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

ORDER MO-2289

Appeal MA07-29

City of Toronto

Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9188
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

The City of Toronto (the City) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for the following information:

> Building permit, zoning examiners notes, related documents and plans/diagrams/specifications for any sign at:
>
> [The requester then listed 30 specific addresses]
>
> The first page or the page that shows the description of the permit for all permits ever issued, regardless of whether they are sign permits, for [specific address] since the original construction of the building, including the original building permit.
>
> [The requester then listed 4 specific addresses]
>
> The 1998 negotiated agreement between the City and several sign companies concerning advertising signs along the Gardiner Expressway and [Queen Elizabeth Way] (this agreement was referred to in item 8.52 http://www.toronto.ca/legdocs/2000/minutes/committees/et/et000920.pdf in Meeting No. 8, Etobicoke Community Council, Wednesday, September 20, 2000).
>
> [The requester then listed 53 specific addresses]
>
> Building permit, zoning examiners notes, related documents and plans/diagrams/specifications for any sign at:
>
> [The requester then listed 6 specific addresses]
>
> **Transportation Services:** Documents outlining the "mutually agreeable process" per Section 4.3 of the contract between Mediacom and Toronto for transit shelters dated Sep 1, 2000 and documents related to approvals for the following enhancements: 3D Listerine Bottle; 3D Hit the Brick Wall Lipton Soup; Sony Bravia; Herbal Essence; Royal Bank No Fees Statement.
>
> Building permit, zoning examiners notes, related documents and plans/diagrams/specifications for any sign at:
>
> [The requester then listed 18 specific addresses]
>
> Building inspections: all documents including inspector's notes related to inspection of [specific permit], [specific address], including any notices sent to property owner or applicant: please bring to the attention of [named individual or named individual], building inspectors who should have some documents.

> MLS [Municipal Licensing & Standards department]: documents concerning MLS investigation of illegal signs at [specific address]
>
> All communications between the Toronto parking Authority and All Vision Canada and between the Toronto parking Authority and Pattison Outdoor that occurred after the effective date of the last FOI request that I sent for communications between the Toronto parking Authority and All Vision Canada and between the Toronto Parking Authority and Pattison.
>
> MLS: documents related to investigations of illegal signs at [specific address or specific address] including Notice of Violation.
>
> Survey and Mapping: the municipal address and previous municipal addresses for the highlighted portion of the map in [specific number]; any survey of the property containing the highlighted portion.
>
> MLS: any document that contains name, address or license number of every licensed sign painter; total revenues from sign painting licensing fees for 2005; any sign painter license applications for 2005, including renewals.
>
> MLS: document concerning MLS investigation of illegal signs at [specific address] that were created after the effective date of the previous FOI for this data.
>
> All communications between [named individual] and All Vision Canada that are readily available.

The City advised the requester that it was of the view that the request, taken together with other recent requests he had made, was frivolous or vexatious within the meaning of section 5.1(a) of Regulation 823 under the *Act*. The City explained, in part:

> To date, you have submitted some 625 access requests of which 338 have been completed. This large volume of requests forms part of a pattern of conduct that amounts to an abuse of the right to access and has caused a burden on the City's systems of operations including those of Toronto Building, City Planning, Municipal Licensing and Standards and the Corporate Access and Privacy Office.
>
> "A pattern of conduct" requires "recurring incidents of related or similar requests on the part of the requester (or which the requester is connected in some material way)." An example of meaning of "abuse" is a situation where a process is used more than once, for the purpose of revisiting an issue or issues that have previously been addressed.

The requester, now the appellant, appealed the City's decision.

As no issues were resolved in mediation, the file was transferred to the adjudication stage of the appeal process.

I began my inquiry into this appeal by sending a Notice of Inquiry to the City. The City submitted representations in response.

I then sent a Notice of Inquiry, together with the non-confidential portions of the City's representations, to the appellant. The appellant also provided representations.

As the appellant's representations raised issues to which I felt the City should have an opportunity to respond, I invited the City to submit reply representations. The City replied with brief representations reiterating their original position that the request is frivolous or vexatious.

DISCUSSION:

FRIVOLOUS OR VEXATIOUS

The *Act* and Regulations provide institutions with a summary mechanism to deal with requests that an institution views as frivolous or vexatious. It has been said in previous orders that these legislative provisions "confer a significant discretionary power on institutions which can have serious implications on the ability of a requester to obtain information under the *Act*," and that this power should not be exercised lightly [Order M-850].

Several provisions of the *Act* and Regulations are relevant to the issue of whether the request is frivolous or vexatious. Section 4(1)(b) of the *Act* reads:

> Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless,
>
> > the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

Section 5.1 of Regulation 823 under the *Act* outlines the grounds required to establish a frivolous or vexatious claim. Section 5.1 reads:

> 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.

On appeal, the onus of demonstrating that there are reasonable grounds for concluding that a request is frivolous or vexatious is on the institution, in this case the City [Order M-850].

Background to the requests from the parties' representations

In his representations, the appellant explains the background to his requests. He describes himself as the co-ordinator of a small community based organization whose purpose is to track illegal billboards in the City of Toronto and to advocate for effective enforcement of the City's by-laws which govern their use. He states that over the last 15 years, the outdoor advertising industry has erected approximately 2000 illegal billboards in Toronto in violation of the City's signage by-laws. He submits that his organization has identified and filed complaints about several hundred billboards, the majority of which have been subsequently removed as a result of City issued orders based on those complaints.

The appellant states that the City only investigates billboards on a complaints basis. He submits that the only way to determine whether a billboard is illegal, and, therefore, whether it is necessary to file a complaint, is to file a Freedom of Information request for access to all sign permits issued to the relevant property. He states that he and the members of his organization then examine the plans, diagrams and other documents associated with the permits to determine whether the existing billboard is in compliance with the permit. He states that given the number of potentially illegal billboards and the fact that building permits must be examined to determine whether a billboard is in compliance, he is required to submit a large number of access requests to the City in order to accomplish the purposes of his organization. However, he submits that his requests do not qualify as frivolous and vexatious under the *Act* and the Regulations.

The City's representations also provide background as to why it takes the position that the appellant's request is frivolous or vexatious. The City explains that during the 2006 calendar year, "the appellant made over 600 access requests, the majority relating to records held by Toronto Building, Municipal Licensing & Standards, Planning and Transportation Services." The City explains that these requests include, for example:

> Access to all building permit records, zoning plans and diagrams for numerous properties; all investigation records relating to illegal signs for particular properties, records on Front Street extension, MLS [Municipal Licensing & Standards] folders for third party signs, records on sign variances for particular properties, MLS history folders for signs, site by-law sign amendments, Viacom Agreement, etc.

The City also explains that City Council has established a Task Force to deal with the issues of billboards in the City, one of which is to provide a better mechanism for compliance and

enforcement measures with respect to illegal billboards. It submits that the appellant is not seeking records but rather a policy change with respect to sign by-laws and enforcement action.

Section 5.1 (a)

Pattern of conduct that amounts to an abuse of the right of access

As indicated above, section 5.1 of Regulation 823 provides that a request is frivolous or vexatious if, among other things, it is part of a "pattern of conduct that amounts to an abuse of the right of access." Previous orders of this office have explored the meaning of this phrase.

In Order M-850, former Assistant Commissioner Tom Mitchinson commented on the meaning of "pattern of conduct". He stated:

> [I]n 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).

Additionally, in establishing whether a "pattern of conduct" exists, the focus should be on the cumulative nature and effect of a requester's behaviour.

The determination of what constitutes "an abuse of the right of access" has been informed by both the jurisprudence of this office in addition to the case law dealing with that term. In the context of the *Act*, it has been associated with a high volume of requests, taken together with other factors. Generally, the following factors have been considered as relevant in determining whether a pattern of conduct amounts to an "abuse of the right of access":

- *The number of requests* – whether the number is excessive by reasonable standards;

- *the nature and scope of the requests* – whether they are excessively broad and varied in scope or unusually detailed, or, whether they are identical to or similar to previous requests;

- *the timing of the requests* – whether the timing of the requests is connected to the occurrence of some other related event, such as court proceedings; and

- *the purpose of the requests* – whether the requests are intended to accomplish some objective other than to gain access without reasonable or legitimate grounds. For example, are they made for "nuisance" value, or

> is the requester's aim to harass the government or to break or burden the system.

[Orders M-618, M-850, MO-1782, MO-1810]

It has also been recognized that 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].

I will consider below whether the facts relevant to this case support a conclusion that the appellant has engaged in a pattern of conduct that amounts to an abuse of the right of access.

Pattern of conduct

The City submits that the appellant's requests amount to a "pattern of conduct." The City takes the position that many of the requests are similar to each other, as they relate to the same issue, which it defines as "the enforcement of the City's by-laws relating to sign permits." It also submits that there is significant overlap in the information that is requested, given that the appellant often follows up on previous requests seeking access to all new information and that he seeks continuous access for records created for properties that have been subject to earlier requests.

The appellant does not contest that he has filed a large number of requests with the City, in particular for permits related to specific addresses or agreements related to advertising signs in identified locations. Although the City submits that most of these requests relate to the same issue, from my review of the request, although the appellant is seeking the same *type* of information for different locations he is not seeking repeated access to the same information. From the information before me, for the most part, each request is separate and distinct from one another and involves different records, even if they relate to the same address or location. Nevertheless, I do accept that they are related and similar requests, particularly given that in some circumstances, as the City has submitted, the appellant follows up on previous requests and seeks access to all additional information dating from a previous request.

In my view, the appellant's requests amount to "recurring incidents of related or similar requests on the part of the requester" as contemplated by former Assistant Commissioner Mitchinson in Order M-850. Accordingly, I find that the appellant's requests amount to a "pattern of conduct," within the meaning of that term.

As to whether this pattern of conduct amounts to "an abuse of process" depends on the presence and relevance of the following factors.

Number of requests

The City submits that at the time that this appeal was filed, the total number of requests submitted by the appellant was 626 and that the City had responded to 590 of them. It submits that this number is "excessive by reasonable standards."

The appellant acknowledges that he has filed a large number of requests. However, he submits that it is not excessive by reasonable standards given the number of billboards in the City that warrant investigation and the fact that his investigation requires that he review building permits. He submits that there are approximately 4000 billboards in the City approximately 2000 of them are illegal. The appellant submits that approximately 80% of his requests are for sign permit files that are managed by the City's Building Department. The appellant argues that the Department deals with a large number of requests for permit records, and is well set up to deal with a large flow of requests of this nature.

The number of requests filed by the appellant in this appeal may not be excessive in relation to the alleged thousands of billboards that warrant investigation. However, in terms of the number of requests submitted by a single requester, in my view, it is sufficiently high enough that I find it to be a relevant factor weighing in favour of a finding that a pattern of conduct exists that amounts to an abuse of the right of access.

Nature and scope of the requests

The City submits that the nature and scope of the appellant's requests are both "broad and varied in nature or unusually detailed or comprehensive." It explains that given that the requester seeks all information relating to signs at particular properties or the entire history of a particular property, locating responsive records entails extensive searches through archival records. It also explains that given that the appellant's requests involve information of a varied nature, they require a number of different departments be involved in the search for responsive records.

The appellant explains that his access requests, which the City has declined to process, fall into three major categories. The appellant defines the categories as follows:

- Category 1: Requests for sign permit documents on file with the Building Department for a particular municipal address. The City files sign permit documents by municipal address. All sign permits for each address are conveniently placed in the same file for easy retrieval. So while the request usually states "building permit, zoning examiners notes, related documents and plan/diagrams for any sign" this description simply describes the content of a permit file.

- Category 2: Requests for enforcement documents concerning investigations of illegal billboards for a particular municipal address on file with Municipal

Licensing and Standards. These documents are similarly filed by municipal address.

- Category 3: Miscellaneous requests related to billboards.

The appellant submits that a significant majority of his request fall within category 1 and are responded to by the Building Department, which, as mentioned above, he argues is "specifically set up to deal with a massive number of requests each year for permit documents." The appellant submits that these access requests are simple to respond to and that the City has rarely asked for extra time or extra payment to conduct the searches.

Having reviewed the access requests that are the subject of this appeal, I do not agree with the City that they are "broad and varied in nature or unusually detailed or comprehensive." Rather, I am of the view that the appellant is quite precise about the information that he seeks. The information sought by the appellant in the requests before me includes the following information:

- building permit files (or documents contained in building permit files) or building inspection information;
- agreements related to specific advertising billboards;
- documents related to agreements related to signs on transit shelters;
- reports or records related to investigations of illegal billboards; and
- information relating to sign painting licences.

In my view, the appellant's requests are not all encompassing or comprehensive, and, although they are detailed, I do not accept that they are unusually so. The appellant seeks specific types of records related to signage by-law enforcement that can be readily grouped into categories. Within those categories he quite clearly identifies the records he seeks. For example, when he seeks records related to building permit files, he identifies them by address or location, and when he seeks agreements he refers to specific advertisements or companies with which the City has advertising arrangements.

I acknowledge that the appellant is seeking a great deal of information. I also acknowledge that in order to respond to the appellant's request the City must communicate with several different departments or conducts searches in several different areas for responsive records. However, in my view, these facts do not necessarily lead to a conclusion that the requests are excessively broad or varied in nature or excessively detailed or comprehensive.

Therefore, I find that the nature and scope of the appellant's requests is not a factor that would support a finding that a pattern of conduct exists that amounts to an abuse of the rights of access.

Timing of the requests

There is no evidence presented by either of the parties that the timing of the requests is a relevant factor to be considered in the determination of whether the appellant's requests fall into a pattern of conduct that amounts to the abuse of the right of access. Accordingly, I find that the timing of the requests is not a relevant factor in the determination of whether the appellant's requests can be described as a pattern of conduct that amounts to an abuse of the right to access.

Purpose of the requests

The purpose of the requests is a relevant factor in the determination of whether a request is part of "a pattern of conduct that amounts to an abuse of the right of access" if it can be demonstrated that the requests are intended to accomplish some objective other than to gain access without reasonable or legitimate grounds. For example, the purpose of the requests is relevant if they are made for "nuisance" value or with the aim to harass the government or break or burden the system.

In many cases, ascertaining a requester's purpose requires the drawing of inferences from his or her behaviour because a requester seldom admits to a purpose other than access [Orders MO-1782, MO-1810].

The City speculates that the appellant may have a number of purposes for filing the requests but that none of them appear to be solely for the purpose of access to the responsive records. The City submits that it believes that the appellant is filing the requests for the purpose of obtaining a policy change with respect to the City's sign by-laws and enforcement procedures for illegal billboards. The City states that the access to information scheme is not the forum for the appellant to effect that change. It submits that the appellant, despite having been given the City's commitment that changes will be made through normal channels to make sign permit by-law enforcement more effective, continues to submit numerous and complicated requests.

The City suggests that the appellant's continued requests, which include follow-up requests for updated information on properties about which he has already obtained information, overburden the City and frustrate its efforts in responding to them. As a result, the City suggests that another of the appellant's possible purposes is to create confrontations in his dealings with the City in order to obtain information to post on his website in a further attempt to bring attention to his complaints and concerns relating to the City's signage enforcement policies and procedures. The City's representations suggest that the appellant's requests are made for "nuisance" value, or with an aim to harass the City in order to effectuate the requested policy change.

The appellant counters that although he has concerns about the sign by-laws and the City's enforcement procedures, he and his organization do not file the requests in an effort to address issues with respect to the sign by-law. He submits:

> Even if the City has undertaken steps to resolve the broader issues related to the sign by-law, which it claims, we are still entitled to the documents on file with the city and are still entitled to continue our research into *individual* illegal billboards because our [access requests] for sign permits on specific properties are designed simply to determine if the billboard on that property is legal and are not related to broader issues with respect to the sign by-law.

He also submits that the purpose of some of his requests are both to provide City Councillors with an audit of the work that the Municipal Licensing and Standards Department has been doing on illegal billboards, as well as to continue his organization's scrutiny of the City's enforcement against illegal billboards.

From my review of the representations, it is clear that the relationship between the City and the appellant is not an easy one. The appellant feels that his efforts to gain access to information have been frustrated because he has used the information to criticize the City. The City, on the other hand, feels that it has made good-faith efforts to respond to the appellant's numerous requests and address his concerns about signage by-law enforcement, but that the appellant continues to frustrate its efforts.

I accept that due to the continuous nature of such a large number of requests, the City may perceive them to be a nuisance or as having been made with the aim to harass. However, in my view, it has not demonstrated that these requests are filed with the intention of accomplishing some objective other than to gain access. Contrary to the City's suggestions, I find that the appellant's behaviour supports his position that he seeks access to the information he requests for reasonable and legitimate grounds; specifically, to review the legality of billboards posted around the City. The fact that he subsequently uses the information to file complaints about illegal billboards or to support his view that signage by-laws and enforcement procedures should be revised, does not alter the fact that his purpose for filing the requests is to gain access to the requested information.

Accordingly, I find that the purpose of the appellant's request is not a factor that leads to a finding that he is engaged in a pattern of conduct that amounts to an abuse of the right of access.

Conclusion

Having considered the factors that, in previous orders, have been found to be relevant to a determination of whether a requester is engaged in a pattern of conduct that amounts to an abuse of process, I have found that the only factor that might support such a finding is the large number of requests that have been filed. Although they are significant in number, I have not found that the nature and scope, the timing or the purpose of the requests could have reasonably been perceived to amount to an abuse of process on the part of the appellant. In my view, in the circumstances of this appeal, it would not be reasonable to conclude that the appellant is abusing his right to access information solely on the basis that he has filed a significant number of requests.

Accordingly, I find that, given the circumstances of this appeal, the appellant is not engaged in a pattern of conduct that amounts to an abuse of the right of access within the meaning of that phrase in section 5.1(a) of Regulation 823 under the *Act*.

It should be noted, however, that my finding is based on the circumstances before me including the number of requests that the appellant had filed as of the date of this appeal. It is not my intention to preclude the possibility of a finding in the future that a significant number of requests, on their own, could amount to an abuse of the right to access within the meaning of section 5.1(a).

Pattern of conduct that would interfere with the operations of the institution

The City takes the position that to process the appellant's numerous requests amounts to "a pattern of conduct that would interfere with its operations."

Above, I noted that the appellant's requests appear to amount to a "pattern of conduct" within the meaning of that term. Now I must determine whether that "pattern of conduct" would "interfere with the operations" of the City.

A pattern of conduct that would "interfere with the operations of an institution" has been defined as one that would obstruct or hinder the range of effectiveness of the institution's activities [Order M-850].

Interference has been found to be a relative concept that must be judged on the basis of the circumstances a particular institution faces. For example, it may take less of a pattern of conduct to interfere with the operations of a small municipality than with the operations of a large provincial government ministry, and the evidentiary onus on the institution would vary accordingly [Order M-850].

The City submits that the number of access requests filed by the appellant at any given time has been excessive. It explains that it's Corporate Access and Privacy (CAP) Office only has three full time access and privacy officers to process access requests. It submits that "last year" CAP received approximately 5140 requests, 626 of which (approximately 12%) were filed by the appellant. The City submits:

> CAP's limited staff resources have been tied up, not only in processing this high volume of requests, but also in responding to the appellant's various complaints and appeals. For example, although the appellant originally agreed to various time extensions for the processing of earlier requests in order to concentrate on those with "priority", he later contacted staff to complain about the delays in processing the earlier requests.
>
> …

> Therefore, in dealing with the high volume of the appellant's requests and in dealing with his various complaints, the effectiveness of the CAP office to process requests from other individuals in a timely fashion has been put at risk and its ability to undertake other activities has clearly been diminished.

The City further submits that in trying to respond to the appellant's large number of requests and his concerns, the program areas' effectiveness in dealing with its core businesses and other functions have been hampered.

The City also expresses some concern because the appellant advised that he plans to file an additional 3000 requests over the next several years. The City submits that this would create unsustainable burden on its limited staff resources.

The appellant takes the position that his requests do not create an unsustainable burden on the City. As noted above he submits that "the [requests] we have filed are very simple to execute for city workers and almost never resulted in the City asking for extra time under the *Act* or extra payment for search time. There is no unsustainable burden." He submits that even if such burden exists, it can be overcome with fees as mandated by the Regulations made under the *Act*.

Having considered all of the circumstances at issue in this appeal, I do not find that the appellant's requests, at this time, amount to a pattern of conduct that would interfere with the City's operations. In my view, my finding is in keeping with previous orders issued by this office.

In Order MO-1427, Adjudicator Sherry Liang had occasion to comment on an institution's assertions that responding to an appellant's requests would interfere with its operations. She stated:

> The District states that this request is a "major interference" with its operations. It states that it is a relatively small municipality engaged in the provision of a variety of services, and that its resources are stretched to the limit. It is concerned about the resources which will be required to deal with this request.
>
> …
>
> [I]t should be noted that the *Act* provides for certain measures which relieve the burden on an institution faced with an apparently onerous request. These are found in section 45 of the *Act* (fees) and the related provisions in the Regulations, and the interim access decision and fee estimate scheme described in Order 81 (which permit, in certain cases, the postponement of the majority of the work required to respond to a request until a deposit has been received). In some circumstances, a time extension under section 20(1) may also provide relief, although where the process described in Order 81 is adopted, such a time

> extension may only be claimed once the appellant pays any deposit which may be required: see Order M-906.
>
> In this case, I conclude that the District cannot rely on "interference with operations" as a ground for finding the request "frivolous or vexatious". The request is in reality much narrower than the District asserts and, in any event, I am satisfied that the *Act* would provide meaningful relief from the burden of responding to the request.

In Order M-1071, Adjudicator Marianne Miller also considered the alternative measures available under the *Act* to relieve an institution faced with a request which may, on the surface, appear likely to interfere with its operations. She noted that:

> Denying a requester his right of access under the *Act* is a serious matter. In my view, the interference complained of must not be of a nature for which the *Act* or jurisprudence (Order 81) provides relief.

I agree with the comments made in these previous orders.

In the circumstances of the current appeal, the appellant is requesting specific information to which he has a right, subject to the exemptions outlined in the *Act*. Having reviewed the request before me closely and considered the representations of the parties, I do not accept that, based on the type of information sought, it is a particularly onerous or complicated task for the City to locate the responsive records. However, I do acknowledge that because the appellant has filed a large number of requests (in fact, a significant percentage of the City's overall requests) for a great deal of information, some of which is held by different City program areas, to locate the sheer amount of information requested places a burden on the City.

While the City's concerns about the burden the appellant's requests place on it are legitimate, I am not persuaded that the relief provided by the *Act* would not be sufficient to address its concerns in this regard. In my view, it would not be reasonable to find that a request is frivolous or vexatious on the basis that it would "interfere with the operations of the institution" where, as here, it appears that cost recovery mechanisms provided by the *Act* would permit the City to mitigate or avoid any such interference.

Accordingly, I do not find that the City has established that the requests submitted by the appellant to date amount to a pattern of conduct that would "interfere with the operations of the institution." However, as with my finding on "abuse of the right to access," my finding here is based on the circumstances before me at this time. Should the number or nature of the requests submitted by the appellant change, the City is not precluded from attempting to demonstrate that the relief provided by the *Act* is insufficient to address the burden that the requests create and that the appellant is engaged in a pattern of conduct that would interfere with its operations.

In summary, based on the circumstances before me, I find that there is insufficient evidence that the appellant has engaged in a "pattern of conduct" that amounts to either an "abuse of the right of access" or that would "interfere with the operations of the institution" pursuant to section 5.1(a).

Section 5.1(b)

Bad faith

Under the "bad faith" portion of section 5.1(b), a request will qualify as "frivolous" or "vexatious" where the head of the institution is of the opinion, on reasonable grounds, that the request is made in bad faith. If bad faith is established, the institution need not demonstrate a "pattern of conduct" [Order M-850].

The term "bad faith" has been defined in Order M-850 by former Assistant Commissioner Mitchinson as:

> "bad faith" is not simply bad judgement or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity; it is different from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with furtive design or ill will [Order M-850].

The City does not make any specific submissions on whether or not it is claiming that the appellant's requests are made in "bad faith". However, the City's submissions appear to suggest that it believes the appellant is submitting a large number of complicated requests for the purpose of gathering information to portray the City in a negative light on his website. As a result, I will address the issue of bad faith.

In Order MO-1168-I, Adjudicator Laurel Cropley made the following findings with respect to a determination of whether a request was made in bad faith. She found that:

> In Order M-864, former Assistant Commissioner [Irwin] Glasberg found that, in the situation where the appellant used information to assist his wife with her legal proceeding against the institution, the access request was filed for legitimate reasons. Having found that the objects of the appellant's requests were genuine and that they were not designed to harass the Board, he concluded:
>
> > I find that the appellant filed his access requests for a legitimate, as opposed to a dishonest, purpose and that he was not operating with an obvious secret design or ill will.
>
> With these comments in mind, I have considered the Board's representations. I will begin by saying that I am not persuaded that the Board has demonstrated that the appellant's request was made in "bad faith". The Act provides a legislated

> scheme for the public to seek access to government held information. In doing so, the Act establishes the procedures by which a party may submit a request for access and the manner in which a party may seek review of a decision of the head. It is the responsibility of the head and then the Commissioner's office to apply the provisions of the Act in responding to issues relating to an access request. In my view, the fact that there is some history between the Board and the appellant, or that records may, after examination, be found to fall outside the ambit of the Act, or that the appellant may have obtained access to some confidential information outside of the access process, in and of itself is an insufficient basis for a finding that the appellant's request was made in bad faith. ***The question to ask is whether the appellant had some illegitimate objective in seeking access under the Act***. I am not persuaded that because the appellant may not have "clean hands" in its dealings with the Board that its reasons for requesting access to the records are not genuine.
>
> ***In a similar vein, there is nothing in the Act which delineates what a requester can and cannot do with information once access has been granted to it*** (see: Order M-1154). In fact, there are a number of exemptions (such as section 10(1), for example) which recognize that disclosure to the public could reasonably be expected to result in some kind of harm. In orders dealing with section 14(1) of the Act, this office has acknowledged that disclosure of personal information to individuals other than the individual to whom the information relates under the Act is, effectively, disclosure to the world, and this is a consideration to be taken into account in determining whether the exemption applies. In my view, the fact that the appellant may decide to use the information obtained in a manner which is disadvantageous to the Board does not mean that its reasons in using the access scheme were not legitimate.
>
> It appears from the nature of the request and the history between the Board and the appellant, that the appellant was not satisfied with the explanation for non-renewal of its contract with the newly amalgamated Board, and that it is seeking access to records relating to the Board's decision. I am satisfied that the appellant is seeking the information for genuine reasons, even though those reasons may be against the Board's interests. Therefore, I find that the Board has not provided me with sufficient evidence to establish that it had reasonable ground for believing that the appellant's access request was made in bad faith. Therefore, the Board cannot rely on this part of section 5.1(b) of the regulation to decline to process the appellant's access request.
>
> [emphasis added]

Considering the circumstances of the current appeal, I acknowledge that the appellant, who is clearly a frequent user of the access to information procedures of the *Act*, has not always made it easy for the City to respond to his access requests without sometimes causing initial confusion or

requiring further clarification. I also acknowledge that the appellant has posted comments on his website that are critical of the City's actions and could be said to portray it in a negative light. However, I cannot agree that this evidence is sufficient to demonstrate that his requests have been made for some dishonest or illegitimate purpose.

In my view, as was the case in MO-1168-I, the requests made by the appellant were made for a genuine purpose. The appellant is involved in an organization that investigates whether certain billboards posted in the City are illegal. Only by examining City records obtained through access to information procedures can the appellant determine whether or not a billboard is illegal and, if so, subsequently file a legitimate complaint. I cannot agree that the appellant's reasons for seeking access to the information he requests or the uses to which he puts that information once he receives it are either illegitimate or dishonest, however disadvantageous they may appear to the City.

Therefore, I find that the City has failed to establish that the requests made by the appellant were made in bad faith for the purposes of section 5.1(b).

For a purpose other than to obtain access

A request is made for a purpose other than to obtain access if the requester is motivated not by a desire to obtain access, but by some other objective [Order M-850]. This is similar to the factor that is relevant in a determination of whether requests amount to an abuse of process under section 5.1(a), but where a request is made for a purpose other than to obtain access under section 5.1(b) it can be deemed as "frivolous and vexatious" without the institution having to demonstrate a "pattern of conduct" [Order M-850].

I have already outlined the parties' representations in this regard in my discussion above where the purpose is a factor in a determination of whether the appellant is engaged in a pattern of conduct that amounts to an abuse of process. I will not reiterate the representations here, but will base my analysis below on their content.

Previous orders have discussed whether requests made for a purpose other than to obtain access qualify as "frivolous or vexatious" within the meaning of section 5.1(b) of Regulation 823.

In Order MO-1168-I, Adjudicator Cropley found that:

> In my view, the fact that once access is obtained, the appellant intends to use the document for a particular purpose, for example to take issue with the Board's decision-making or to bring action against the Board, does not mean that the request is "for a purpose other than to obtain access" within the meaning of section 5.1(b) of the Regulation.

In Order M-860, former Inquiry Officer John Higgins noted:

> … if the appellant's purpose in making requests under the *Act* is to obtain the information to assist him in subsequently filing a complaint against members of the Police, in my view this does not indicate that the request was for a purpose other than to obtain access; rather, the purpose would be to obtain access **and** use the information in connection with a complaint.

In Order M-906, former Inquiry Officer Higgins observed that:

> … to find that a request is "for a purpose other than to obtain access" and thus "frivolous or vexatious" on the basis that the requester may use the information to oppose actions taken by an institution would be completely contrary to the spirit of the *Act*, which exists in part as an accountability mechanism in relation to government organizations.

I agree completely with these comments. I am satisfied that the request was made for the purpose of obtaining access. Moreover, I find that this purpose is not contradicted by the possibility that the appellant may also intend to use the documents against the Board once access is granted. Therefore, I find that the Board cannot rely on this part of section 5.1(b) of the regulation to decline to process the appellant's access request.

I adopt the reasoning applied in MO-1168-I and in the orders that it references, for the purpose of the present appeal.

Considering the circumstances of this appeal, I find that the City has not provided reasonable grounds for me to conclude the appellant's requests are made for a purpose other than to obtain access. As noted above, in my analysis of the "abuse of process" component in section 5.1(a) and the "bad faith" component of section 5.1(b), I am prepared to accept that the appellant legitimately seeks access to the information that he is requesting. He seeks this information in order to determine whether certain billboards are posted illegally or not, a determination that can not be made without a review of the requested records.

Following the orders described above, I find the fact that the appellant may subsequently make use of the records he obtains as a result of his requests under the *Act* to file complaints about illegal billboards *or* to attempt to demonstrate that policy change with respect to procedures in place to respond to certain by-laws is desirable or required, does not indicate that the request was made for a purpose other than to obtain access. Accordingly, I find that it has not been established that the appellant's requests were made "for a purpose other than to obtain access."

In summary, I find that the City has failed to demonstrate that the requests were made in "bad faith" or "for a purpose other than to obtain access" as required by section 5.1(b).

Conclusion

The tests under 5.1 of Regulation 823 set a high threshold that, in my view, has not been met in the circumstances of this appeal. Based on the foregoing analysis, I find that the City has not established the requirements of either section 5.1(a) or (b) of the regulation and that there exists a reasonable basis for finding that the requests made by the appellant are not frivolous or vexatious within the meaning of section 10(1)(b) of the *Act*.

ORDER:

1. I do not uphold the City's decision that the appellant's request in Appeal MA07-29 is frivolous or vexatious.

2. I order the City to issue an access decision for Appeal MA07-29 in accordance with section 19 of the *Act*, treating the date of this order as the date of the request.

Original signed by: April 10, 2008
Catherine Corban
Adjudicator