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

ORDER MO-2113

Appeals MA-050347-1 and MA-060005-2

Brantford Police Services Board

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NATURE OF THE APPEALS:

BACKGROUND

In 2002, officers employed by the Brantford Police Services Board (the Police) were called to stand by and keep the peace at [a named property] in Brantford. A [named individual and her family] was being evicted from their home and they did not want to leave. A family member later lodged complaints with the Ontario Civilian Commission on Police Services (OCCPS) concerning alleged wrongdoings by the officers who attended at the home. These complaints were investigated by the Police, who found them to be unsubstantiated. The family member's subsequent appeal to OCCPS was also unsuccessful.

The Police received two requests under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to the named property on a specified date in 2002. The record is unclear as to the exact date and nature of the requests because the appellant provided conflicting information which, despite efforts from this office, could not be reconciled. However, the Police state that the request they responded to was dated August 20, 2005 and read, in part:

> (1) What led [a named police officer] to believe that [family members] bought the house together in 1986? Did he see a deed listing [a named family member] as a co-owner?

The Police responded to the requester on September 23, 2005, in which they refused to process her access request because, in their opinion, the request was frivolous or vexatious within the meaning of section 4(1)(b) of the *Act*. The Police advised the requester further that they had told her "on more than one occasion" that all information had been disclosed.

It would be helpful, at this point, to discuss the history of requests (in addition to those in the present appeals) leading to the Police's September 23, 2005 decision. In their representations, the Police provided a chronology indicating that on each of the following dates, the requester submitted requests for information respecting the subject property: September 30, November 10, November 20, 2004 and January 15, March 14, March 15, March 31, April 6, April 7, April 23, June 6, July 16, July 20, and August 12, 2005. The Police advised that there was another request on December 1, 2005.

The requester, now the appellant, appealed the Police frivolous or vexatious decision of September 23, 2005 and this office opened **Appeal MA-050347-1**. No issues were resolved through mediation and the file moved to the inquiry stage of the appeal process. I was assigned to conduct the inquiry.

The requester subsequently submitted another similar request to the Police on January 2, 2006 for access to:

1. A copy of [a named report] from [a specified date] regarding the alleged execution of a Court Order at [a specified house].
2. A copy of [a named report] regarding the same.

3. A copy of all correspondence between the Police and [a named financial institution] regarding the acquisition of a 1986 [two named financial institutions record].
4. All correspondence between Police & Outreach/Victims of Crisis.
5. A copy – your copy – of the Writ of Seizure & Sale re [a named property]
6. All correspondence between Police & "Home Alone" re [a named property].
7. A copy of the Bank's Mortgage Deed re [a named property]
8. All correspondence between Police & [a named public utility] re [a named property]. (emphasis in original)

The Police issued another decision on January 12, 2006 refusing to process the request because, again, in their opinion, the request was frivolous or vexatious.

The requester, now the appellant, also appealed this decision. This office opened Appeal **MA-060005-2**. Because I had carriage of MA-050347-1, a similar appeal involving the same issue and parties, MA-06005-2 was referred directly to me.

I began the adjudication process by sending a Notice of Inquiry to the Police, in each appeal, inviting them to submit representations. The Police provided representations. I then sent a Notice of Inquiry to the appellant, in each appeal, along with the complete representations of the Police. I did not send attachments provided by the Police with their representations in response to Appeal Number MA-050347-1 because they were voluminous and already in the appellant's possession. The appellant provided representations in response to the Notices.

Due to the similarity of the representations and of the issues in the two appeals, I have decided to dispose of both appeals in a single order. Additionally, because of the similarities in both appeals, and for ease of reference in this order, I will discuss the issue of whether the requests were frivolous or vexatious as a whole, rather than on an appeal-by-appeal basis.

DISCUSSION:

ARE THE REQUESTS FRIVOLOUS OR VEXATIOUS?

Under section 4(1)(b) of the *Act*, every person has a right of access to a record or part of a record in the custody and control of an institution unless the head of an institution is of the opinion that on reasonable grounds that the request for access is frivolous or vexatious.

Section 5.1 of Regulation 823 under the *Act* elaborates on the meaning of the terms "frivolous" and "vexatious":

> A head of an institution that receives a request for access to a record or personal information shall conclude that the request is frivolous or vexatious if,

> (a) the head is of the opinion on reasonable grounds that the request is part of a pattern of conduct that amounts to an abuse of the right of access or would interfere with the operations of the institution; or
>
> (b) the head is of the opinion on reasonable grounds that the request is made in bad faith or for a purpose other than to obtain access.

Section 4(1)(b) provides institutions with a summary mechanism to deal with frivolous or vexatious requests. This discretionary power can have serious implications on the ability of a requester to obtain information under the *Act*, and therefore it should not be exercised lightly [Order M-850].

An institution has the burden of proof to substantiate its decision to declare a request to be frivolous or vexatious [Order M-850].

Definition of a Pattern of Conduct and an Abuse of the Access Process

In Order M-850, former Assistant Commissioner Mitchinson comprehensively reviewed both the standard and legal dictionaries to assist him in defining the phrase "pattern of conduct". He arrived at the following conclusion in defining that term:

> The *Concise Oxford Dictionary* (8th ed.) offers the following definitions:
>
> **pattern:** a regular or logical form, order or arrangement of parts (behaviour pattern, the pattern of one's daily life)
>
> **conduct:** behaviour, esp. in its moral aspect. ... the action or manner of directing or managing (business, war, etc.)
>
> Consolidating these two definitions, a "pattern of conduct" means a regular form of behaviour.
>
> The same dictionary defines "regular" as:
>
> acting or done or recurring uniformly or calculably in time or manner; habitual, constant, orderly
>
> No legal dictionary I consulted offered a definition of "pattern of conduct". However, *Black's Law Dictionary* (6th ed.) has a definition of "pattern of racketeering activity". This definition, which derives from several American cases, reads, in part, as follows:

> As used in the racketeering statute ..., a "pattern of racketeering activity" includes two or more related criminal acts that amount to, or threaten the likelihood of, continued criminal activity. ... A combination of factors, such as the number of unlawful acts, the time over which the acts were committed, the similarity of the acts, the number of victims, the number of perpetrators, and the character of the unlawful activity can be considered in determining whether a pattern existed.

Taking all of these definitions into consideration, in my view, a "pattern of conduct" requires recurring incidents of related or similar requests on the part of the requester (or with which the requester is connected in some material way). As the definitions of both "pattern of racketeering activity" and "regular" would suggest, the time over which the behaviour is committed is also a factor.

In determining what constitutes "an abuse of the right of access", I feel that the criteria established by Commissioner Tom Wright in Order M-618 are a valuable starting point. Commissioner Wright found that the appellant in that case (who is not the same person as the appellant in this case) was abusing processes established under the *Act*.

The Commissioner described in detail the factual basis for the finding that the appellant had engaged in a course of conduct which constituted an abuse of process. The Commissioner found that an excessive volume of requests and appeals, combined with four other factors, justified a conclusion that the appellant in that case had abused the access process. The four other factors were:

1. the varied nature and broad scope of the requests;

2. the appearance that they were submitted for their "nuisance" value;

3. increased requests and appeals following the initiation of court proceedings by the institution;

4. the requester's working in concert with another requester whose publicly stated aim is to harass government and to break or burden the system.

Assistant Commissioner Mitchinson then concluded his discussion and review of the law applicable to "abuse of process" as follows:

> To summarize, the abuse of process cases provide several examples of the meaning of "abuse" in the legal context, including:

- proceedings instituted without any reasonable ground;
- proceedings whose purpose is not legitimate, but is rather designed to harass, or to accomplish some other objective unrelated to the process being used;
- situations where a process is used more than once, for the purpose of revisiting an issue which has been previously addressed.

In my view, although this is not intended to be an exhaustive list, these are examples of the type of conduct which would amount to "an abuse of the right of access" for the purposes of section 5.1(a).

I adopt the reasoning of the former Assistant Commissioner Mitchinson in Order M-850 for the purposes of the present appeal.

The following factors may be relevant in determining whether a pattern of conduct amounts to an "abuse of the right of access":

- *Number of requests*

  Is the number excessive by reasonable standards?

In the circumstances of these appeals, based on my review of the evidence, I find that the number of requests submitted to the Police by the appellant is excessive by any reasonable standard. In their representations, the Police provided a chronology of the requests made by the appellant, the responses and the disclosure of records provided to the appellant. According to the Police, they have received over 15 access requests from the appellant, all of which are related to the 2002 eviction of her and her family. Early requests led to the disclosure of all of the records the Police identified as responsive on two separate occasions: on March 1, 2005 and again on July 15, 2005. In total, the appellant has received complete disclosure (215 pages) of records, which represents all of the records that the Police have identified as responsive to her requests. The Police advised that on August 9, 2005, they wrote to the appellant and advised that she had "complete copies of all police reports relating to [the specified house], along with every police officers' notes that had any involvement in calls … This also included copies of photocopied documents received from … [a named individual].

I am satisfied that the appellant has received access to all records responsive to her requests. It is clear that the Police have communicated this to the appellant. In my view, her continuing requests for the same information are excessive.

- *Nature and scope of the requests*

  Are they excessively broad and varied in scope or unusually detailed? Are they identical to or similar to previous requests?

In the present appeal, based on my review of the evidence, I find that the nature and scope of the appellant's requests are excessively broad and identical to her previous requests. The appellant's representations are not cogent or helpful. Her representations mirror her access requests and, in reading them, it is difficult to imagine how the Police could respond further to her requests. Moreover, her requests do not appear to have access as the primary objective, and I will now turn to this factor.

- *Purpose of the requests*

  > Are the requests intended to accomplish some objective other than to gain access? For example, are they made for "nuisance" value, or is the requester's aim to harass government or to break or burden the system?

Based on my review of the evidence, I find that the appellant's request is intended to accomplish some objective other than access. Based on the representations from the appellant and the Police, I agree with the Police that the requests include demeaning statements about members of the Police and that this conduct is not acceptable. I also agree with the Police that the requests are "for beliefs or interpretations" from the Police, rather than to obtain access to information.

In my view, the appellant's behaviour demonstrates a lack of regard for the access process and an intention to harass and unduly burden the Police. My findings are supported by the findings of Adjudicator Laurel Cropley in Order MO-1519, where she was faced with a similar case involving an individual who had made multiple requests for the same information and had behaved in a belligerent and uncooperative manner throughout the processing of his requests by a municipal institution. Adjudicator Cropley stated:

> As discussed above, I have reviewed the circumstances under which the appellant submitted his request, his behaviour throughout both the request and appeal stages and his past behaviour in dealings with the City. Based on my own assessment of these circumstances, I have concluded that his request is frivolous or vexatious. In my view, the appellant's actions in the manner in which he has and is approaching the freedom of information processes constitutes a clear abuse of the right of access. I find that to permit him to continue his pattern of harassment and belligerence would so offend public policy that I will, pursuant to the Commissioner's inherent supervisory authority under the *Act*, remedy this abuse…

In the present appeals, I find that the appellant has clearly made use of the access provisions of the *Act* more than once, for the purpose of revisiting an issue which has been previously addressed by the Police through its decisions on her earlier requests for the identical information. This activity is another of the examples from the abuse of process cases in a legal context which are cited in Order M-850. I find that this revisiting of previously-resolved issues also represents a pattern of conduct that amounts to an abuse of the right of access as contemplated by section 4(1)(b) of the *Act* and section 5.1(a) of Regulation 460.

Other factors, particular to the case under consideration, can also be relevant in deciding whether a pattern of conduct amounts to an abuse of the right of access [Order MO-1782]. In my view, the tone and substance of the appellant's representations themselves supports my finding that there are reasonable grounds to conclude that the request is part of a pattern of conduct that amounts to an abuse of the right of access. The appellant's representations are rambling and aggressive and contain repeated allegations of misconduct directed toward the Police and others, and have little to do with her access requests.

In the circumstances of this appeal, therefore, I find that the Police have demonstrated that the appellant's pattern of conduct, which includes the requests at issue in these appeals, is an abuse of the right of access. For this reason, I find that the requests at issue in these appeals are frivolous or vexatious within the meaning of section 4(1)(b) of the *Act* and section 5.1 of Regulation 823.

Conclusion and Remedy

Where a request is found to be frivolous or vexatious, this office will uphold the institution's decision. In addition, this office may impose conditions such as limiting the number of active requests and appeals the appellant may have in relation to the particular institution [Order MO-1782 and MO-1921].

In the present appeal, it is my view that this is an appropriate situation to limit the appellant's active access to information matters with the Police to one at a time. In this way, the appellant's ability to make legitimate requests to the Police is not unduly impeded.

ORDER:

1. I uphold the Police decision under section 4(1)(b) of the *Act* that the appellant does not have a right of access to the records she requested because the requests are frivolous or vexatious, and I dismiss these appeals. However, the appellant may choose to re-activate these requests in accordance with the terms of my order below.

2. I impose the following conditions on the processing of any requests and appeals from the appellant with respect to the Police now and for a specified time in the future:

    (a) For a period of one year following the date of this order, I am imposing a one-transaction limit on the number of requests and/or appeals under the *Act* that may proceed at any given point in time, including any requests or appeals that are outstanding as of the date of this order.

    (b) Subject to the one-transaction limit described in provision 2(a) above, if the appellant wishes any of her requests and/or appeals that exist at any

given time to proceed to completion, the appellant shall notify both this office and the Police and advice as to which matter she wishes to proceed.

(c) If the appellant fails to pursue any of her appeals that are with this office on the date of this order within two years of the date of this order, this office may declare those appeals to have been abandoned.

3. The terms of this order shall apply to any requests and appeals made by the appellant or by any individual, organization or entity found to be acting on her behalf or under her direction.

4. At the conclusion of one year from the date of this order, the appellant, the Police and/or any person or organization affected by this order, may apply to this office to seek to vary the terms of provision 2 of this order, failing which its terms shall continue in effect until such time as a variance is sought and ordered.

5. This office remains seized of this matter for whatever period is necessary to ensure implementation of, and compliance with, the terms of this order.

Original signed by: October 31, 2006
Beverley Caddigan
Adjudicator