

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4384

Appeal MA21-00320

York Regional Police Services Board

May 30, 2023

Summary: The York Regional Police Services Board (the police) received a request under the *Act* for access to records related to a specified incident. The police issued a decision denying access in full to the responsive photographs under section 15(a) (information published or available to the public) of the *Act*. The appellant appealed the police's decision to the IPC, and in this order, the adjudicator upholds the police's decision and dismisses the appeal.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 15(a); *Municipal Act*, 2001, S.O. 2001, c. 25, as amended, section 391.

OVERVIEW:

[1] This order determines the issue of access to crime scene photographs, which the York Regional Police Services Board (the police) claim are available to the public and therefore exempt from disclosure under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*).

[2] The police received an access request under the *Act* for the following records related to a specified incident:

I want all photos, finger and foot printings, police notes, name of the officers involved and finally the investigator report [named individual].
If any voice records or microphone records please provide it as well.

[3] The police issued a decision withholding the requested records in full under the mandatory personal privacy exemption in section 14(1) of the *Act*.

[4] The appellant appealed the police's decision to the Information and Privacy Commissioner of Ontario (IPC) and a mediator was appointed to explore resolution.

[5] During mediation, the police issued a revised decision granting the appellant access in full to several records, including the call hardcopy, a general occurrence hardcopy, and officers' notes for the specified incident. In their revised decision, the police relied on section 15(a) (information published or available to the public) of the *Act* to refuse access to both the 911 audio recording and 32 crime scene photographs. The police stated that these types of records are available to the public for a fee under different legislation, and asked the appellant to forward a cheque for \$113 for the audio recording and \$153 for the 32 photographs.

[6] In response to a request from the appellant to not pay the fees, the police agreed to not charge \$113 for the 911 audio recording. The police maintained their position that the photographs are exempt from disclosure under the *Act* because they are publicly available for a fee, and asked the appellant to pay \$153 for the photographs. The appellant objected to the police's decision.

[7] As a mediated resolution was not possible, the appeal was transferred to the adjudication stage, where an adjudicator may conduct an inquiry under the *Act*. I commenced an inquiry in which I sought and received representations from the parties about the issues in this appeal.

[8] In this order, I uphold the police's access decision and dismiss the appeal.

RECORDS:

[9] The records remaining at issue in this appeal are 32 crime scene photographs.

DISCUSSION:

Does the discretionary exemption at section 15(a) for published information or information available to the public apply to the photographs?

[10] The police claim that section 15(a) applies to the photographs at issue in this appeal, while the appellant argues that it does not.

[11] 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;

[12] 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.¹

[13] 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

[14] 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

[15] In order to rely on the section 15(a) exemption, the institution must take adequate steps to ensure that the record 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 property sale data⁵ and police accident reconstruction records.⁶

[17] 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*.⁷ However, the cost of accessing a record outside the *Act* may be so prohibitive that it amounts to an effective denial of access, in which case the exemption in section 15(a) would not apply.⁸

Representations, analysis and findings

[18] For the reasons that follow, I find that the police have established that the photographs at issue are currently available to the public through a regularized system of access, and therefore, they are exempt from disclosure under the *Act*.

[19] The police submit that the crime scene photographs are exempt under section 15(a) because they are available in their entirety to the public through a regularized system of access.

[20] In response to my Notice of Inquiry, the appellant submitted a complaint he

¹ Orders P-327, P-1387 and MO-1881.

² Order MO-1881.

³ Orders P-327, P-1114 and MO-2280.

⁴ Order MO-2263.

⁵ Order PO-1655.

⁶ Order MO-1573.

⁷ Orders P-159, PO-1655, MO-1411 and MO-1573.

⁸ Order MO-1573.

made against the police to the Office of the Independent Police Review Director (OIPRD). The complaint outlines the appellant's allegations against the police and their conduct during the investigation. While I have reviewed it in full, I will not refer to his OIPRD complaint because it is not directly relevant to my determination in this appeal.

[21] The appellant did not submit any representations with respect to section 15(a).

[22] As noted above, to show that a "regularized system of access" exists, the police 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.⁹

A system exists and the record is available to everyone

[23] With their representations, the police submitted Bylaw No. 02-15 (the bylaw), which permits the police to impose fees or charges for services or activities, provided by them or on their behalf, under section 391 of the *Municipal Act*. The fee charged for photographs is outlined in "Schedule A" of the bylaw and is set at \$51 per 10 photographs.

[24] The police explain that crime scene photographs are taken by specifically trained officers/and or forensic investigative assistances (FIA) assigned to the York Regional Forensic Identification Bureau (FIU), who are requested to attend the scene of an investigation. The police further explain that once the photos are taken, they are uploaded by the officer and/or FIA to the FIU server.

[25] The police note that previously the FIU would collect fees and disclose photographs, but due to operational changes, the Freedom of Information Unit (FOIU) collects the fees and discloses the photographs on their behalf. The police summarized their system of access as follows:

- Any member of the public who requests photographs obtained by police during investigations will be directed to the FIU and they can either submit a request in writing, or attend in person at one of the customer service counters and complete a request form for photographs.
- Once received, their request will be forwarded to the FOIU, who will confirm the availability of the photographs, the number of photographs, and the fees. The FOIU will then contact the requester, and advise them of the fees and confirm how they want to receive the photographs.

⁹ Order MO-1881.

- Once they have agreed to pay the fees, the FOIU will advise the FIU of the request, who will retrieve the photographs from their server and forward them to the FOIU for disclosure. If the requester wants the photographs to be mailed out or sent out by secure email link, then they will have to send in the payment prior to the photographs being disclosed, or they can attend in person and pay for the photographs and pick them up at the same time.

[26] Based on the information provided by the police, I am satisfied for the purposes of section 15(a) that a system exists to provide the public with access to the photographs held by the police from the FIU through procedures as set out in the bylaw, and that these photographs are available to everyone who requests them, for a fee.

A pricing structure to access the photographs is in place

[27] As noted above, 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*.¹⁰ However, the cost of accessing a record outside the *Act* may be so prohibitive that it amounts to an effective denial of access, in which case the exemption in section 15(a) would not apply.¹¹

[28] The fee charged for photographs is outlined in "Schedule A" of the bylaw and is set at \$51 per 10 photographs. The total fee chargeable under the bylaw is \$153 for the 32 photographs and that is the fee the police have charged under section 15(a). The appellant has not argued that this cost is prohibitive, and I find that it is not so prohibitive that it would amount to an effective denial of access. Furthermore, the police have advised the appellant that his insurance company, in relation to the specified incident, could obtain the photographs on the appellant's behalf and pay the fee. The police explain that insurance companies routinely make requests for these types of photographs. Therefore, I am satisfied that there is a pricing structure in place to access the photographs.

[29] In summary, as required by section 15(a) of the *Act*, the police have demonstrated that a system exists, the photographs are available to everyone, and there is a pricing structure that is applied to all who wish to obtain them. Accordingly, I find that section 15(a) applies to the photographs at issue because the police have established that the photographs are currently available to the public through a regularized system of access.

Exercise of discretion

[30] The section 15(a) exemption is discretionary, meaning that the police can decide to disclose information even if the information qualifies for exemption. The police must exercise their discretion. On appeal, I may determine whether the police failed to do so.

¹⁰ Orders P-159, PO-1655, MO-1411 and MO-1573.

¹¹ Order MO-1573.

[31] The police state that they properly exercised their discretion under section 15(a), and took into consideration all relevant circumstances, including the fact that the photographs are available to the public and that they have disclosed all records related to the investigation in their entirety to the appellant except for the photographs at issue. The police further state that no irrelevant factors were considered and the photographs were not withheld in bad faith or for an improper purpose.

[32] The appellant did not make representations on the police's exercise of discretion.

[33] After considering the representations and the circumstances of this appeal, I find that the police did not err in their exercise of discretion with respect to their decision to deny access to the photographs under section 15(a) of the *Act*. I am satisfied that the police considered relevant factors and did not consider irrelevant factors in the exercise of discretion. In particular, I am satisfied that the police have disclosed all records related to their investigation except for the photographs at issue, and they withheld the photographs because they are available to the public.

[34] Accordingly, I find that the police exercised their discretion in an appropriate manner in this appeal, and I uphold it.

ORDER:

I uphold the police's decision and dismiss the appeal.

Original signed by: _____
Anna Truong
Adjudicator

_____ May 30, 2023