

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4397

Appeal MA22-00150

City of Hamilton

June 21, 2023

Summary: This order deals with an access decision made under the *Act* in response to a request for records relating to the cutting down of a tree. The city identified records responsive to the request, but denied access to them, claiming the application of the discretionary exemption in section 15(a) (information published or available to the public). During the inquiry of this appeal, the city was provided with the opportunity to provide representations to the IPC, but did not do so. In this order, the adjudicator finds that the city has not discharged its burden of proof under section 42 that the records fall within section 15(a). As a result, the adjudicator orders the city to disclose the records to the appellant.

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

OVERVIEW:

[1] This order resolves the sole issue raised as a result of an access decision made by the City of Hamilton (the city) in response to an access request made under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The access request was for all records pertaining to the cutting down of a tree at a specified address.

[2] In response, the city identified records responsive to the request and issued an access decision to the requester. The city denied access to the records, claiming the application of the discretionary exemption in section 15(a) (information published or

available to the public) of the *Act*. The city advised the requester that the records are available to the public in accordance with the provisions of the province's *Planning Act*. The city provided the requester with the name and contact information of a city staff member to arrange to access the public files and confirm any fees associated with that access.

[3] The requester, now the appellant, appealed the city's decision to the Information and Privacy Commissioner of Ontario (the IPC).

[4] During the mediation of the appeal, the appellant advised the mediator that, after an unsuccessful attempt at mediation to obtain copies of the records in person from the city's planning and clerk's offices, they would like to proceed to adjudication. The appellant also advised the mediator that they require accommodation from the city to receive the records in a hard copy format and in font size 16.

[5] The city did not respond to the mediator about the appellant's ongoing issues surrounding the public availability of the records.

[6] The appeal then moved to the adjudication stage of the appeals process, where an adjudicator may conduct an inquiry. I sought representations from the city by sending them a Notice of Inquiry, but did not receive representations from them. IPC staff contacted the city by email on two occasions to ask when the city would be providing representations. The city confirmed that they had received the Notice of Inquiry and advised staff they would be providing representations to the IPC. However, the city has not submitted any representations, nor did it request an extension of time in which to submit their representations to the IPC. As a result, I decided to conclude the inquiry and to proceed to issue this order.

[7] For the reasons that follow, I find that section 15(a) does not apply and I order the city to disclose the records to the appellant.

RECORDS:

[8] The records are those identified by the city and are related to the cutting down of a tree at a specified property.

DISCUSSION:

[9] The sole issue in this appeal is whether the records are available to the public and exempt under section 15(a) of the *Act*. at issue.

[10] Section 15 of the *Act* allows an institution to withhold records if the information in the records has been published or is already available to the public, or if it is soon to be published. This exemption is intended to allow an institution to refer a requester to a

publicly available source of information, and to protect information that has not yet been published.

[11] 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;

[12] Section 15(a) is intended to provide an institution with the option of referring a requester to a publicly available source of information where this is a more convenient way to access the information. It is not intended to be used in order to avoid an institution's obligations under the *Act*.¹

[13] 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 same record that was requested.²

[14] Section 15(a) does not permit an institution to withhold a small amount of publicly- available information from a larger record, particularly where the entire record is otherwise subject to disclosure under the *Act*. A requester should not be required to compile small pieces of information from a variety of sources in order to obtain a complete version of a record that could be disclosed.³

[15] 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.⁴

[16] To establish that a regularized system of access exists, the institution must show that

- a system exists,
- the record is available to everyone, and
- there is a pricing structure applied to all who wish to obtain the information.⁵

[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,

¹ Orders P-327, P-1114 and MO-2280.

² Order MO-2263.

³ Order PO-2641.

⁴ Orders P-327, P-1387 and MO-1881.

⁵ Order MO-1881.

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 this appeal, 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.⁶ Without any representations, there is simply no information before me to understand the reasons why the city believes that the requested records are exempt under section 15(a).

[20] As a result, I find that the city has not established that the records are exempt from disclosure under section 15 of the *Act*.

ORDER:

[21] I do not uphold the city's claim that the exemption in section 15 applies to the records.

[22] 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.

Original signed by: _____
Cathy Hamilton
Adjudicator

_____ June 21, 2023

⁶ Orders P-327, P-1387 and MO-1881.