

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3683

Appeal MA17-727

City of Ottawa

November 5, 2018

Summary: The City of Ottawa received an access request under the *Municipal Freedom of Information and Protection of Privacy Act* for access to all records relating to complaints made by the requester to the city within a specific period. The city notified an affected party and then issued a decision disclosing the responsive record in full. The affected party appealed that decision to this office. During the inquiry, it became clear that the requester was already in possession of a copy of the record at issue. Given that the requester has a copy of the record, the adjudicator dismisses the appeal as moot.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended.

Orders and Investigation Reports Considered: Orders M-271 and P-1295.

OVERVIEW:

[1] The City of Ottawa (the city) received a 28-part request under the *Municipal Freedom of Information and Protection of Privacy Act* (MFIPPA or the *Act*) for access to all records relating to complaints made by the requester to the city within a specific period.

[2] Prior to issuing a decision, the city clarified the request with the requester and identified a third party interest in one responsive record, a surveyor's report. Pursuant to section 21(1) of the *Act*, the city notified the third party as an affected party and

sought their representations on disclosure of the record. In doing so, the city shared a copy of the responsive record for the affected party's consideration. The affected party made representations to the city requesting that the record not be disclosed, pursuant to the mandatory exemption at section 10(1) of the *Act* (third party information).

[3] The city issued a decision to disclose the record to the requester on the basis that the record does not meet the criteria for exemption under section 10(1). The city notified the affected party of its decision to disclose the record and of its right to appeal. The affected party appealed the city's decision to this office on the basis of its position that the exemption in section 10(1) applies to the record, thereby becoming the third party appellant (the appellant) in this appeal.

[4] During mediation, the mediator discussed the issues with all of the parties, including the original requester (the requester). Some information was exchanged between the parties, including the identities of the requester and the appellant. No further mediation was possible and the appeal was moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry under the *Act*.

[5] I began my inquiry by inviting the appellant to provide written representations, which were shared in their entirety with the city and the requester in accordance with *Practice Direction Number 7* and the IPC's *Code of Procedure*. Both the city and requester provided written representations for my consideration, which I shared with the appellant. The appellant provided written representations in reply.

[6] Upon review of the parties' submissions, I noted that included with the documentation provided by the requester in support of his position was an exact copy of the record at issue.¹ Staff of this office contacted the appellant and requester to point this out and inquire whether they wished the inquiry to proceed. The requester confirmed that he wanted the inquiry to be resolved with an order.

[7] In this order, I find that there is no useful purpose to be served by determining the possible application of the exemption from disclosure under section 10(1) as the issue is moot.

RECORDS:

[8] The sole record at issue is a one-page document titled, "Surveyor's Real Property Report" (the surveyor's report).

¹ For the parties' reference, refer to the second and fourth pages of Appendix D of the original requester's representations.

PRELIMINARY ISSUE:

Is the appeal moot because the record is already in the requester's possession?

[9] The requester's representations included several appendices. Of note is Appendix D, a "Site Review Report" that contains an exact copy of the surveyor's report at issue in this appeal. The requester's representations indicate that he obtained the Site Review Report through a freedom of information request to the city in 2013. Thus, it appears that disclosure of the one-page record at issue has been achieved by means other than this particular appeal under the *Act*.

[10] Since the issue to be determined in this appeal is whether surveyor's report should be disclosed to the requester, the requester's possession of a Site Review Report containing the surveyor's report raises a preliminary issue for me to determine. Where a record has previously been disclosed to a requester by the institution, or in another context, the issue of mootness is raised. I must address the question of whether the appeal is moot and if so, whether I ought nonetheless to proceed to a determination of the section 10(1) third party exemption claimed to deny access to it under the *Act*. For the reasons that follow, I conclude that I should not proceed with such a determination.

[11] In Order P-1295, former Assistant Commissioner Irwin Glasberg considered the question of when an appeal under the *Act* could be considered moot. He stated:

The leading Canadian case on the subject of mootness is the Supreme Court of Canada's decision of *Borowski v. The Attorney General of Canada* [(1989), 57 D.L.R. (4th) 231]. There, the court commented on the topic of mootness as follows:

The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot ...

In the *Borowski* case, Sopinka J., speaking for the court, indicated that a two-step analysis must be applied to determine whether a case is moot.

First, the court must decide whether what he referred to as “the required tangible and concrete dispute” has disappeared and the issues have become academic. Second, in the event that such a dispute has disappeared, the court must decide whether it should nonetheless exercise its discretion to hear the case.

[12] The approach taken by former Assistant Commissioner Glasberg in Order P-1295, which was to apply the test set out in *Borowski*, has been adopted in subsequent orders of this office. Where the requester has already obtained access to the record at issue, adjudicators have declined to make a determination on the application of exemptions claimed to withhold records on the basis that the appeal is moot. This determination is made where there is not sufficient public interest or importance to decide if the exemptions apply nonetheless.²

[13] Applying the test for mootness in *Borowski*, I find that the first part of the test has been met. The live controversy, which might have been said to exist between the city and the appellant relating to the disclosure of the record, is now at an end because the surveyor’s report is already in the requester’s possession. Thus, the question of whether the record qualifies for exemption pursuant to section 10(1) is purely academic.

[14] With regard to the second part of the test, I have considered whether the question of access to the surveyor’s report is of sufficient public interest or importance to merit the review of the application of section 10(1) of the *Act* regardless of mootness. I note that the requester indicated his preference for this appeal to proceed to a decision, but did not address the issue of mootness.

[15] In Order M-271, former Assistant Commissioner Glasberg dealt with a situation in which the requester had obtained a copy of the record from someone other than the institution. In that case, he proceeded with the appeal because one of the issues was the appellant’s desire to request a correction of personal information under section 36(2) of the *Act*. He indicated that, in this situation, the institution in question would have to acknowledge that it had custody of the record for which the correction was to be requested. In addition, the parties in that case had been involved in an ongoing series of requests and the Assistant Commissioner was of the view that his order might reduce the need for future appeals.

[16] However, he also made the following comments of a more general nature about situations where an appellant already possesses the record at issue:

In the ordinary course of events, I would be extremely reluctant to apply the resources of the Commissioner’s office to decide an appeal where the appellant is already in possession of the records at issue through legitimate means. In my view, such an exercise would serve no useful

² See Orders MO-2049-F, MO-2525, MO-2571, MO-2728, MO-2979, MO-3032, PO-2756, and PO-3057-I.

purpose. In addition, appeals of this nature consume the scarce resources of institutions and impede the ability of the Commissioner's office to deal with the files of other appellants.

[17] I agree with these views and adopt them for the purposes of this appeal.

[18] In my view, the circumstances of this appeal differ from those before the Assistant Commissioner in Order M-271 and do not serve to justify proceeding to a determination of the section 10(1) issue. The absence of factors such as those present in Order M-271 and the fact that the requester has obtained a copy of the record at issue by legitimate means (through a prior access request to the city) means that any determination regarding access would have no practical effect. I am not persuaded by the circumstances or the information before me that there are any factors weighing in favour of my continuation of this appeal in respect of the surveyor's report. Accordingly, I find that this appeal is moot and that no useful purpose would be served by proceeding with a determination of the application of the section 10(1) exemption to the surveyor's report.

ORDER:

I dismiss the appeal.

Original signed by: _____

Jaime Cardy
Adjudicator

November 5, 2018