO-1573].

Representations

The City submits that it has encouraged its departments to practice active dissemination and routine disclosure of records, and that the Building Division has identified Orders to Comply as a record suitable for this practice.

The City states that after discussion of the request, including the distinction between requests processed under the *Act* and records available through routine disclosure, the appellants contacted the Building Division about obtaining the Order to Comply for the specified property. The City submits that the appellant called back, "stating that because there was a fee attached to accessing the records, he believed that the records were not publicly accessible."

The appellants concede that the City informed them that Orders to Comply were subject to the policy of routine disclosure and active dissemination, but submit that:

> [we] later discovered that the City had established a parallel system to MFIPPA regarding access to the City's Orders to Comply, without attendant obligations of the Act, e.g. appeal procedures regarding fees. The verbal fee estimate provided to us (as documented earlier) was very high. This is clearly not a best practice for 'routine disclosure and active dissemination'.

The reference to a verbal fee estimate relates to correspondence submitted to this office during the intake stage of the appeal process. In describing their conversation with the Building Division employee they'd been directed to speak with, the appellant stated:

> [The employee] was also unable to give us the final cost of obtaining the records we are requesting. According to [him] the cost would range from $15 to $100's depending on the search time involved.

In reply, the City submitted that the "verbal fee estimate" provided by the Building Division employee had actually been intended as an overview of the fee structure, not a fee estimate specific to the appellants' circumstances. The City maintains that the record is available through a "regularized system of access" and explains the system as follows:

> Pursuant to By-law 03-119, the City's Building & Licensing Division is authorized to provide information to members of the public for a fee set by the division and approved by City Council.

> The attached division "Information Request Form" (Appendix B) provides details of the fee for a file search ($8.00 for every 15 minutes) and the cost for photocopies ($1.00 for the first page and 25 cents for each additional page).
>
> Based on the foregoing and as confirmed by the division the cost to access the named Order to Comply (which is a recent order and does not require a search of the division's microfiche system) would be $9.00.
>
> …
>
> Given the foregoing, the City will maintain that a "regularized system of access" exists; that the record is available to everyone; and there is a pricing structure that is applied to all who wish to obtain the information.

The City provided copies of By-law 03-119 ("Fees for Services/Activities By-law") and the Information Request Form.

In brief sur-reply representations, the appellants refute the City's characterization of the conversation with the Building Division employee, and state that the request form was never provided to them. The appellants submit that the system in place does not amount to routine disclosure and active dissemination, and that the City should consider posting such records on-line where they could be accessed for free. The appellants also express the opinion that "exempting Orders to Comply under s. 15(a) is not in the public interest" and refer to media reports about the City's licensing department and inadequate record keeping practices.

Analysis and Findings

My decision on the City's claim of the exemption in section 15(a) is based on a review of the representations, including the attachments provided. Having considered the evidence before me, I conclude that a regularized system of access exists and that the Order to Comply sought by the appellants is publicly available within the meaning of section 15(a).

As outlined previously, for section 15(a) to apply, the City is required to establish that the record is available to the public generally, through a regularized system of access. A regularized system of access exists if a system exists for dissemination of the record, the record is available to everyone, and there is a pricing structure that is applied to all who wish to obtain the information [see Order P-1316].

I find that a regularized system of access exists for Orders to Comply and that this type of record is available to everyone. I am satisfied that these records are available through the Building and Licensing Division of the Planning and Economic Development Department and that any individual may fill out an Information Request Form and submit it to staff in the Building Division for processing.

Next, I find that there is pricing structure in place for Orders to Comply and other records designated by the City for routine disclosure that applies to any individual seeking access to these records. I have reviewed City By-law 03-119 (the Fees for Services/Activities By-law), including its "Schedule A" which sets out a fee structure for all applications for goods, services, activities and certain inspections through the Building Division. In my view, the By-law reflects the intent of the City to charge for these items on a cost recovery basis.

The By-law fees are reflected, with very minor variations, on the Information Request Form as follows: a file search is charged at $8.00 for every 15 minutes, and the cost for photocopies is $1.00 for the first page and 25 cents for each additional page. As the City has provided in its representations what is essentially a fee estimate of $9.00 for obtaining this particular Order to Comply through the Building Division, I note that these fees are quite similar to those set by 6 of Regulation 823 for requests made under section 45(1) of the *Act*. Furthermore, although in some circumstances the cost of accessing a record outside of the *Act* may be so high that it amounts to an effective denial of access [see Order MO-1573], I reject any suggestion that this is the case here.

I acknowledge that the appellants have expressed concern about various aspects of obtaining the Order to Comply through the Building Division, such as there being no right to appeal, no on-line access, and reported record management problems within the Division. However, these are not, in my view, relevant factors in the determination of whether the requirements of section 15(a) are established, nor are they concerns over which I have jurisdiction.

In Order P-327, former Assistant Commissioner Tom Mitchinson described the purpose of section 22(a), the provincial equivalent of section 15(a), in the following manner:

> In my view, the section 22(a) exemption is intended to provide an institution with the option of referring a requester to a publicly available source of information where the balance of convenience favours this method of alternative access; it is not intended to be used in order to avoid an institution's obligations under the Act.
>
> In my view, if the requested information is otherwise available from a public library, government publications centre or other similar system, then access rights under the Act are not diminished by requiring members of the public to utilize these alternative sources (Order P-327). However, I feel that section 22(a) should only be invoked in situations where the request can be satisfied through the alternative source.

I agree with the former Assistant Commissioner's approach to section 15(a). In the circumstances of this appeal, I accept that the balance of convenience favours the method of alternative access designed by the City for Orders to Comply.

In sum, I find that all the requirements of section 15(a) have been established by the City, and that the record is "published or available to the public" in the sense contemplated by the exemption. Accordingly, subject to my findings on the City's exercise of discretion below, section 15(a) applies to the record.

EXERCISE OF DISCRETION

The section 15(a) exemption is discretionary, in that it permits an institution to disclose information, despite the fact that it could be withheld because it is publicly available. On appeal, the Commissioner may review the institution's exercise of discretion, to determine whether or not it has erred in exercising it, but this office may not substitute its own discretion for that of the institution (see section 43(2)).

An institution will be found to have erred in the exercise of discretion, for example, where it does so in bad faith, for an improper purpose, or takes into account irrelevant considerations, or fails to consider relevant considerations. In that event, this office may send the matter back to the institution for a re-exercise of discretion, based on proper considerations.

Relevant considerations may include those listed below:

- the purposes of the *Act*, including the principles that
    - information should be available to the public
    - individuals should have a right of access to their own personal information
    - exemptions from the right of access should be limited and specific
    - the privacy of individuals should be protected

- whether the requester is seeking his or her own personal information

- whether the requester has a sympathetic or compelling need to receive the information

- whether the requester is an individual or an organization

- the relationship between the requester and any affected persons

- whether disclosure will increase public confidence in the operation of the institution

- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person

- the age of the information

- the historic practice of the institution with respect to similar information

However, not all those listed above will necessarily be relevant, and additional unlisted considerations may be relevant [Orders P-344, MO-1573]. For example, previous orders of this office reviewing the exercise of discretion in the case of a section 15(a) claim have emphasized that the review should include consideration of whether the balance of convenience favours the institution in the circumstances.

Representations

The City's representations on the exercise of discretion in this appeal refer back to its practice of encouraging City departments to identify records suitable for active dissemination and routine disclosure. As I understand the submissions, the City is suggesting that the identification of Orders to Comply as records amenable to routine disclosure provides evidence of an appropriate exercise of discretion. The City submits that it attempted to expedite the request by contacting the appellants upon receipt of it to clarify the request. The City submits that it acted in good faith in advising the appellant to obtain the record through the Building Division where it was "directly and quickly available".

The appellants' representations on the City's exercise of discretion in exempting the record under section 15(a) focus on community concerns about non-compliance with property standards, and lack of forthright communication by the City regarding infractions and enforcement issues. The appellants suggest that the City has not acted in compliance with the spirit of the *Act*.

Findings

As set out above, the City has provided me with brief submissions on its exercise of discretion in claiming section 15(a) to deny access to the Order to Comply. Based on my consideration of all of the representations before me and the broader circumstances of this appeal, I am satisfied that the City did not err in the exercise of its discretion. More particularly, I have not been provided with any evidence that would lead me to conclude that the City took irrelevant considerations into account or that it failed to consider relevant ones. I am satisfied that the City properly exercised its discretion in applying section 15(a) to Orders to Comply where, in my view, the balance of convenience is tipped in favour of the City maintaining a regularized system of access.

Having found that the City did not err in its exercise of discretion, I uphold the City's decision to deny access to the Order to Comply under section 15(a).

REASONABLE SEARCH

The appellants claim that the City has not conducted an adequate search for records responsive to their request, as outlined on page two of this order.

General Principles

In appeals, such as this one, that involve a claim that additional responsive records exist, the issue to be decided is whether the City has conducted a reasonable search for the records as required by section 17 of the *Act*. If I am satisfied that the search carried out was reasonable in the circumstances, the City's search will be upheld. If I am not satisfied, further searches may be ordered.

The *Act* does not require the City to prove with absolute certainty that further records do not exist. However, the City must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records. A reasonable search is one in which an experienced employee expends a reasonable effort to locate records which are reasonably related to the request [Orders M-282, P-458, M-909, PO-1744 and PO-1920]. Furthermore, 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

The appellants submit that the Order to Comply issued by the City set a certain date for repairs to the roof of the house on the property adjacent to theirs and that the date had passed without the repairs being completed. Accordingly, the appellants feel that the following types of records should exist: "formal documentation of any time extensions" granted by the City in relation to the Order to Comply for the specified property, inspection reports for the property, and correspondence between the City and the owners of the subject property. In support of the assertion that the City carried out inspections of the subject property, the appellants directed my attention to highlighted text in email correspondence between them and the Coordinator of the Standards and Licensing Section of the Building Division.

The appellants state that they have communicated with their City Councillor about this issue, and mention that his office had a list of properties for the ward that were not in compliance with property standards, one of which is the subject property. The appellants contend that this list of properties is responsive to their request, but has not been identified as such by the City. In later correspondence, the appellants actually submitted a copy of this 12 page list with four lines relating to the subject property highlighted and state:

> … the report also indicated the issuance of an order and courtesy letter by the City. Each of these records would be responsive to our request.

The City responds that upon receipt of the October 6th clarified request, a "Request for Access to Municipal Records" was sent to the Planning and Economic Development Department, initially, and then directed to a License Officer with the Building and Licensing Division of that Department. This employee completed a search of department records and identified only records created as a consequence of the appellants' complaints. A copy of an email (to the FOI Unit) from the License Officer was enclosed, and stated:

> I looked at our files and all complaints on this file during the time frame indicated are initiated by [the appellant]. One of those complaints did result in an Order [to Comply] being issued under the Property Standard By-law (which has been complied with). Therefore, I assume I am excluding this as well since the complaint was initiated by [the appellant].

The City continues by explaining the approach taken to those records:

> The records include three "Action Request" forms, each detailing the appellant's complaint, and corresponding "Amanda" computer screens that contain details of the actions undertaken by the City's Building & Licensing division in response to each of the appellant's complaints. Each of the "Action Request" forms also contains the personal information of the property owner of [the specified address]; specifically the property owner's name and residential address (Appendix E).
>
> As the appellant(s) had indicated in their October 6th letter that they were not seeking access to copies of their complaints or orders to comply, the records identified by [the License Officer] were deemed to be non-responsive by the writer. This information was communicated to the appellant in the City's November 9, 2006 decision letter. However, the City still offered access to the non-responsive records if the appellant changed her mind and desired access.
>
> [The License Officer] further confirmed … that there were no other complaints against the subject property and that there was no record of any involvement in the matter by the appellant's ward councillor.

The City also submits that inquiries were made through the office of the Coordinator of the Standards and Licensing Section of the Building Division, and although no conversation took place directly with that individual, a by-law clerk in the division confirmed that he did not possess additional records.

The appellants insist that there should be email correspondence between the City and the owner of the subject property:

> In the email of Monday, July 17, 2006 [the Division Coordinator] confirmed that he has received an e-mail from the owners of [the subject property]… this e-mail is responsive to our request.

In its reply representations, the City provided additional information obtained from the License Officer in the Building and Licensing Division:

> 1. No work orders were issued against the named property.
>
> 2. The inspector … confirmed that the Order to Comply was posted on the property site; …
> 3. The Order to Comply was also sent to the registered property owner via registered mail. A courtesy letter may have accompanied the order. … [T]he courtesy letter is simply a form letter that is **not** addressed personally to the sender [sic], but **may** be included with the order or any other official mailing from the division to a property owner [emphasis in original]
>
> 4. The Order to Comply is a responsive record that can be obtained directly from the [Building Division]…
>
> 5. "Correspondence/follow-up action" is detailed in the Amanda print screens referenced [previously]. (The appellant has previously stated that she did not wish to access her own complaints against the property. It is noted once again, that the appellant's complaints include the City's follow-up details to the appellant's complaints, and that these records are available to the appellant upon payment of the appropriate processing fees. These records have been identified by the City as non-responsive to the request, because the appellant has stated that she did not wish to access her own complaints.)

Finally, the City submits that after receiving the appellants' representations, an additional search of the server was conducted with regard to the email account of the Division Coordinator, who is no longer employed by the City, but no new records located.

When asked to provide sur-reply representations, the appellants explained that the circumstances surrounding this matter have

> [generated] cause for uncertainty in our mind about the fact situation surrounding the issuance of the Order to Comply. We are also uncertain about whether or not the Order to Comply was withdrawn by the City without the work being done. …
>
> Simply put, a City record noting our complaint is not responsive, everything else is. It would be absurd for the City to rely solely on our complaint to be the basis for the City issuing an Order to Comply against a property without proper inspection and related documentation.

Analysis and Findings

As previously stated, in appeals involving a claim that additional records exist, the issue to be decided is whether an institution has conducted a reasonable search for responsive records as required by section 17 of the *Act*. Furthermore, although requesters are rarely in a position to indicate precisely which records an institution has not identified, a reasonable basis for concluding that additional records might exist must still be provided.

Having considered the representations of the City and the appellants, as well as the general circumstances of this appeal, I am satisfied that the City has provided sufficient evidence to show that it made a reasonable effort to identify and locate records responsive to the request.

It must be acknowledged that the clarified request submitted by the appellants was detailed in nature. It was clearly composed so as to identify information that would assist them in better understanding certain actions related to the rental property located adjacent to their home. In enumerating records, and categories of records, that they believe should exist, it can likely be said that the appellants were seeking this information based on an assumption that it should have been recorded and kept by the City.

There is some balancing to be brought to the task of reviewing an institution's search for responsive records. On one hand, the appellants must provide a reasonable basis for showing that such records may exist, and in this appeal, the appellants have submitted documentation suggesting that other records responsive to their request might exist. I find that the appellants have provided me with a reasonable basis for their belief that additional records exist.

On the other hand, I am also mindful that the City has conducted searches with knowledge of the nature of the records said to exist because the appellants have been able to provide very specific direction in this regard. And ultimately, the issue comes down to whether or not I am satisfied that the City made a *reasonable* effort to identify and locate any existing records that might be responsive to the various points outlined in the appellants' request. To reach my decision, I have considered whether the City engaged an experienced employee to expend a reasonable effort to locate the specific records. Based on the information, I am satisfied that the City did so.

I understand that the appellants may be frustrated to discover that information which a member of the public might assume is routinely recorded and filed by the City simply may not exist. In a review of the adequacy of the City's search, however, my authority does not extend to a review of its record-keeping practices.

Accordingly, based on the information provided by the City and the appellants, and having considered the circumstances of this appeal, I am satisfied that the City's search for records responsive to the request was reasonable in the circumstances.

ORDER:

1. I uphold the City's decision to deny access to the record on the basis that section 15(a) of the *Act* applies to it.

2. I uphold the City's search for responsive records and dismiss that aspect of the appeal.

Original signed by: February 22, 2008
Daphne Loukidelis
Adjudicator