Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3184

Appeal PA11-400

University of Toronto

March 28, 2013

Summary: The appellant sought access to certain information pertaining to an institute of the University of Toronto. The university decided to deny access to the information claiming that the request was frivolous and vexatious, an abuse of process at common law and moot. The adjudicator does not uphold the university's decision and orders it to provide a decision letter in response to the appellant's access request.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, ss. 1, 2(1) (definition of record), 10(1), 24(1)(a), 24(1)(b), 26 and 29; Regulation 460 to the Act, ss. 2, 5.1.

Orders Considered: M-850, M-860, MO-1168-I, MO-1782, MO-1924, MO-2111, MO-2129, MO-2289, PO-2046, PO-2490, PO-3057-I, PO-3089-F.

Cases Considered: *Borowski v. Canada (Attorney General)* [1989] 1 S.C.R. 342; *St. Joseph Corp. v. Canada (Public Works and Government Services)*, [2002] F.C.J. No. 361 (T.D.); *Brookfield LePage Johnson Controls Facility Management Services v. Canada (Minister of Public Works and Government Services)*, [2003] F.C.J. No. 348 (T.D.); *Canadian Tobacco Manufacturers' Council v. Canada (Minister of National Revenue - M.N.R.)*, [2003] F.C.J. No. 1308 (F.C.); *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2004] O.J. No. 224 (Ont. Div. Ct.); affirmed (Ont. C.A.), [2005] O.J. No. 4047; application to Supreme Court of Canada for leave to appeal dismissed [2005] S.C.C.A. No. 563.

OVERVIEW:

[1] The University of Toronto (the university) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act* or *FIPPA*), for access to the following information:

> Statistics of the following applicants for the Ph. D. program at [an identified institute of the university]
>
> (1) The average age of successful applicants into all Ph. D. programs for the years [specified time period] and [specified time period]
>
> (2) The amount of applicants ages 60 plus for the years [specified time period] and [specified time period]
>
> (3) The religion and sexual orientation of all successful applicants for the years [specified years] and [specified years]

[2] The university issued a decision letter denting access to the information on the basis that the request was frivolous and vexatious. In particular, it took the position that part three of the request was frivolous and vexatious, made in bad faith and an abuse of process. The university further advised that with respect to parts one and two of the request, a complaint of age discrimination that was brought by the complainant pertaining to her failure to be admitted to the identified institute's Ph.D. program for the first specified time period was settled on terms that included a full and final release, which postdated the first specified time period. The university stated that the current request for information pertaining to age for the first of the two specified time periods is "barred by the release" or is "part of an attempt to revisit these issues using *FIPPA* that the university considers vexatious and an abuse of process." The university also advised the requester that "[the identified institute of the university] does not track or use information on age, religion or sexual orientation of Ph.D. applicants in its admissions processes or educational programs".

[3] In a letter sent in response to the university's access decision, the appellant stated:

> You have made the allegation that my request is frivolous and vexatious. My request is relevant to my understanding of the Human Rights Code protected rights. My experience, which is at the very heart of my information request, is very real and not frivolous and vexatious. I was barred from entering the Ph.D. program at "[the identified institute of the

> university] because I was discriminated against due to age and perceived disability, amongst other things.
>
> …
>
> The release of [identified date] was not full and final and that is why I was able to relitigate. …

[4] The requester (now the appellant) also appealed the university's decision to this office.

[5] Mediation did not resolve the matter and it was moved to the adjudication stage of the appeal process where an adjudicator conducts an inquiry under the *Act*.

[6] I commenced my inquiry by sending a Notice of Inquiry setting out the facts and issues in the appeal to the university. The university provided representations. I then sent a Notice of Inquiry along with a copy of the university's representations to the appellant. The appellant provided representations in response.

ISSUES:

A. Is the request frivolous or vexatious?

B. Is the request an abuse of process at common law?

C. Is the request moot?

DISCUSSION:

A. Is the request frivolous or vexatious?

[7] 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.[1]

[8] Several provisions of the *Act* and Regulations are relevant to the issue of whether the request is frivolous or vexatious. Section 10(1)(b) of the *Act* reads:

[1] Order M-850.

> Subject to subsection 69(2), 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.

[9] Section 5.1 of Regulation 460 to the *Act* 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.

[10] An institution has the burden of proof to substantiate its decision that a request is frivolous or vexatious.[2]

[11] 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.[3]

Section 5.1 (a)

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

[12] As indicated above, section 5.1 of Regulation 460 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.

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

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[2] Order M-850.
[3] Order MO-1782.

> [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).

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

[15] 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" [4]:

- *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.

[16] 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.[5]

[17] The university explains in its representations that the appellant applied on two occasions as a Ph.D. candidate at the identified institute of the university, but was not selected for the program.

[4] Orders M-618, M-850, MO-1782, MO-1810, MO-2289.
[5] Orders MO-1782, MO-2289.

[18] The university takes the position that:

> She has subsequently engaged in freedom of information requests and human rights complaints against the university, related to her non-admission. Although her requests and complaints have been few in number, they have been very labour intensive because the appellant is uncooperative and inconsistent and exhausts every possible step, even where there appears to be no reasonable prospect for success.

[19] The university further submits that the appellant "has attributed her non-admission to unfounded and bizarre homophobic and anti-semitic beliefs about [the identified institute of the university] and its admissions process", which are "fundamentally offensive to the university and its commitment to Equity, Diversity and Excellence".

[20] In the university's view, the appellant's request:

> … is part of a continuing pattern of conduct by the appellant, designed to further her homophobic and anti-semitic agenda, and an ill founded belief that religion, sexual orientation or age are factors in admission to the [identified institute of the university] Ph.D. program.

[21] The university submits that on the basis of these ideas or beliefs, the appellant made two Human Rights complaints and two access requests under *FIPPA* on the same subject matter - "her non-admission to the [identified institute of the university] Ph.D. program." The university submits that in the present appeal "the purpose of the appellant is clearly articulated in her correspondence, quoted to [an administrative tribunal] and in its decisions." In its view, the request "is intended to accomplish an objective other than to gain access, based on discriminatory elements."

[22] The university takes the position that:

> … these requests are made for the malicious or misguided reason of attacking [the identified institute of the university's] admission process in the context of a homophobic and anti-semitic agenda, not for the purpose of gaining access to records. It is also the university's submission that the request is made in bad faith, as its homophobic and anti-semitic basis is directly contradictory and offensive to fundamental university values and principles.

[23] The university explains that the identified institute is guided by a policy on Equity and Diversity "which articulates in detail the strong commitment of [the identified institute of the university] to social justice and the just treatment of each individual

member of its community and the communities that it serves." The university also points to its Statement on Equity, Diversity and Excellence and submits that:

> The purposes of the statement are to express the university's values regarding equity and diversity, and relate these to the university's unwavering commitment to excellence in the pursuit of its academic mission. They are a hallmark of the university's approach to issues of equity and diversity. The appellant's homophobic, anti-semitic agenda and view are antithetical and profoundly offensive to these core values of the university, the values of the Information and Privacy Commissioner/Ontario and of the legislature of Ontario that enacted *FIPPA*.
>
> …
>
> In the context of the appellant's views and stated beliefs, processing this request would be offensive and repugnant to a community which embraces and explicitly recognizes the value of equity and diversity.

[24] In support of its position, the university refers to excerpts from decisions of another administrative tribunal, and submits that the appellant's reasons for pursuing all these processes are based on:

> … a bizarre misconception about the significance and connection of her silent presence on a [named organization] video, the [identified institute of the university] admissions process and her perceptions of a homosexual and Jewish domination of the executive of [the named organization] (an independent organization that is not part of or under the control of the university).
>
> It is the university's submission that further processing of such a request would be an abuse of process and offensive to the university's commitment to equity and diversity.

[25] The university asserts that the appellant's request amounts to "a pattern of conduct that amounts to an abuse of the right of access":

> Given the requester's persistence, uncooperativeness and exhaustion of all process steps, the university submits that the request is made for its nuisance value, and to harass the university in the context of the appellant not having been accepted in the [identified institute of the university's] Ph. D. program in [specified year] and [specified year].

> The [other administrative tribunal] ruled that the [proceedings] were instituted without any reasonable grounds. The university submits that the same is the case for this request. It is an attempt to revisit through *FIPPA* issues that have been addressed in the [other administrative tribunal] decisions.

[26] The appellant asked that her representations in this matter remain private and confidential. Without revealing the specific details of her representations the appellant sets out her theories on why she was not admitted to the institute's Ph. D. program and disputes the university's position that her request is frivolous and vexatious. She also disputes the assertion that the identified institute of the university does not track or use information on age or religion of Ph.D. applicants in its admissions processes or educational programs.

Analysis and finding

[27] In support of its position, the university points to two requests (including the one before me) made under the *Act* and two other complaints (only one of which actually named the university as a party) made by the appellant before another administrative tribunal. In my view, however, it is the number of the requests before this office that is germane. That said, the existence of other proceedings before other administrative bodies may be relevant in considering the factors relating to the timing and the purpose of the request, as well as whether the request was made in bad faith or for a purpose other than access.

[28] There are only two requests at issue. The appellant's first request was addressed in two orders of this office.[6] The second request is before me. In the authorities relied upon by the university to support its frivolous and vexatious claim, appellants had made many more requests to the respective institutions. For example, in Order MO-1782, 28 requests had been submitted to the receiving institution. In Order MO-2111, 27 requests had been received and in MO-2289 there were 626.

[29] Furthermore, each of the two requests is for different information, although there was perhaps an overlapping time period. It could also be argued that they both arose out of the appellant not being admitted to the identified institute's Ph.D. program on two occasions. However, in my view, the requests are very different in scope and nature. The first request was for information pertaining to the appellant, only. The request before me is for information relating to applicants to the identified institute's Ph.D. program.

[30] I acknowledge that second request was made a very short time after the ruling made by the other administrative tribunal (where the university was not a party), that

[6] See Orders PO-3057-I and PO-3089-F.

commented on the appellant's failure to establish an evidentiary basis for her complaint against an organization that is not a part of the university. The request at issue in this appeal may well have arisen as a result of the determination in the other proceeding, but this timing, in my view, does not support a finding that the request before me is frivolous and vexatious. Quite the contrary, it may point to the appellant attempting to obtain evidentiary support for her theories as to why she was not admitted to the institute's Ph.D. program.

[31] Finally, the university attempts to link the appellant's stated purpose for her request to certain evidence discussed in the decisions of the other administrative tribunal, as well as the comments made by the decision-maker in the proceeding against an organization that is not a part of the university. I have read the excerpts referred to by the university. In my view, the decision-maker's comments referenced by the university point to a lack of evidence to support the appellant's various theories advanced in the context of that proceeding, rather than a blanket comment on the motive and purpose behind the appellant's access request that is at issue before me. The appellant expressed in her letter sent in response to the university's decision letter the purpose for her request, which, in the appellant's words, "is relevant to my understanding of the Human Rights Code protected rights." It must be kept in mind that there is a difference between the purpose of the request and the purpose for which the information is to be used if access is granted. In my view, the university has failed to lead sufficient evidence to establish that the request at issue is intended to accomplish some objective other than to gain access without reasonable or legitimate grounds. For example, that it was made for "nuisance" value, or that it is the appellant's aim to harass the university or to break or burden the system.

[32] In my view, the university has failed to establish a pattern of conduct that amounts to an abuse of the right of access.

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

[33] The university submits that although the appellant's requests and complaints have been few in number, they have been very labour intensive "because the appellant is uncooperative and inconsistent and exhausts every possible step, even where there appears to be no reasonable prospect for success."

[34] Relying on Order MO-2111, the university states that while the appellant has not been aggressive, she has been uncooperative:

> She has persistently exhausted available processes in support of an agenda that is profoundly offensive to the university and, in so doing, has invoked not only the access provisions under *FIPPA*, but [other statutory] processes.

[35] The university submits that the appellant has not worked constructively with the university to resolve her requests. The university then recounts its experience with the processing of the request addressed in Order PO-3057-I, where, the university states, after not mentioning or objecting to the clarification of the wording of the initial request, at the end of the mediation of the underlying appeal, the appellant sought to revert to the pre-clarification wording.[7] The university states that in that appeal, it had disclosed some withheld information to the appellant and had asked a named organization to provide a copy of a video to the appellant, even though the organization was not a part of the university.

[36] The university submits that it:

> … expended considerable resources and effort in its constructive work to clarify the request with the appellant, in its good faith attempt to process the request as thoroughly as possible, in granting the appellant reasonable access to all responsive records, in waiving the fee despite limited representations, in assisting the appellant by asking if [a named organization] would provide her the video, and in mediating as diligently and as openly as possible.

Analysis and finding

[37] In my view, the university has failed to lead sufficient evidence to establish "a pattern of conduct that would interfere with the operations of the institution." I find that it is the requests under the *Act* that I must consider for the purposes of a determination whether this part of section 5.1(a) applies, not proceedings before another administrative tribunal, one of which did not even name the university as a party. This is the second of two requests made by the appellant to the university under the *Act*. This does not amount to a multiplicity of requests made by the appellant under the *Act*.

[38] Furthermore, a claim that a request is frivolous and vexatious because the requester's pattern of conduct would interfere with the operations of the institution should not be made just because an appellant is uncooperative or even frustrating. Simply reverting back to the pre-clarification wording of a request, which I note was dealt with in an interim order, making unfounded allegations of misconduct in another administrative proceeding or not working constructively with the university with respect to these two requests, does not, in my view, constitute "a pattern of conduct that would interfere with the operations of the institution."

[39] As a result, 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 or

[7] I note that this appeal was ultimately resolved by two orders, the first of which (PO-3057-I) determined the scope of the request at issue in that appeal, upholding the university's position.

would interfere with the operations of the institution as set out in section 5.1(a) of Regulation 460 under the *Act*.

Section 5.1(b)

Bad faith

[40] 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".[8]

[41] 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.

[42] The university takes the position that the appellant's ability to make a request for certain information under the *Act* is barred by the existence of a release in a matter commenced by the appellant with respect to, amongst other things, her not being admitted to the identified university institute's Ph.D. program for the first time period set out in the request. The university states that this complaint was settled at mediation on a without prejudice basis on terms that included a full release "covering all matters prior to the date of the settlement". The university states that, notwithstanding the release, it granted the appellant access to certain records relating to the first time period set out in the request.

[43] The university submits that the appellant's request for similar information pertaining to the later time period in the face of the release "is a further step in her persistent and ongoing attempts to raise the age issue in a bad faith manner that the university submits is frivolous and vexatious".

[44] The university further submits that:

> … the appellant's actions are consistent with the definition of bad faith in Order M-850, in that they are "prompted … by some interested or sinister motive" and that she has made her request because she consciously intends to promote a bizarre, homophobic and anti-semitic agenda

[8] Order M-850.

> respecting the [identified institute of the university's] admissions process – a "dishonest purpose of moral obliquity". In this context it is necessary to note that the appellant's actions and beliefs as elucidated in the [other administrative tribunal] decisions, may originate in profoundly misguided ideas, which she may legitimately hold and believe. However, their execution and presentation in the context of a statutory process such as that set out in *FIPPA*, is offensive and repugnant to [the identified institute of the university] and the university.
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> It is the view of the university that the request is intended to accomplish an objective other than to gain access, based on discriminatory elements. The [other administrative tribunal] ruled that the [proceedings] were instituted with an objective that was not legitimate. It is the university's view that the appellant is seeking the information described in part 3 for the same objectives described in the [other administrative tribunal] decision. A request made for a purpose other than to obtain access is frivolous and vexatious and/or constitutes an abuse of process …

[45] The appellant expressed in her letter sent in response to the university's decision letter that the request "is relevant to my understanding of the Human Rights Code protected rights" she also stated that "the release of [identified date] was not full and final and that is why I was able to relitigate".

Analysis and finding

[46] The university did not provide me with a copy of the release it refers to in its representations, so I have no idea whether its terms included a consideration of the *Act*'s access provisions. I have some doubt that this office was a party to this release or that proceedings before it were specifically limited by the terms of the release.

[47] The *Act* imposes statutory obligations on institutions with respect to the disclosure of government-held information. It requires the institution to disclose information upon request, where that information is not excluded from the *Act* or is not subject to exemption from disclosure. In *Toronto Police Services Board v. (Ontario) Information and Privacy Commissioner*, 2009 ONCA 20 (CanLII) (reversing [2007] O.J. No. 2441), the Ontario Court of Appeal recently affirmed the strong public accountability purposes served by the *Act* and the need to "ensure that citizens have the information required to participate meaningfully in the democratic process." This is reflected in the purposes of the *Act* and in the fact that the Commissioner may make orders regarding disclosure of information that are binding on institutions.

[48] The weight of judicial authority is to the effect that it is not possible to contract out of the *Act*.[9] In the context of an access request under the *Act*, in order to be withheld from disclosure, a record must either be excluded from the application of the *Act* under section 65 or an analogous provision, or qualify for an exemption according to its terms.

[49] For an institution to enter into an agreement that certain information in its custody or control that is subject to the *Act* would not be disclosed, would be to contract out of its obligations under *FIPPA*. This would undermine the public policy of accountability and transparency that is the foundation of the access provisions of the *Act*.

[50] The legislature has turned its mind to the question of when and whether confidentiality provisions outside of the *Act* may prevail over the *Act* [see section 67(1) and the example given above]. A list of prevailing provisions is contained in the *Act*, and further, some other statutes may contain their own specific prevailing provisions. Beyond these, there is no provision that an institution, by agreement, can exclude information in its custody or control from the *Act*.

[51] Thus even if the release had specifically referred to an access request under the *Act*, it would be subject to the comments above.

[52] 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 wrote 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.

[9] See, in this regard *St. Joseph Corp. v. Canada (Public Works and Government Services)*, [2002] F.C.J. No. 361 at paragraphs 51-55 (T.D.); *Brookfield LePage Johnson Controls Facility Management Services v. Canada (Minister of Public Works and Government Services)*, [2003] F.C.J. No. 348 at paragraphs 14-19 (T.D.); *Canadian Tobacco Manufacturers' Council v. Canada (Minister of National Revenue - M.N.R.)*, [2003] F.C.J. No. 1308 at paragraphs 122-124 (F.C.); *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2004] O.J. No. 224 at paragraph 33 (Ont. Div. Ct.); affirmed (Ont. C.A.), [2005] O.J. No. 4047; application to Supreme Court of Canada for leave to appeal dismissed [2005] S.C.C.A. No. 563.

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.

[53] On the face of the request, the requester seeks access to information, which in her letter responding to the university's access decision, she indicates "is relevant to my understanding of the Human Rights Code protected rights." I have considered the comments made by the decision maker in another administrative proceeding commenced against an organization that is not a part of the university and have very carefully considered the university's representations. It is not my role in this proceeding to consider the merits of a human rights claim, but to examine the request in its factual context. The third part of the request is for information about the religion and sexual orientation of successful Ph.D. applicants, which is the main focus of the university's concerns. The first and second parts of the request are for information relating to age. I note in passing that the institute's own application for admittance into the Ph.D. program does request the applicant's age, although it does not request the applicant's religion or sexual orientation.[10]

[54] I have acknowledged above that the second request was made a very short time after the ruling made by the other administrative tribunal that took issue with the appellant's failure to lead sufficient evidence to establish an evidentiary basis for the appellant's complaint in that proceeding.[11] The request may well have arisen as a result of the determination in the other proceeding, but this timing, in my view, does not support a finding that the request before me was made in bad faith. As indicated in my discussion above, it may instead point to the appellant attempting to obtain evidentiary support for her theories as to why she was not admitted to the institute's Ph.D. program.

[55] In my view, the request made by the appellant was made for a genuine purpose. I cannot agree that the appellant's reasons for seeking access to the information she requests or the uses to which she puts any information she may receive are either illegitimate or dishonest, however misguided they may appear to be.

[56] Therefore, I find that the university has failed to establish that the request made by the appellant at issue before me was made in bad faith for the purposes of section 5.1(b).

For a purpose other than to obtain access

[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 by some other objective.[12] Previous orders have discussed whether requests made for a purpose other than to obtain

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[10] This is a publicly available document available on the institute's website.
[11] Brought against an organization that is not a part of the university.
[12] Order M-850.

access qualify as "frivolous or vexatious" within the meaning of section 5.1(b) of Regulation 460.

[58] In Order M-860, dealing with the equivalent section under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA*), former Senior Adjudicator 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. [Emphasis in original]

[59] In Order MO-1924, again dealing with the equivalent section under *MFIPPA*, former Senior Adjudicator John Higgins provided extensive comments on when a request may be found to have a purpose other than to obtain access. In that case, the institution argued that the objective of obtaining information for use in litigation or to further a dispute between an appellant and an institution was not a legitimate exercise of the right of access. In rejecting that position, Senior Adjudicator Higgins stated:

> 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 former Senior Adjudicator Higgins for the present appeal.

[61] The appellant set out the purpose of her request in her letter sent in response to the university's access decision where she wrote that "[m]y request is relevant to my understanding of the Human Rights Code protected rights." Moreover, I find that this purpose is not contradicted by the possibility that the appellant may also intend to use any responsive documents against the university if access is granted. While her approach may be difficult, I find that her request is not for a purpose other than to obtain access. Accordingly, I find that the university has not established that section 5.1(b) applies.

[62] In summary, I find that the university 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

[63] The tests under 5.1 of Regulation 460 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 university 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*. Therefore, I find that the university cannot rely on sections 5.1(a) or (b) of the regulation to decline to process the appellant's access request.

B. Is the request an abuse of process at common law?

[64] The university submits that the IPC controls its own process and can refuse a matter which would frustrate the intent of the legislature or the purposes of *FIPPA* or the IPC.

[65] The university submits that:

> Given the appellant's intentions and beliefs, elucidated in the [other administrative tribunal] decisions, the university submits that processing of this request would be inconsistent with the purposes of the IPC and of *FIPPA*, which would become tools to further the requester's homophobic and anti-semitic agenda.

[66] In Order PO-2490, former Senior Adjudicator Higgins concluded that parties to an appeal are not precluded from arguing that a request under the *Act* is an abuse of process at common law. In this regard, former Senior Adjudicator Higgins endorsed the

reasoning of former Commissioner Tom Wright in Order M-618, who considered a claim of abuse of process on the basis of common law principles, prior to the addition of the "frivolous or vexatious" provisions to the *Act*. In that case, former Commissioner Wright stated:

> I have been referred to ample and persuasive legal authority for the proposition that, as an administrative tribunal exercising quasi-judicial functions, the Commissioner is "master of his own process". On this basis I believe that I have the necessary authority to control what I identify as abuse of that process which would frustrate the intent of the Legislature in creating both a freedom of information regime and an office for its administration.
>
> The authority of an administrative tribunal to prevent abuses of its own process is affirmed in the judgment of Misener J., of the Ontario Court (General Division), in *Sawatsky v. Norris* (1992), 10 O.R. (3d) 67. Judge Misener considered that, even absent the express power to deal with abuses of process granted by section 23 of the *Statutory Powers Procedure Act* R.S.O. 1990, as amended, a review board under the *Mental Health Act* "has the common law right to prevent abuse of its process, absent an express statutory abrogation of that right" (at p. 77).

[67] Former Senior Adjudicator Higgins then went on to consider the application of the common law principles in the circumstances of PO-2490. However, because the common law principles are, to a significant extent, the foundation of the "frivolous or vexatious" provisions of the *Act*, he referred to previous decisions in that regard, and other case law on the subject, in deciding this issue in Order PO-2490.

[68] Like former Senior Adjudicator Higgins in Order PO-2490, because the principles that would apply to an allegation that a request is an abuse of process or "frivolous or vexatious" at common law are, to a significant extent, the foundation of the frivolous or vexatious provisions of the *Act*, I return to my findings above in deciding this issue.

[69] In my view, in the circumstances of this appeal, the university has failed to meet the threshold of establishing or reasonable grounds that the appellant engaged in a pattern of conduct that amounts to an abuse of the right of access or would interfere with the operations of the university or that the access request was made in bad faith or for a purpose other than to obtain access. Accordingly, the university has failed to establish that the request at issue in this appeal is "frivolous or vexatious" under the *Act* or is an abuse of process at common law.

C. Is the request moot?

[70] The university submits that "since the information that the appellant seeks is neither used nor tracked, it follows that the university would not have records responsive to the request, rendering the request moot." The university reiterates that the identified institute of the university "does not track or use information on age, religion or sexual orientation of Ph.D. applicants in its admissions processes or educational programs".

[71] The university submits that Order PO-2046 sets out a test for "mootness" and its application to appeals under the *Act*, sourced from *Borowski v. Canada (Attorney General)*[13] (*Borowski*).

[72] The university submits that applying the first part of the *Borowski* test there is "no tangible and concrete dispute because the scope of the dispute in the present case is beyond and outside of the scope of the request".

[73] The university submits that:

> In this case there is no "dispute" since [the identified institute of the university] does not track or use information on age, religion or sexual orientation of Ph. D. applicants in its admissions processes or educational programs. There is no active or "live controversy" as contemplated in *Borowski*.

[74] Regarding the second part of the test, whether in the event that the request is moot, the IPC should nevertheless exercise its discretion to process the request, the university submits:

> Based on the present facts, the university asks the IPC to note that the university has already informed the appellant in its [decision letter] that [the identified institute of the university] does not track or use information on age, religion or sexual orientation of Ph. D. applicants in its admissions processes or educational programs. To proceed with the request would not advance the purposes of the statute.

[75] Accordingly, the university asks that the appeal be dismissed.

Analysis and finding

[76] Several sections of the *Act* deal with the formalities of making an access request.

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[13] [1989] 1 S.C.R. 342.

[77] Section 1 of the *Act* sets out that the purposes of the *Act* are,

> (a) to provide a right of access to information under the control of institutions in accordance with the principles that,
>
> > (i) information should be available to the public,
> >
> > (ii) necessary exemptions from the right of access should be limited and specific, and
> >
> > (iii) decisions on the disclosure of government information should be reviewed independently of government; and
>
> (b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.

[78] Section 10(1) of the *Act* sets out a person's general right of access to records:

> Subject to subsection 69(2), 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,
>
> > (a) the record or the part of the record falls within one of the exemptions under sections 12 to 22; or
> >
> > (b) the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious

[79] Section 24(1) of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
>
> > (a) make a request in writing to the institution that the person believes has custody or control of the record;
> >
> > (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;

[80] Section 26 of the *Act* provides that:

> Where a person requests access to a record, the head of the institution to which the request is made or if a request is forwarded or transferred under section 25, the head of the institution to which it is forwarded or transferred, shall, subject to sections 27, 28 and 57, within thirty days after the request is received,
>
> > (a) give written notice to the person who made the request as to whether or not access to the record or a part thereof will be given; and
> >
> > (b) if access is to be given, give the person who made the request access to the record or part thereof, and where necessary for the purpose cause the record to be produced.

[81] Section 29 of the *Act* describes the content of a notice of refusal under section 26. Section 29 reads:

> (1) Notice of refusal to give access to a record or a part thereof under section 26 shall set out,
>
> > (a) where there is no such record,
> >
> > > (i) that there is no such record, and
> > >
> > > (ii) that the person who made the request may appeal to the Commissioner the question of whether such a record exists; or
> >
> > (b) where there is such a record,
> >
> > > (i) the specific provision of this *Act* under which access is refused,
> > >
> > > (ii) the reason the provision applies to the record,
> > >
> > > (iii) the name and position of the person responsible for making the decision, and
> > >
> > > (iv) that the person who made the request may appeal to the Commissioner for a review of the decision.

[82] Section 2(1) of the *Act* specifically defines a "record" as follows:

> "record" means any record of information however recorded, whether in printed form, on film, by electronic means or otherwise, and includes,
>
> (a) correspondence, a memorandum, a book, a plan, a map, a drawing, a diagram, a pictorial or graphic work, a photograph, a film, a microfilm, a sound recording, a videotape, a machine readable record, any other documentary material, regardless of physical form or characteristics, and any copy thereof, and
>
> (b) subject to the regulations, any record that is capable of being produced from a machine readable record under the control of an institution by means of computer hardware and software or any other information storage equipment and technical expertise normally used by the institution;

[83] Section 2 of Regulation 460 under the *Act* states:

> A record capable of being produced from machine readable records is not included in the definition of "record" for the purposes of the *Act* if the process of producing it would unreasonably interfere with the operations of an institution.

[84] Generally speaking, an institution is not required to create a new record in response to a request under the *Act*.[14]

[85] In Order MO-2129, in the course of addressing a request for information under *MFIPPA* that appeared to exist within the record holdings of an institution, but not in the format asked for by the appellant in that appeal, Adjudicator Colin Bhattacharjee went on to address the obligations of the Toronto Police Services Board (the Police) in the circumstances of that appeal, determining that:

> … If the request is for information that currently exists in a recorded format different from the format asked for by the requester, as is the case in this appeal, the Police have dual obligations.
>
> First, if the requested information falls within paragraph (a) of the definition of a record (e.g., paper records), the Police have a duty to

[14] See Order MO-1989 upheld in *Toronto Police Services Board v. (Ontario) Information and Privacy Commissioner*, 2009 ONCA 20.

> identify and advise the requester of the existence of these related records (i.e., the raw material). However, the Police are not required to create a record from these records that is in the format asked for by the requester (e.g., a list).
>
> Second, if the requested information falls within paragraph (b) of the definition of a record, the Police have a duty to provide it in the requested format (e.g., a list) if it can be produced from an existing machine readable record (e.g., a database) by means of computer hardware and software or any other information storage equipment and technical expertise normally used by the institution, and doing so will not unreasonably interfere with the operations of the Police. In such circumstances, the Police have a duty to create a record in the format asked for by the requester.
>
> In my view, a reasonable search for records responsive to an access request would include taking steps to comply with these two obligations. …

[86] The university argues that the request is moot on the basis that the identified institute of the university "does not track or use information on age, religion or sexual orientation of Ph.D. applicants in its admissions processes or educational programs". In my view that is answering a question that was not asked. Accordingly, the request is not moot on the grounds suggested by the university. The request seeks access to certain information. As discussed above, the application form for the institute's Ph.D. program requests the age of the applicant. If there are no records in the custody or control of the university that are responsive to the request, then the university should issue the appropriate decision letter in accordance with section 26 of the *Act*, rather than simply claiming that the request is moot.

[87] Accordingly, I will therefore order the university to issue an access decision to the appellant, in accordance with the terms of the *Act*, without claiming that the request is frivolous or vexatious.

ORDER:

1. I do not uphold the decision of the university.

2. I order the university to issue an access decision in response to the appellant's request, treating the date of this order as the date of the request and without claiming that the request is frivolous or vexatious, all in accordance with sections 26, 28 and 29 of the *Act*.

3. I further order the university to send me a copy of the access decision issued to the appellant pursuant to Provision 2 of this order when the decision is issued to the appellant.

Original Signed By: March 28, 2013
Steven Faughnan
Adjudicator