Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3121

Appeal PA11-508

University of Ottawa

October 22, 2012

Summary: The appellant made a request to the university for information regarding a specified professor. The university issued a decision advising the appellant that his request was frivolous and vexatious on the basis that it was made for a purpose other than to obtain access and was made in bad faith. The university's decision is not upheld and the university is ordered to provide a decision to the appellant.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 10(1)(b); Regulation 460, section 5.1.

Orders and Investigation Reports Considered: MO-1924.

OVERVIEW:

[1] The appellant made a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the University of Ottawa (the university) for the following information:

- All records about [a named individual], since [specified date].
- All records about [a named individual's] law firm, since [specified date].

- All communications and records about [named law professor] with university legal counsels, with university executives and their offices, and with university deans (law) and their offices, since [specified date].

- All records about the Student Appeal Centre (SAC) report released on November 12, 2008, entitled, "Student Appeal Centre 2008 Annual Report", since [specified date].

[2] The university confirmed receipt of the appellant's request and issued a decision advising that it had determined that the appellant's request was frivolous and vexatious as it was made for a purpose other than to obtain access and was made in bad faith.

[3] During my inquiry into this appeal, I sought and received representations from the university and the appellant. Representations were shared in accordance with Section 7 of the IPC's *Code of Procedure* and *Practice Direction 7*.

[4] In this order, I do not uphold the university's decision.

DISCUSSION:

[5] The sole issue to be determined is whether the appellant's request for access is frivolous and vexatious. Section 10(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.

[6] Section 5.1 of Regulation 460 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.

[7] Section 10(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].

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

Grounds for a frivolous or vexatious claim

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

[9] 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?

- 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?

- 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?

- Timing of the requests

  Is the timing of the requests connected to the occurrence of some other related event, such as court proceedings?

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

[10] 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].

[11] The focus should be on the cumulative nature and effect of a requester's behaviour. 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 [Order MO-1782].

[12] The university provided representations on a number of factors and submits that appellant's pattern of conduct amounts to an abuse of the right of access. I set out the university's representations below.

[13] The appellant submits that his request for access is legitimate and the university's decision was a deliberate attempt to delay or refuse to conduct a search for responsive records. The appellant provides evidence that responsive records exist in support of his position that his request was not in bad faith or for a purpose other than to obtain access. I also set out the appellant's representations below.

Number of requests and appeals

[14] The university notes that the appellant has made twenty-four requests, which represents approximately 8% of the total requests received by the university since it began reporting requests to this office. Further, the university notes that all but three of the appellant's requests have resulted in costly and lengthy appeal proceedings with this office including multiple appeals on the same request in several instances. The university provided a detailed table setting out the appellant's requests, and information describing the appeal history of each.

[15] The university submits that the appellant's appeal rate is unusually high as requesters at the university rarely appeal decisions. Accordingly, this results in the appellant's requests being particularly time and resource consuming to process. The university points out that this office has noted in its index of appeals that the appellant's files (appeals) are subject to processing limitations within this office.

[16] Finally, the university submits that in Order M-850, former Assistant Commissioner Tom Mitchinson took into account the high volume of appeals filed by the appellant to this office when considering whether an appellant's request was frivolous and vexatious.

[17] The appellant submits that while the "number of requests" is a factor, I should also consider the fact that some requesters will have a greater need for access than others. The appellant submitted that this office has recognized the validity of his reasons for making his requests and subsequent appeals.[1]

[18] The appellant also disputes the university's submission that the majority of his requests were made prior to his dismissal.

[1] The appellant's evidence of this is an email from the Registrar of this office informing the appellant that he is permitted to have 9 active appeals at a time.

[19] The appellant also submits that the university has never previously suggested that his prior 23 requests or associated appeals were frivolous or vexatious or made for a purpose other than to obtain access or made in bad faith. The appellant argues that the university's decision is an attempt to thwart his attempts at access. The appellant states:

> The university has never warned or disciplined the appellant for requests when the appellant was an employee of the university. The university has never previously complained to the IPC about the appellant's requests and appeals being procedurally improper.
>
> The university now claims that the appellant's requests and appeals since 2006 have for years been an unreasonable burden on university resources yet it has never complained or attempted to resolve the matter previously.
>
> …
>
> This sudden change of position by the university coincides with the newest appellant's request for access regarding a high-profile case involving a university funded … lawsuit entirely funded by the university against the appellant for his critical comments [named] blog.

Informal Communications

[20] The university submits that the consideration of whether a request is frivolous or vexatious will take into account the cumulative nature and effect of the requester's behavior including informal contacts with the institution.

[21] In this particular case, the university submits that the appellant has sent numerous e-mails and letters, as well as telephone communications, to the university with respect to his requests for access to information both inside and outside the formal request mechanism provided for in the *Act*. As evidence, the university submitted the affidavit of the Freedom of Information Coordinator who affirms, at paragraphs 9 through 11:

> In addition to the official requests submitted through the formal access to information procedures, [the appellant] also informally contacts the Access to Information and Privacy Office with a frequency that is much higher than other requestors when he has active access requests and appeals. [The appellant] will regularly call my office, send e-mails or regular mail. He will also occasionally visit the office in person. A sample of this correspondence is attached hereto as Appendix 2 of my Affidavit.

> An example of this informal contact is the phone call I received after issuing in the submissions in response to [specified appeal number]. [The appellant] called me to ask whether [named law firm] prepared the submissions. In response, I explained that I had prepared and signed these submissions myself. The only reason there might have been a similarity was because I had used similar formatting. Unsatisfied with my verbal response over the telephone, he began an exchange of a number of e-mails on this subject, which have been attached hereto as Appendix 3 of my Affidavit.
>
> Considering the volume of these informal contacts, as well as his often express desire for an immediate response, responding to these various forms of communication takes time that could otherwise be spent processing requests, [the appellant's] and others.

[22] The university further notes, that the appellant's communications also include deadlines and ultimatums that the appellant demands that the university respect, including the following example sent in response to the university's decision in the current appeal:

> I therefore urge you to change your untenable initial conclusion immediately and I await your confirmation and a proper decision letter.
>
> Please confirm immediately (by this week) and produce a new decision letter.

[23] As a result, the university submits that the appellant's communications have had a severe, negative impact on the operations of its Access to Information and Privacy Office. The appellant continues to personally target individuals such as the university's coordinator by alleging conflict of interest, despite a finding of this office in Order PO-3009-F that this was not the case. The university submits that the appellant's allegations and confrontational approach are found in a number of communications and attached these as evidence to its representations.

[24] In support of its position that the appellant's informal contacts should be a factor in my consideration of whether his request is frivolous and vexation, the university submits that I should consider the findings in the following decisions:

- The decision from the Alberta Information and Privacy Commissioner, *Grant MacEwan College*, that finds when looking at the volume of requests submitted by a requester, it is also essential to consider informal contacts.

- MO-1921 where Adjudicator Donald Hale took into consideration the fact that the requester had made over one hundred phone calls to the institution, as well as other forms of "informal contacts" such as fax, e-mail and regular mail.

[25] The university also asks that I consider MO-1519 where the adjudicator noted the following about another requester:

> In contrast to working constructively in pursuit of his objectives, the appellant seeks to control the process for responding to and resolving freedom of information matters, and he demands almost unlimited attention of any party who approaches him or whom he deems necessary to contact, be it City representative or a representative of the IPC.
>
> Taken as a whole, I find the evidence supports a conclusion that the appellant's request is part of a pattern of conduct that amounts to an abuse of the right of access, and that is my finding.

[26] The appellant did not address the issue of his informal communications with the university.

Nature and scope of the Requests

[27] The university submits that the appellant's requests cover a broad scope of documents coupled with very detailed and extensive lists of documents, locations or individuals that should be searched. The university submits that the nature and scope of the appellant's requests are similar to those of the requesters in Orders M-850 and MO-1782.

Timing of the Requests and Purpose of the Requests

[28] The university submits that the timing of the appellant's requests is linked to proceedings such as the arbitration of the appellant's dismissal or, in this particular case, with the ongoing litigation involving another individual. The university argues that this factor combined with the other factors illustrates that the appellant's request is for an inappropriate purpose and thus is frivolous and vexatious.

[29] The appellant submits that his access requests have generally related to his protracted labour dispute with the university. He further submits that any of the records he has obtained as a result of these requests has been provided to a named organization or his union. The appellant states:

> The labour dispute stated in 2005. The appellant was dismissed in 2009 and the dismissal is presently in ongoing binding labour arbitration hearings with dates scheduled in May 2012. The arbitration process does

> not have discoveries. It has a confined disclosure process limited only to matters presently before the arbitrator.
>
> As part of the labour arbitration process, the lawyer of the union of the appellant has communicated the particulars that the union is relying on to argue employer bad faith in dismissal. There are nine (numbered) areas of concern retained by the union, including the law suit which is the subject of the appellant's instant access request. The other points relate to several of the appellant's past access requests. This demonstrates one area (labour dispute) where the appellant's access requests are legitimately motivated.

Findings

[30] In order for me to find a "pattern of conduct", the institution must establish recurring incidents or related or similar requests by the appellant.

[31] Based on my review of the appellant's requests, I find that the appellant made a total of 24 requests with 16 requests made before he was dismissed and eight requests (including the present request) following his dismissal. The appellant's requests can be broken down by year as follows:

> 2006 – 1
> 2007 – 0
> 2008 – 15
> 2009 – 6
> 2010 – 1
> 2011 – 1

[32] The appellant's requests in 2008 were numerous but since that time his requests have tapered off. In fact, I find that the appellant has not made a request for his own personal information since September 2010. The appellant also has 28 appeals stemming from his requests. I find the number of the appellant's requests and appeals is significant.

[33] I have reviewed the appellant's 24 requests and find that they are predominantly for his personal information, including the following:

- All records about me that have been produced or sent by or received by the Dean of the Faculty of Science since November 30, 2006.

- All records about me that have been produced or sent by or received by you (or your office) since November 30, 2006; including via your offices of (1) Secretary of the University, (2) FIPPA coordinator and (3) Legal Counsel of the University

(including the office of past Legal Counsel of the University) (including the office of past Legal Counsel [named individual] that you directly oversaw)

- All records about me that have been produced or sent by or received by the VP-Academic of the University [named individual] since November 30, 2006.

- All records about me that have been produced or sent by or received by the President of the University since November 30, 2006.

[34] These requests were all sent on the same day and all relate to information about the appellant by various authors in the university administration. I find that there is some overlap and repetition in these requests. In 2009, the appellant's requests solely relate to his administrative suspension. Later in 2009, the appellant's requests return to requests for correspondence about him sent to and from various individuals at the university and are similar to those submitted in 2008:

- I request all records about me that are in the control of or have been produced or sent by or received by the VP – Academic of the University (named individual) since April 21, 2008.

- I request all records about me that have been sent or received by or are held by [named individual] since May 8, 2009.

- I request all records about me that have been sent or received by or are held by the Dean of the Faculty of Science and/or the Dean's Office, since April 21, 2008 (the date of my previous request for the Dean of Science.

[35] These requests are similar to the requests above and are only dissimilar in date. I find the scope of the appellant's requests relating to his personal information to be specific, in that they are limited to certain individuals, time periods and subject matter. I do not consider the appellant's requests to be overly broad in scope, nor do they contain detailed and extensive lists of documents or locations to search. I do, however, note that the appellant appears to be attempting by his requests to have a complete copy of any university record which contains his personal information.

[36] A number of the appellant's requests also contain requests for general information. I cannot discern how these requests are related and I would not characterize them as similar, overlapping or related. With the exception of one request, I further find that they tend to be narrow in scope, often relating to a single subject matter.

[37] I find that the university's submission on the appellant's informal communications with its staff is a valid factor to consider. Based on my review of the correspondence provided by the university, I find the appellant's informal communications with the

university's freedom of information staff seek to both dictate and control the response and timing of the way his requests and appeals are dealt with by the university.

[38] The university's submission is that the timing of the appellant's requests is linked to his labour arbitration involving the university or the ongoing litigation with a named individual at the university. While I find that this is true, I am unable to find that this is a factor establishing a pattern of conduct. Instead, the timing of the appellant's requests relates to his purpose for making the requests.

[39] Based on my review of the appellant's requests and considering the factors listed above, I find that the university has not established a pattern of conduct that amounts to an abuse of the right of access. While I accept the university's submissions that the number of the appellant's requests and appeals is high, I find that the number of the appellant's requests has significantly decreased and as such is not a relevant factor in my determination.

[40] The appellant's requests for his personal information are similar in nature but again, I find that there is little overlap or repetition in these requests. Further, the appellant has not requested records containing his personal information since 2010. Lastly, I can find no improper purpose nor can I link the appellants request to particular events which would establish a pattern of conduct. Finally, while I find the appellant's informal communications with the university to be troubling in their frequency and tone, I find that this factor alone does not establish the pattern of conduct that amounts to an abuse of the right of access.

[41] I wish to emphasize for the university that not only did I consider each factor in isolation, but I also considered the cumulative effect of the appellant's requests, informal communications and the number and scope of his requests on the university. However, I find that in this present appeal, I am not satisfied that there is a pattern of conduct on the part of the appellant that amounts to an abuse of the right of access.

Pattern of conduct that interferes with the operation of an institution

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

[43] Interference is 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].

[44] The university submits that the exceedingly high number of requests, appeals and other communications is overwhelming the university's ability to meet the overall demand for access to information services. The university reiterates its earlier submission that the appellant's request represents approximately 8% of the total requests for the university and the IPC's 2010 Annual Report concluded that the university has more appeals filed against it than any other university. The university concludes with the following:

> The only reason other requesters have not felt more of an impact is because university personnel frequently work beyond normal working hours to meet the elevated demand for their services caused by the appellant. In the Coordinator's affidavit, she states that she has had to work long hours, including weekends and holidays in order to deal with the increased workload caused by the appellant.

[45] I find that the university has not provided sufficient evidence to establish that the appellant's requests amount to a "pattern of conduct that would interfere with the operations of the institution." The basis for the university's argument is that the staff in the freedom of information office must work above and beyond normal working hours to meet the demand for service by the appellant. Based on my review of the appellant's requests for information, it is not evident to me why his requests would require such extraordinary measures. The university did not provide me with evidence of how it has been required to vary the usual methods of responding to the appellant's request i.e. charging a fee, clarifying the request, time extensions or interim access decisions, in order to reduce the workload or manage the appellant's expectations. Nor did the university provide evidence of the measures needed to be taken in order to respond to the appellant's requests. While the university is required under the *Act* to perform its duties as an institution, it is able to institute policies and procedures for dealing with requesters.

[46] Accordingly, I find that the university has not met the requirements in section 5.1(a).

Request made in bad faith or for a purpose other than to obtain access

[47] Where a request is made in bad faith, the institution need not demonstrate a "pattern of conduct" [Order M-850]. "Bad faith" has been defined as:

> The opposite of "good faith", generally implying or involving actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfil some duty or other contractual obligation, not prompted by an honest mistake as to one's rights, but by some interested or sinister motive. ... "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].

[48] The university submits that the appellant's requests, including the one which is the subject of the current appeal, were made in bad faith. The university notes that when determining whether or not a request has been made in bad faith or for a purpose other than access, it is often necessary to draw inferences from a requester's behavior to determine their true purpose because a requester will seldom admit to a purpose other than access.

[49] The university cites a number of decisions of this office, the British Columbia commissioner's office, and the Alberta commissioner's office. In doing so, the university likens the appellant's behavior and actions to those of the requesters in the decisions relied upon. Regarding the appellant specifically, the university states the following:

> The appellant has been relentless in his use of the *FIPPA* access process as a springboard for his attack on the university and certain individuals. In this instance, he is using the access process to advance his private interests.
>
> …
>
> The appellant has no legitimate interest in the information he has requested in the instant case. He is already aware that the university is funding [named individual's] lawsuit against him as this was confirmed in a letter to him dated October 25, 2011.
>
> The fact that the appellant continued with the access request after receiving written confirmation that the university was supporting [named individual] confirms that the appellant's purpose are not access, but to attack the university and certain individuals all in an effort to "bend them to his will" in the words of the Commissioner in the Grant MacEwen College decision.
>
> There is no conceivable valid purpose for the appellant to have access to the records demanded concerning [another named individual].

[50] The university submits, providing examples from the appellant's blog, that the appellant is acting in bad faith as he misrepresents the decisions received by this office and the information received as a result of those decisions.

[51] Lastly, the university submits that the appellant has indicated his bad faith in the access process by stopping payment on cheques used to pay his access fees for two requests, even after receiving the records.

[52] The appellant submits that the university has not substantiated its claim that he was acting in bad faith. He further submits that the university's submissions regarding postings on his blog are irrelevant to the present appeal. Lastly, he submits that the issues with the stopped payment cheques have been settled and the university has dropped its fees in other requests.

[53] In conclusion, the appellant submits that he has a legitimate reason behind his requests and appeals which are rooted in the following:

- Access to and protection of his personal information;
- Public participation in criticizing institutions;
- Active litigation and labour arbitration;
- Active independent investigation; and
- Media reporting in matters of public interest.

[54] The appellant notes that he is an independent journalist with web information groups and/or registered non-profit organizations. He also notes that he is an independent researcher, blogger and producer and host of a weekly radio show.

Finding

[55] The university's submissions supporting its position that the appellant is acting in bad faith or his requests are for a purpose other than to obtain access are the following:

- The appellant uses his access requests as a means to attacking the university and various individuals within the university administration.

- The appellant already has the information he needs and there is no valid reason for him to be pursuing the current access request.

- The appellant misrepresents the decisions made by this office or the information he has received under the access to information process.

- The appellant's refusal to act fairly in his dealings with the university i.e. not paying for records he has received.

[56] The university submits that the appellant is using the *Act* in order to pursue his private interests, namely attacking the university.

[57] 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 some other objective. 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 or vexatious" without the institution having to demonstrate a "pattern of conduct" [Order M-850].

[58] I find that the appellant's requests and the evidence provided by the university do not support a finding that the appellant is acting in bad faith or has made the request for a purpose other than to obtain access. I have examined the appellant's behavior, including reviewing his blog entries and his correspondence with the university and this office. I also considered the incidents where the appellant stopped payment on the cheques used to pay for records he had received. While I find these incidents would be evidence of a purpose other than to obtain access, I find that since that time, the university has provided records to the appellant and payment has not been an issue.

[59] In Order MO-1924, former Senior Adjudicator John Higgins considered whether a requester's objective of obtaining information for use in litigation with the institution or to further the dispute between the requester and the institution was a purpose other than to obtain access. The Senior Adjudicator states:

> This argument necessitates a discussion of whether access requests may be for some collateral purpose over and above an abstract desire to obtain information. Clearly, such purposes are permissible. Access to information legislation exists to ensure government accountability and to facilitate democracy (see *Dagg* v. *Canada (Minister of Finance)*, [1997] 2 S.C.R. 403). This could lead to requests for information that would assist a journalist in writing an article or a student in writing an essay. The *Act* itself, by providing a right of access to one's own personal information (section 36(1)) and a right to request correction of inaccurate personal information (section 36(2)) indicates that requesting one's personal information to ensure its accuracy is a legitimate purpose. Similarly, requesters may also seek information to assist them in a dispute with the institution, or to publicize what they consider to be inappropriate or problematic decisions or processes undertaken by institutions.
>
> To find that these reasons for making a request are "a purpose other than to obtain access" would contradict the fundamental principles underlying the *Act*, stated in section 1, that "information should be available to the public" and that individuals should have "a right of access to information about themselves". In order to qualify as a "purpose other than to obtain access", in my view, the requester would need to have an improper

> objective above and beyond a collateral intention to use the information in some legitimate manner.

[60] I adopt the approach set out by the Senior Adjudicator for the present appeal. The appellant has provided the purpose behind his request which is the subject of this appeal. I find his reasons to be reasonable and I find that his request is not for a purpose other than to obtain access. Accordingly, I find that the university has not established section 5.1(b).

[61] In summary, I find that section 10(1)(b) of the *Act* and section 5.1 of Regulation 460 do not apply to the appellant's request that is the subject of the appeal. While I have found that the university has not, in this appeal, established that the appellant is frivolous and vexatious, I have found that there are aspects of the appellant's behavior, that if were to continue, could form the basis of another claim by the university.

ORDER:

1. I do not uphold the university's decision that the appellant's request is frivolous and vexatious.

2. I order the university to issue an access decision regarding the request, in accordance with sections 26, 28 and 29 of the *Act*, treating the date of this order as the date of the request, and without recourse to a time extension under section 27.

Original signed by: October 22, 2012
Stephanie Haly
Adjudicator