Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3325

Appeal PA12-537

University of Ottawa

March 25, 2014

Summary: The University of Ottawa received a request for access to a report prepared by a named psychiatrist and all records about the report since a specified date. The university issued a decision advising that the request was frivolous or vexatious pursuant to section 10(1)(b) of the *Act* on the basis that it was made for a purpose other than to obtain access and was made in bad faith. In this order, the adjudicator does not uphold the university's decision and orders it to issue an access decision with respect to the responsive records.

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: Orders MO-850, MO-1924, PO-2915, PO-2917 and PO-3121.

Cases Considered: *Toronto Police Services Board v. (Ontario) Information and Privacy Commissioner*, 2009 ONCA 20 (CanLII) (reversing [2007] O.J. No. 2441).

OVERVIEW:

[1] The University of Ottawa (the university) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a report about the requester prepared by a named psychiatrist. The requester also sought access to all records which referred to the report since January 1, 2008. The requester specified

that in searching for responsive records, the university's search should include the following types of records in the following locations:

> I expect that there are respondent records (communications, emails, documents, electronic media, etc.) in the offices of:
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> a) The Dean of the Faculty of Science, [named individual]; and
> b) The VP-Governance; and
> c) The VP-Academic; and
> d) The Legal Counsel of the University; and
> e) The President of the University; and
> f) The President's executive aide; and
> g) Campus Protection Services (Security); and
> h) University public and media relations staff and/or directors.
>
> I expect that respondent records will include but not be limited to: voice recordings, news media articles, web articles, security reports, campus surveillance information (including video), emails, letters, faxes, financial invoices and/or bills, reports by others, and other reports by [named medical doctor].
>
> Please provide all records in electronic for on CD, to save the costs of photocopies. Please provide electronic versions of all electronic media such as voice recordings, video, and photographs.

[2] The university issued a decision indicating that the request is frivolous or vexatious pursuant to section 10(1)(b) of the *Act*, for the reasons set out in section 5.1 of Regulation 460 of the *Act*.

[3] The requester, now the appellant, appealed the university's decision.

[4] During mediation, the university advised that it maintains that the request is frivolous or vexatious because it was made for a purpose other than to obtain access. The university explained that the appellant had already received access to some of the responsive records through litigation. The university also indicated that similar types of records were adjudicated in Order PO-2915 which upheld the university's decision to deny access to the responsive records.

[5] As a mediated resolution could not be reached, the appeal was transferred to the adjudication stage of the appeal process for an inquiry. The sole issue to be determined in this inquiry is whether the request is frivolous or vexatious within the meaning of section 10(1)(b) of the *Act*.

[6] During my inquiry into this appeal, I sought and received representations from the university and the appellant and shared these in accordance with this office's *Code of Procedure* and *Practice Direction Number 7.*

[7] For the reasons that follow, I do not uphold the decision of the university.

DISCUSSION:

Frivolous or Vexatious

[8] As noted above, in this appeal I must determine whether the appellant's request for access to specific information is frivolous or vexatious within the meaning of section 10(1)(b) of the *Act*. That section 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.

[9] 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.

[10] 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.[1]

[1] Order M-850.

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

Grounds for a frivolous or vexatious claim

(a) Pattern of conduct that amounts to an abuse of the right of access or would interfere with the operations of an institution.

[12] In the current appeal, the university does not make any submissions on whether the request at issue in this appeal demonstrates a "pattern of conduct that amounts to an abuse of the right of access or would interfere with the operations of [the university]" as contemplated by the test to determine whether it was "frivolous or vexatious" set out in section 5.1(a) of Regulation 460. It states that the "pattern of conduct" was not at issue for this specific request.

[13] Accordingly, whether or not the request can be considered to be frivolous or vexatious within the meaning of section 10(1)(b), depends on whether the portion of the test set out in section 5.1(b) of Regulation 460 can be established by the university.

(b) The request is made in bad faith or for a purpose other than to obtain access

[14] As set out in section 5.1(b) of Regulation 460, a head can conclude that a request is frivolous or vexatious within the meaning of section 10(1)(b) of the *Act* if they are of the opinion on reasonable grounds that the request is made in bad faith or for a purpose other than to obtain access.

[15] The university submits that the appellant's request was both made in bad faith and for a purpose other than to obtain access.

Purpose other than to obtain access

[16] 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.[3]

[17] Previous orders have found that an intention by the requester to take issue with a decision made by an institution, or to take action against an institution, is not sufficient to support a finding that the request is "frivolous or vexatious."[4]

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[2] *Ibid.*
[3] *Ibid.*
[4] Orders MO-1168-I and MO-2390.

[18] 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.[5]

[19] Where a request is made for a purpose other than to obtain access, the institution need not demonstrate a "pattern of conduct."[6]

[20] The university takes the position that the appellant's request has been made for "a purpose other than to obtain access" as contemplated by section 5.1(b) of Regulation 460. It points to Order M-850 where former Assistant Commissioner Tom Mitchinson discussed this key phrase:

> In my view, this is a phrase whose meaning is relatively straightforward. There are no terms of art, nor terms which have particular meaning in a legal context. If the requester was motivated not by a desire to obtain access pursuant to a request, but by some other objective, then the definition in section 5.1(b) would be met, and the request would be "frivolous" or "vexatious."

[21] It is the university's position that the appellant's motivation in making this specific request has "at least" two purposes other than to obtain access to the responsive records. It submits that the first is to "by-pass the interim award pertaining to the confidentiality of documents issued in his labour dispute with the university and be able to publish the records at stake." The second, it submits, is "to obtain a controversial decision of [this office] on the already adjudicated issue on an excluded status of the records under section 65(6) of the *Act*." It summarizes that "the appellant seeks to re-litigate matters already decided by [this office] in Order PO-2915 and by the Labour Arbitrator in his Interim Award."

[22] The university submits that the appellant already has access to the records responsive to the current request and that these records are subject to a confidentiality order issued by a labour arbitrator in proceedings involving the university and the appellant. In addition to taking the position that this indicates that the appellant's purpose in making the request is other than to obtain access, the university also expresses concern that if it were obliged to respond to the access request, the Freedom of Information Coordinator's office would be put in a position where it would "contribute to a failure to comply with the Arbitrator's Order."

[23] The university also submits that the current situation can be distinguished from that in other orders issued by this office that have found that the objective of obtaining information for use in litigation or to further a dispute between the appellant and an institution is a legitimate exercise of the right of access because in those situations the

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[5] Order MO-1924.
[6] Order M-850.

appellants sought information that was not already in their possession. It submits that in the context of this appeal, given that the appellant "has already been provided access to the records in an arbitration process," his purpose for making the request cannot be for the purpose of obtaining access, it must be for another purpose.

[24] The university further submits that the appellant has previously made a very similar request which was addressed by this office in Order PO-2915. In that Order, Adjudicator Frank DeVries upheld the university's decision that the responsive records were excluded from the scope of the appeal pursuant to labour relations exclusion at section 65(6)3 of the *Act*. The university submits that although the request in the current appeal is more specific and for a different time period, any responsive records "would also fall under the same exclusion as the two requests are related to the same subject matter."

[25] The appellant disputes the university's position that (1) the request repeats a prior request, (2) that he wishes to circumvent or revisit Order PO-2915, (3) that he already has access to the requested records, (4) that he seeks to circumvent the labour arbitrator's confidentiality order, and (5) that he is attempting to re-litigate the interim award.

[26] The appellant submits that due to the different date ranges ascribed to the current request and that which the university claims is similar that resulted in Order PO-2915, the current request covers different responsive records. Also, the appellant submits that the requests are differently worded and, although he concedes that there may be some "accidental overlap" in the responsive records, there is no reason to conclude that the specific records sought by his current request would also be responsive to those sought by the request that gave rise to Order PO-2915.

[27] He further submits that given that the university has not established that the current request is a repeat of a prior request, there is no basis to their argument that the request has been made in bad faith to circumvent or revisit the issues and records that were addressed in Order PO-2915.

[28] He also submits that although he obtained access to some records responsive to his current request, they were disclosed to him in a process that is distinct from the access to information process set out in the *Act* and that the records that were disclosed to him in the labour arbitration process are bound by the legal principle of "implied undertaking" which prevents disclosure to non-parties. He submits that he seeks access to the responsive records for the purpose of revealing information contained in them to the public. Additionally, he states that given that the specific grievances before the labour arbitrator are not about the subject matter covered by the current request, there is no reason to conclude that there is complete overlap between the arbitration disclosures and his current access request.

[29] With respect to the university's allegation that he seeks to circumvent the arbitrator's interim award, the appellant submits that the interim award cannot be "conflated with an order to ban publication of specified documents via routes other than the litigation, as it is solely an explicit confirmation and practical application of the implied undertaking rule." He submits that the "interim award applies solely as an implied undertaking of the 'documents produced'" and "it is meant to protect the process of disclosures in litigation, not to ban access to documents obtainable via routes other than litigation, as with all implied undertaking circumstances."

[30] Finally, the appellant disputes the university's allegation that he seeks to re-litigate the arbitrator's interim award by making this request. He submits that the interim award is not about gaining access to documents, but is about the procedural protection of the disclosure process in arbitration.

[31] In reply, the university reiterates that the records responsive to the appellant's request, the specific report of the psychiatrist and three corresponding documents were provided to the appellant in the context of the arbitration proceedings involving the appellant and the university. It reiterates its position that the confidentiality order issued by the arbitrator in those proceedings encompasses these records.

[32] The university also submits that the appellant's stated motivation for seeking access to the records is for "public participation" which, in their view, is for the purpose of using the access to information process to circumvent the arbitrator's confidentiality order.

[33] On sur-reply, the appellant disputes the university's position that all the responsive records were provided to him during through arbitration proceedings as he submits that there should be more responsive records than those that he received in arbitration. He also reiterates his view that the university is not barred from providing access to the records by virtue of the arbitrator's confidentiality order.

Analysis

[34] In Order MO-1924,[7] former Senior Adjudicator John Higgins provided an extensive discussion of 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, former 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

[7] Followed by Orders MO-2326, PO-2761 and PO-3121.

> 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 a 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 decision or processes undertaken by institutions.
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> 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.

[35] I adopt the approach set out by former Senior Adjudicator Higgins for the purposes of this appeal. I find that the university has not provided sufficient evidence to support a finding that the appellant's request was made for a purpose other than to obtain access.

[36] I do not accept the university's concern that the arbitrator's award prohibits it from responding to the appellant's access request. The labour relations proceedings which involve both the appellant and the university are separate and distinct from the access process in the *Act* that sets out the appellant's right to obtain access to information. 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*,[8] the Ontario Court of Appeal 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 institution.

[8] 2009 ONCA 20 (CanLII) (reversing [2007] O.J. No. 2441).

[37] 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]. A list of prevailing provisions is contained in the *Act*, and further, some other statutes may contain their own specific prevailing positions. Beyond these, there is no provision that an institution can exclude information in its custody or control from the *Act*.

[38] In regard to the arbitrator's confidentiality order, which was provided to me by the university, there is no evidence before me that suggests that it would prevail over the university's obligations to perform its statutory duties outlined in the *Act*. There is also no evidence that when making such order the arbitrator considered or applied the *Act*. In my view, the confidentiality order does not prohibit the institution from responding to an access to information request under the *Act*.

[39] Therefore, I find that the existence of the confidentiality order does not prevent the institution from exercising its obligations under the *Act* with respect to responding to the appellant's request for information. It should be noted, however, that it is not for me to determine whether the appellant's public disclosure of any information obtained through the access to information process outlined in the *Act* that is also subject to a labour arbitrator's confidentiality order, would be a breach of that order.

[40] Although I acknowledge that the appellant may have been provided with access to some of the records that are responsive to his request during the course of labour relations proceedings, in the circumstances of this appeal, I do not accept that this necessarily leads to the conclusion that he is motivated by an objective other than to obtain access. From my review of the parties' representations, as well as the arbitrator's confidentiality order, it is clear that the access ordered to any records that may have been disclosed to him through the labour arbitration process is subject to certain restrictions. Therefore, such restricted access is clearly not equivalent to the kind of unrestricted access that would be granted under the *Act* if it is found that no exclusions or exemptions apply to some or all of the information. Accordingly, I do not accept that either the existence of the arbitrator's confidentiality order or the fact that the appellant may already have restricted access to some of the records responsive to his request supports a conclusion that he is motivated by an objective other than to obtain access.

[41] Additionally, I do not accept the university's argument that by requesting access to the specific records sought in his request, the appellant's purpose is not to obtain access to those records, but is to revisit matters that were previously addressed in Order PO-2915. From my review of the requests for records sought in both the appeal that gave rise to Order PO-2915 and the current appeal, it is clear that they are not identical. In fact, the university concedes in its representations that the request in the current appeal is more specific and for a different time period. As a result, although there may be some overlap, it is clear that records that were not at issue in Order PO-2915 would be responsive to the current request. Moreover, while it is possible and, given the subject matter, likely, that similar exclusions or exemptions might be applied

to the records responsive to the request in the current appeal, I do not accept that the appeals are similar enough to find that the appellant's purpose in making this request is to revisit Order PO-2915 rather than to obtain access to the specific documents identified in his request.

[42] The records sought by the appellant include and relate to a psychiatric report that was prepared about him. I accept that he legitimately seeks access to these records through the *Act*. I acknowledge that the dispute between the university and the appellant is acrimonious and that the appellant has previously publicly disclosed information that the university believes paints it in a negative light. I am well aware that should he be granted access to some or all of the responsive records he may publicly disclose some of the information that they contain. However, as noted above, in Order MO-1924, former Senior Adjudicator Higgins stated that "requesters…may seek information…to publicize what they consider to be inappropriate or problematic decision or processes undertaken by institutions." Accordingly, in the circumstances of the current appeal, regardless of what the appellant chooses to do with the information that he seeks, should he be granted access to it under the *Act*, in my view, it is clear that his purpose for making the request is genuine and he legitimately seeks access to the responsive records.

[43] As a result, I find that the university has failed to establish that the request was made by the appellant for a purpose other than to obtain access as contemplated in section 5.1(b) of Regulation 460.

Bad faith

[44] The university also submits that there are also reasonable grounds to establish that the request is made in bad faith, as contemplated by the "bad faith" component of section 10(1)(b).

[45] Where a request is made in bad faith, the institution need not demonstrate a "pattern of conduct."[9]

[46] "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

[9] Order M-850.

> negligence in that it contemplates a state of mind affirmatively operating with furtive design or ill will.[10]

[47] The university submits that although its "initial motive" for finding that section 10(1)(b) applied to the request was based on its position that the requester was making an access request for purposes other than to obtain access, all of the reasons that it has previously mentioned can also provide reasonable grounds to conclude that the appellant had "a state of mind affirmatively operating with furtive design" and therefore, that the appellant's request was made in bad faith.

[48] The university submits that in Order M-850, former Assistant Commissioner Mitchinson summarized examples of the meaning of "abuse" in the legal context and included in that summary "situations where a process is used more than once for the purpose of revisiting an issue which has been previously addressed." It submits:

> [T]he combination of the fact that the appellant already has access to the requested records and the knowledge by the appellant of the precedent orders, which protected the confidentiality of the records and excluded this type of document from the scope of the *Act*, it would be hard to conclude that this request was made in good faith.

[49] It also submits that by making the request at issue in the current appeal, the appellant seeks to revisit "matters already decided by [this office] in Order PO-2915 and by the labour arbitrator in his interim award." Specifically, it submits that given that the appellant already has access to the requested records, coupled with the appellant's knowledge of precedent orders, including Order PO-2915, which protected the confidentiality of the records and excluded them from the scope of the *Act.* As a result, the university submits that it would be difficult to come to a conclusion that the request was made in good faith.

[50] The university further submits that it "had a 'reasonable ground' to conclude that the appellant had a 'state of mind affirmatively operating with furtive design,'" and therefore, that the appellant's request was made in bad faith." It does not, however, provide the evidentiary basis for that "reasonable ground" in its representations.

[51] The appellant submits that seeking access to records through the access to information process set out in the *Act* cannot be said to be in bad faith "simply because some [responsive] records are subject to an implied undertaking." He further submits that for reasons outlined in his arguments that I have set out under the heading "Purpose other than to obtain access," the university has not satisfied its burden to show his request was made in "bad faith."

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[10] *Ibid.*

Analysis

[52] Applying the definition referred to above, for similar reasons as those I have outlined above in my analysis of whether the appellant's purpose for filing the request was one other than to obtain access, I find that there is insufficient evidence before me to support a finding of bad faith on the part of the appellant in this appeal. Although the appellant has previously filed a large number of access requests with the university and it is of the view that he is using the *Act* in order to criticize its actions and administration, in my view, there is insufficient evidence to establish that, in this case, he is motivated by some dishonest purpose. The records responsive to his request include and relate to a report prepared by a psychiatrist that contains an evaluation of the appellant himself. I am satisfied that the appellant has a genuine desire to seek access to the specific records that he has requested.

[53] As previously noted, the appellant may already have obtained access to some of the responsive records through the arbitration proceedings. As highlighted by both the university and the appellant, for the purposes of the labour arbitration these records are subject to a confidentiality order that imposes an "implied undertaking" on the parties not to disclose them. In my view, this does not support a conclusion that the request was made in "bad faith." Rather, I find that the appellant legitimately seeks access to the records using the access scheme outlined in the *Act*, which as noted above is separate and distinct from the arbitration process, recognizing that should he be granted access to them, or portions of them, his use of that information will not be subject to restrictions.

[54] Again, I acknowledge that the relationship between the parties is acrimonious and that the appellant has previously publicly expressed negative comments about the university. I also acknowledge that the appellant has stated that he seeks access to this information for "public participation" and may choose to reveal whatever information that may be disclosed to him in a public forum. As stated by Adjudicator Laurel Cropley in Order M-1154, "there is nothing in the *Act* which delineates what a requester can and cannot do with information once access has been granted to it." Similarly, as I noted above, former Senior Adjudicator Higgins stated in Order MO-1924 that "requesters may also seek information … to publicize what they consider to be inappropriate or problematic decisions or processes undertaken by institutions." In my view, the fact that the appellant may publicly disclose the content of the records if he is granted access to them does not mean that his reasons for using the access scheme are not legitimate or are in "bad faith."

[55] There is insufficient evidence before me to suggest that, with respect to the access request before me, the appellant is acting with some dishonest or illegitimate purpose or goal. I am satisfied that he legitimately seeks access to the information that he has requested, which is a report prepared by a psychiatrist about him, and I am unable to ascribe "furtive design or ill will" on his part. As a result, I find that the

university has failed to establish that the request was made by the appellant in bad faith for the purposes of section 5.1(b) of Regulation 460.

[56] In sum, I do not uphold the university's decision that the request that is at issue in this appeal is frivolous or vexatious as contemplated by section 10(1)(b) of the *Act*. Accordingly, I will order the university to provide the appellant with a decision letter in response to his request.

ORDER:

1. I order the university to provide the appellant with a decision letter in response to his request for for access to a report by a named psychiatrist and all records about the report since January 1, 2008, in accordance with the provisions of the *Act*, treating the date of this order as the date of his request. The university is to refer to the wording of the original request when responding to it and when preparing its decision letter.

2. In order to verify compliance with provision 1 of this order, I reserve the right to require the university to provide me with a copy of any decision letter provided to the appellant.

Original signed by: March 25, 2014
Catherine Corban
Adjudicator