

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

INTERIM ORDER MO-4443-I

Appeals MA22-00148 and MA22-00149

City of Hamilton

September 25, 2023

Summary: This interim order deals with the appeals from two access decisions made under the *Act* in response to requests for records relating to retaining walls and tree protection plans at specified addresses. The city denied access to responsive records on the basis of section 15(a) (information published or available to the public). During mediation, the appellant raised the issue of the reasonableness of the city's search.

In this order, the adjudicator does not uphold the city's decisions. She also finds that the city did not conduct a reasonable search. The adjudicator orders the city to disclose the records to the appellant and to conduct a further search.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 15(a), 17 and 42.

Orders Considered: Interim Order MO-4328-I, Orders MO-4099 and MO-4397.

OVERVIEW:

[1] This order deals with two appeals from the decisions of the City of Hamilton (the city). The city received two requests under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records pertaining to specified addresses.

[2] In Appeal MA22-00148, the request was for:

... all records pertaining to the city approved plans for retaining walls for [specified address], including but not limited to, permits, plans, and reports pertaining to same.

[3] In Appeal MA22-00149, the request was for:

... all records pertaining to the city approved tree protection plans for [specified addresses] and [specified address], including but not limited to, permits, plans, and reports pertaining to same.

[4] The city issued decisions for both requests, denying access to the responsive records pursuant to section 15(a) (information published or available to the public) of the *Act*.

[5] In both decisions, the city identified responsive records as being available from a senior project manager at the city and provided the contact information for that individual.

[6] The requester, now the appellant, appealed both decisions to the Office of the Information and Privacy Commissioner of Ontario (the IPC).

[7] During mediation, the appellant attempted to retrieve the documents from the city's office, as directed in its decision letters. Subsequently, the city mailed the appellant what it identified as the publicly available responsive records. A senior project manager from the city's Planning and Economic Development emailed the mediator records pertaining to "Vegetation Management Plan and Grading and Servicing Plan" for a specified site.

[8] After receipt and review of the records, the appellant advised the mediator that he believes not all responsive records have been provided to him. As such, reasonable search was added to the scope of both these appeals.

[9] As further mediation was not possible, both appeals were transferred to the adjudication stage of the appeals process, where I conducted a single inquiry under the *Act*. I invited the city to submit representations in response to a Notice of Inquiry, which summarized the facts and issues in the appeals. The city did not submit representations. The appellant was then invited to submit representations and did so.

[10] For the reasons that follow, I find that section 15(a) does not apply. I also find that the city did not conduct a reasonable search for records responsive to the appellant's requests. I order the city to disclose the records withheld under section 15(a) and to conduct a further search for responsive records.

ISSUES:

- A. Does the discretionary exemption at section 15(a) for information available to the public apply to the responsive records?
- B. Did the city conduct a reasonable search for records?

DISCUSSION:

Issue A: Does the discretionary exemption at section 15(a) for information available to the public apply to the responsive records?

[11] The appellant argues that section 15(a) does not apply because the city has no regularized system of access for the records withheld under this exemption. For the reasons that follow, I find section 15(a) does not apply.

[12] Section 15(a) of the *Act* 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.

[13] For this section to apply, the city 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.¹

[14] To show that a "regularized system of access" exists, the institution must demonstrate that:

- a system exists
- the record is available to everyone, and
- there is a pricing structure that is applied to all who wish to obtain the information.²

[15] Section 15(a) of the *Act* 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*.³ In order to rely on the section 15(a) exemption, the institution must take adequate steps to ensure that the record

¹ Orders P-327, P-1387 and MO-1881.

² Order MO-1881.

³ Orders P-327, P-1114 and MO-2280.

that they allege is publicly available is the record that is responsive to the request.⁴

[16] Examples of the types of records and circumstances that have been found to qualify as a “regularized system of access” include:

- unreported court decisions⁵
- statutes and regulations⁶
- property assessment rolls⁷
- septic records⁸
- property sale data⁹
- police accident reconstruction records¹⁰
- orders to comply with property standards.¹¹

[17] Under section 42 of the *Act*, where an institution refuses access to a record or part of a record, the burden of proof that the record or part of the record falls within one of the specified exemptions in the *Act* lies upon the institution. Section 42 states:

If a head refuses access to a record or a part of a record, the burden of proof that the record or the part falls within one of the specified exemptions in this Act lies upon the head. R.S.O. 1990, c. M.56, s. 42.

[18] In these appeals, I notified the city that I was conducting an inquiry by sending them a Notice of Inquiry. The Notice of Inquiry informed the city that it had the burden of proof to establish the application of the exemption claimed and it set out the above information about the exemption claimed.

[19] The city received the Notice of Inquiry, but did not provide representations to the IPC. As indicated above, to establish that section 15(a) applies, the city must explain how the record is available to the public generally, through a “regularized system of access,” such as a public library or a government publications centre.¹² Without any representations, I am unable to find that the city has a system of access for the responsive records. Accordingly, I find that the records at issue are not exempt

⁴ Order MO-2263.

⁵ Order P-159.

⁶ Orders P-170 and P-1387.

⁷ Order P-1316.

⁸ Order MO-1411.

⁹ Order PO-1655.

¹⁰ Order MO-1573.

¹¹ Order MO-2280.

¹² Orders P-327, P-1387 and MO-1881.

under section 15(a).

[20] I note that the appellant has already received some of the records at issue. However, as the city did not participate in the inquiry, I do not have any information as to the records that were previously disclosed to the appellant. As it is unclear to me that the appellant has received a copy of all the records claimed exempt under section 15(a), I will order the city to provide the appellant with a copy of all the records claimed exempt under section 15(a), even if those records were already disclosed to him.

Issue B: Did the city conduct a reasonable search for records?

[21] The appellant claims that further records responsive to his request exist.

[22] Where a requester claims 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 17.¹³ If I am satisfied 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.

[23] 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 it has made a reasonable effort to identify and locate responsive records.¹⁴ A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related (responsive) to the request.¹⁵

[24] 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 such records exist.¹⁶

Representations, analysis and findings

[25] As noted above, the city did not provide representations.

[26] In his representations, the appellant argues that the disclosed records are only some of the records responsive to his request. He submits that to date he has only received some plans but he believes there should be more responsive records. The appellant also submits that city staff reviews and/or comments on plans and, as such, he believes those records should exist but he has not been provided with them to date. Moreover, he finds it difficult to believe that there are no permits and reports responsive to his requests.

¹³ Orders P-85, P-221 and PO-1954-I.

¹⁴ Orders P-624 and PO-2559.

¹⁵ Orders M-909, PO-2469 and PO-2592.

¹⁶ Order MO-2246.

[27] In the absence of representations from the city, I find that the city did not conduct a reasonable search.

[28] As stated above, the city was sent a Notice of Inquiry inviting its representations on whether its search for responsive records was reasonable. It was asked to provide its explanation of all the steps it took in response to the request including: whether or not the request was clarified, whether responsive records once existed but no longer do, and details of its search efforts including who searched, in what places and for which types of files. The city did not provide representations in response to the Notice of Inquiry.

[29] As the city did not submit representations, there is no evidence before me with respect to who searched, for which types of files, in what manner and in what places. In Interim Order MO-2721-I, the adjudicator also dealt with a similar circumstance where the institution did not submit representations regarding its search. The adjudicator made the following comments which I find helpful here:

It may well be that the municipality has conducted a reasonable search; however, due to its complete absence of representations I must conclude that it has failed to *demonstrate* that it has conducted a reasonable search for records responsive to the appellant's request. [emphasis in the original]

[30] Without the city's representations in response to the Notice of Inquiry, I am unable to conclude that the city conducted a reasonable search. Accordingly, I find that the city has not met its search obligations under section 17 the *Act* and order it to conduct a further search for records responsive to the appellant's requests.

ORDER:

1. I do not uphold the city's claim that the exemption in section 15(a) applies to the records.
2. I order the city to disclose the records to the appellant within **30 days** of this order and in a format that addresses the accommodation requirements of the appellant. The city is to provide the records to the appellant in hard copy format and in font size 16 to accommodate the challenges identified by the appellant in accessing records.
3. I also order the city to conduct a further search for records responsive to the appellant's request.
4. I order the city to provide me with affidavit evidence describing its search efforts, by **October 24, 2023**. At a minimum, the affidavit(s) should include the following:

- i. The name(s) and position(s) of the individual(s) who conducted the search(es) and their knowledge and understanding of the subject matter and the scope of the request;
 - ii. The date(s) the search(es) took place and the steps taken in conducting the search(es), including information about the type of files searched, the nature and location of the search(es), and the steps taken in conducting the search(es);
 - iii. Whether it is possible that responsive records existed but no longer exist. If so, the city must provide details of when such records were destroyed, including information about record maintenance policies and practices, such as evidence of retention schedules; and
 - iv. If it appears that no further responsive records exist after further searches, a reasonable explanation for why further records do not exist.
5. The city's representations will be shared with the appellant, unless there is an overriding confidentiality concern. The procedure for submitting and sharing representations is set out in *Practice Direction Number 7*, which is available on the IPC's website. The city should indicate whether it consents to the sharing of its representations with the appellant.
6. I remain seized of these appeals to deal with issues arising from order provisions 2, 3 and 4.

Original Signed by _____

Lan An
Adjudicator

September 25, 2023 _____