

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3188

Appeal PA12-210

University of Ottawa

April 18, 2013

Summary: The appellant made a series of 38 requests over an eighteen-month period. The university responded to one of the requests by refusing to process it, arguing that the request was frivolous or vexatious under section 10(1)(b) of the *Act*. In this decision, the university's decision is upheld on the basis that the evidence tendered establishes a pattern of conduct on the part of the appellant that amounts to an abuse of the right of access. As a result, the request is found to be frivolous and vexatious. The order provides that the appellant's right of access will be limited to one active appeal or request at a time.

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: M-850, MO-1782.

OVERVIEW:

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

Provide copies of all documents, including emails, correspondence, memos, complaints, media lines, etc. regarding the letter to the [specified newspaper](published

in the April 7th edition) by [named university's vice-president of governance], since April 1, 2012.

[2] The university issued a decision declining to proceed with the request on the basis that it is frivolous or vexatious, as contemplated by section 5.1 of Regulation 460 under the *Act*. The requester (now the appellant) appealed the university's decision.

[3] During mediation, the appellant provided the mediator with a copy of the letter to which he referred in his request. The appellant maintained that the university has no grounds for making the decision that his request is frivolous or vexatious, and that his request should be processed. The mediator discussed section 5.1 of Regulation 460 under the *Act* cited in the university's decision and some relevant orders with the parties.

[4] The university subsequently advised that it continues to claim that the request is frivolous or vexatious as a pattern of conduct has been established. As no further mediation was possible, the appeal was transferred to the inquiry stage of the appeals process where an adjudicator conducts an inquiry under the *Act*.

[5] I began my inquiry by seeking the representations of the university, a complete copy of which was then provided to the appellant, who also provided me with submissions. The non-confidential portions of the appellant's representations were then shared with the university, which declined to make further submissions.

[6] In this order, I find that the appellant's request is frivolous and vexatious and will order that the appellant's right of access under the *Act* is limited to having one current request and appeal at any given time with both the university and this office.

DISCUSSION:

FRIVOLOUS OR VEXATIOUS REQUEST

[7] The sole issue for determination in this appeal is whether the request for access is frivolous or vexatious. Section 10(1)(b) 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.

[8] 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.

[9] 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].

[10] 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

[11] 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?

[12] In support of its contention that the appellant's access to information request history demonstrates a pattern of conduct that amounts to an abuse of the right of access, the university has provided a table setting out detailed information about each of the 38 requests made by the appellant under the *Act* between January 11, 2011 and July 19, 2012. Included with this data is the date of the request, a description of the subject matter and information relating to those that led to a total of 12 appeals with this office during that period.

[13] The appellant counters this evidence with statements indicating that his requests to the university represent only a fraction of the hundreds of requests for information he has made to various federal, provincial, municipal governments over the past two years.

[14] Based on my review of the actual requests made by the appellant and the timing of each, I conclude that they are excessive by reasonable standards. The requests are often repetitive in nature and, initially, involved activities of the same two professors. Later, the appellant's attention shifted to the university's actions in responding to his requests and the requests were extremely broad in nature.

[15] While the appellant attempts to explain his conduct by stating that the Commissioner's office suggested that he re-submit his requests when the time for filing an appeal on his first eight requests had expired, I find that his actions in the intervening months demonstrate a different course of action. Examining the subject matter of each of the 38 requests, I have no difficulty in finding that they are excessive owing to their repetitive nature and the fact that they are aimed first at the academic activities of the two professors, and then the university's responses to his requests.

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?

[16] The university points out that the requests, taken as a whole, "are unusually detailed in that many directly target and link two University of Ottawa professors and in particular, one professor more often than the other." Specifically, it submits that requests 1-4 are identical to requests 14-17, while there is overlap between the subject matter of requests 27 and 28. Requests 5, 13, 18, 21, 22, 29, 30 (the request which gave rise to this appeal), 31, 32, 33, 34, 36 and 38 seek access to records relating to the internal responses generated within the university as a result of one of his earlier requests. These requests relate solely to the university's response to his earlier requests.

[17] The appellant counters by suggesting that requests 14-17 were submitted on the recommendation of staff with this office only after the time period for appealing the decisions in requests 1-4 had elapsed.

[18] Again, I agree that the majority of the requests are unusually broad in their scope and could potentially capture a huge number of responsive records. As noted above, the subject matter of many of the requests relate not to records relating to the activities of the professors or the expenses incurred by them, but rather seeking a detailed examination of the reaction of a broad range of officials within the university to his requests, many of whom would have had no association whatsoever with the decision-making behind the responses provided by the university.

[19] In addition, many of the records that are responsive to the requests overlap because of the manner in which the requests are phrased and the broad "catchment" which they describe. In many cases, the requests seek the same information from a broad range of university officials, many of whom may have not participated in responding to the requests or whose involvement may have been supervisory or

cursory. I find that this is a significant consideration in my determination of whether the university has established the required "pattern of conduct" that would lead to a determination that the requests are frivolous and vexatious and amount to an abuse of the right of access.

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?

[20] The university submits that many of the requests relate to the activities of the same two individual professors and notes that the appellant did not submit representations to this office in the appeals which gave rise to Order PO-3084.¹ It argues that it is reasonable to conclude from this evidence that the requests have been "made for nuisance value and/or designed to harass individuals at the University resulting in an abuse of the right of access."

[21] The appellant explains his access request history as being part of a series of "identically worded requests to various universities access the country, using professors who were prominent in the media, as an experiment and test so I could learn more about provincial FOI systems". He also indicates that as his requests were made, "representatives of the university took it upon themselves to conduct a series of media interviews about the requests". As a result, the appellant sought access to information by making requests under the *Act* about this process as well.

[22] The appellant states that his access requests to the university are part of an "experiment and test" aimed at enhancing his knowledge of access to information systems. Without any further elucidation of the purpose and methodology behind this "experiment and test", I do not find this explanation to be credible and conclude that it further undermines the appellant's arguments that his requests were made for some valid purpose. Rather, I find that based on their content and repetitive nature, it is reasonable to conclude that the requests were made for some objective other than to obtain access to the requested information.

[23] I find that this consideration weighs significantly towards a finding that the requests made by the appellant establish a pattern of conduct that amounts to an abuse of the appellant's right of access.

¹ Order PO-3084, dated June 7, 2012 in which Commissioner Ann Cavoukian determined that the exclusionary provision in section 65(8.1)(a) applies to expense reports submitted to the university by an identified professor. This appeal arose from two earlier requests from the appellant in this matter.

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]

[24] 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].

[25] The university points out that the request which gave rise to this appeal was made on April 13, 2012, the same day as 9 other requests, and that in three weeks preceding, 4 other requests were filed. The university points out that these 14 appeals were "connected to and contemporaneous with IPC appeal PA12-22 and PA12-24 and the media interest that these files generated in April 2012."

[26] The appellant argues that he submitted multiple requests on the same day "purely for simplicity" and in order to avoid the large fees that would have resulted from a multi-part request.

[27] I accept the university's position that filing a number of requests of a very similar nature and scope over a relatively short period of time demonstrates a pattern of conduct which amounts to an abuse of the right of access. Between February 23, 2012 and May 8, 2012, the appellant submitted a total of 17 requests, all of which involved the activities of the same university professor and the university's responses to various access to information requests and appeals that had been filed at that time. I find that this factor is yet another indication of a pattern of conduct which amounts to an abuse of the right of access.

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

[28] 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].

[29] 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].

[30] The university submits that the volume of requests "and the number of appeals are overwhelming the university's ability to meet the overall demand for access to information services." It states that the 38 requests made since January 2011

represent 22% of the requests received in 2011 and 33% of requests received to August 2012. In addition, these requests gave rise to 12 separate appeals over that same time span.

[31] The appellant indicates that if the university's access to information office staff were feeling overwhelmed by the requests he had submitted, they could have contacted him and some could have been placed on hold.

[32] I find that the requests filed by the appellant have placed an unreasonable burden on the university's resources, particularly considering the very broad nature of many of the appellant's requests, which encompass a large number of records. The university is required to provide access to information services to many individuals and to have to allocate so much of its limited resources to respond to requests submitted by one individual is unreasonable.

Bad faith

[33] Where a request is made in bad faith, the institution need not demonstrate a "pattern of conduct" [Order M-850].

[34] "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].

[35] The university submits that it is reasonable under the circumstances to conclude that the motivation behind the appellant's requests and subsequent appeals is to target, harass and intimidate individuals at the university. It also argues that the pattern of conduct exhibited by the appellant undermines the academic freedom of the professors who have been the subjects of his requests. It suggests that "[A]cademic freedom permits Universities and its professors to freely explore controversial issues and pursue research without fear of interference by the public."

[36] The appellant indicates that he has no agenda, other than to obtain access to publicly available information that is not subject to an exemption or exclusion under the *Act*.

[37] Based on the evidence provided by the university and the appellant, I am unable to ascribe "furtive design or ill will" on the part of the appellant. I am satisfied that the appellant is of the view that his actions are warranted and that he is not acting in bad faith in making the number of requests he has made. However, as indicated above, the appellant appears to concede that his requests are creating problems for the university and that "[I]f your office decides to limit the number of requests I can make to the University, I am prepared to accept that."

Purpose other than to obtain access

[38] 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].

[39] In order to qualify as a "purpose other than to obtain access", the requester would need to have an improper objective above and beyond a collateral intention to use the information in some legitimate manner [Order MO-1924].

[40] The university suggests in its representations that the appellant has some other motive for seeking access to the records that are responsive to his requests but has not elaborated upon this conjecture or provided any evidence to support it. I find that I have not been provided with sufficient evidence to establish that this consideration is applicable in the circumstances of this appeal.

Remedy

[41] 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].

[42] The university argues that as a remedy, the appellant ought to be precluded from making any further access requests with respect to the activities of the professors who were the subject of appeals PA12-22 and PA12-24, which resulted in the issuance of Order PO-3084, which is referred to above. As an alternative, the university suggests that the appellant's right to submit access requests to it be limited through the imposition of conditions limiting the number of requests in such a way that the university would only be required to respond to one request at a time.

[43] In response to the university's suggestion that the appellant's right to make requests be curtailed, as described above, the appellant states "[I]f your office decides to limit the number of requests I can make to the University, I am prepared to accept that."

[44] For the reasons outlined in my discussion above, I find that the university has provided sufficient evidence to enable me to uphold its decision to refuse to respond to the appellant's requests on the basis that they represent a pattern of conduct sufficient to establish an abuse of the right of access. The number of requests made, as well as their repetitive nature, leads to this conclusion. In addition, I was not persuaded by the explanation provided by the appellant as to his reasons for submitting the requests in the first place. I found this statement to be not credible and it did not support the appellant's position.

[45] However, I do not agree that the appellant's conduct amounted to bad faith, nor do I find that the requests were made solely to for a purpose other than to obtain access and cannot find that the requests were frivolous and vexatious on those grounds.

[46] In conclusion, I find that the university has established that the requests were part of a pattern of conduct that amounts to an abuse of the right of access and that they may be properly characterized as "frivolous and vexatious." I further find that the appellant also recognizes that his conduct was such as to unnecessarily burden the university's access to information staff and that some limits ought to be place on his right to make requests under the *Act*. Accordingly, in the order provisions below, I will impose conditions limiting the number of active requests and appeals the appellant may have in relation to the university so as to minimize the impact of the appellant's requests on the university's access to information resources, while still enabling him to make requests for access to information under the *Act*.

ORDER:

1. I uphold the university's decision under section 10(1)(b) of the *Act* that the appellant does not have a right of access to the records he requested because the requests are frivolous or vexatious, and I dismiss this appeal.
2. I impose the following conditions on the processing of any requests and appeals from the appellant with respect to the university 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

his requests and/or appeals that exist at any given time to proceed to completion, the appellant shall notify both this office and the university and advise as to which matter he wishes to proceed.

- (c) If the appellant fails to pursue any of his 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 his behalf or under his direction.
- 4. At the conclusion of one year from the date of this order, the appellant or the university 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: _____
Donald Hale
Adjudicator

_____ April 18, 2013