Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3150

Appeal MA13-454

Town of Ajax

January 15, 2015

Summary: The Town of Ajax received a request for access to information pertaining to a court proceeding involving the requester. The town issued a decision advising that the request was frivolous or vexatious pursuant to section 4(1)(b) of the *Act*. In this order, the adjudicator does not uphold the town’s decision and orders it to issue an access decision with respect to the responsive records.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 4(1)(b); Section 5.1(a) and 5.1(b) of Regulation 823.

Orders Considered: Orders M-850, M-860, M-1154, MO-1168-I, MO-1782, MO-1924, MO-2111 and MO-2289.

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

OVERVIEW:

[1] The Town of Ajax (the town) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act* or *MFIPPA*) for access to information pertaining to a court proceeding involving the requester. In particular, the request was for “paperwork” sent by a named solicitor to the town “for legal fees in the amount of

$43,704.25" pertaining to the court proceeding as well as for "paperwork" concerning the outcome of the court proceeding.

[2] In its initial decision letter, the town relied on section 4(1)(b) of the *Act* to deny access to the requested information, on the basis that the request was frivolous or vexatious.

[3] The requester (now the appellant) appealed the town's decision.

[4] During the course of mediation, the town issued a supplementary decision letter in which it maintained its position that the request was frivolous or vexatious and also took the alternative position that information in the responsive records would, in any event, qualify for exemption under sections 10(1)(a), (b) and (c) (third party information) and section 12 (solicitor-client privilege) of the *Act*.

[5] Mediation did not resolve the appeal and it was moved to the adjudication stage of the appeals process where an adjudicator conducts an inquiry under the *Act*. In the course of adjudication, I requested and received a copy of the records that the town considered to be responsive to the request, accompanied by a detailed index of records. There are additional exemptions claimed in the town's index of records.

[6] I decided to first address whether the request is frivolous or vexatious and after that determination, decide on the next steps to be taken with respect to the processing of this appeal.

[7] I commenced my inquiry by sending the town a Notice of Inquiry setting out the facts and issues in the appeal. The town provided representations in response. I then sought representations from the appellant on the facts and issues set out in a Notice of Inquiry as well as the town's non-confidential representations. The appellant provided responding representations.

[8] For the reasons that follow, I do not uphold the decision of the town.

DISCUSSION:

Frivolous or Vexatious

[9] 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]

[1] Order M-850.

[10] Several provisions of the *Act* and Regulations are relevant to the issue of whether the request is frivolous or vexatious.

[11] Section 4(1)(b) of the *Act* reads:

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

[12] Section 5.1 of Regulation 823 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.

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

[14] 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

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

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[2] *Ibid.*

[3] Order MO-1782.

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

> [I]n my view, a "pattern of conduct" requires recurring incidents of related or similar requests on the part of the requester (or with which the requester is connected in some material way).

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

[18] 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 it is the requester's aim to harass the government or to break or burden the system.

[19] 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]

Section 5.1(b)

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

[5] Orders MO-1782, MO-2289.

Bad faith

[20] 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".[6]

[21] "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.[7]

Purpose other than to obtain access

[22] 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.[8] 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."[9]

[23] In Order M-860, 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]

[24] In Order MO-1924, 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

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[6] Order M-850.
[7] *Ibid.*
[8] *Ibid.*
[9] Orders MO-1168-I and MO-2390.

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.
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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.

[25] I adopt the approach set out by former Senior Adjudicator Higgins for the present appeal.

The town's representations

[26] In support of its position that the request before me is frivolous or vexatious, the town refers to the investigation of a zoning by-law infraction which ultimately resulted in the appellant being found guilty. The town also relies on a circumstance set out in the confidential portion of its representations.

[27] The town further refers to a cost order made against the appellant in the court proceeding, submitting that:

> .. due to his stubborn resistance and uncooperative nature, [the appellant] was ordered to reimburse the town for much of the costs incurred by its solicitor.

[28] The town submits that throughout the by-law enforcement investigation and after the court decision the appellant made allegations of misconduct against various individuals, including by-law enforcement officers, the solicitor that represented the town in the court proceeding and other town staff.

[29] In addition, the town submits that before the court proceeding, the appellant would routinely call town staff requesting information. The town submits:

> When he was unable to get the answer he wanted, [the appellant] would then start calling staff in other departments for the same information. This is a common pattern of behaviour, and his contact with town staff ranged from senior staff to supervisors and front-line workers, most of which have no knowledge or involvement with his particular case. This harassment escalated to the point that staff were directed to forward any and all inquiries from [the appellant] to the town's solicitor. After the court decision in favour of the town, [the appellant] continued his harassment of staff, resulting in another directive to staff advising that inquiries from [the appellant] must be directed to the town's FOI [Freedom of Information] Coordinator.

[30] The town submits that this conduct has continued. The town states that in a telephone call in February 2014 the appellant told a town tax associate "that he will be publishing some report shortly against the town, accusing them of embezzling funds" and that he has spoken to the Law Society of Upper Canada (Law Society), who told him the town "was in the wrong and he can sue them". The town submits that this is "a common statement from [the appellant] and has caused a considerable degree of anxiety and confusion among town staff."

[31] The town states that the appellant filed a complaint with the Law Society against the solicitor acting on behalf of the town, which was dismissed without a hearing.

[32] The town further submits that:

> Since July 2012, [the appellant] filed six separate requests for information under the [*Act*]. On two instances he dropped off a new request as he was picking up the information from a previous request. It is further noted that [the appellant's] constant and harassing phone calls to staff continued during this time. Nevertheless, the town released all records to which the requestor was entitled to under the *Act*. The information requested has typically been related to the already decided court case and judgments. [The appellant] has made the town and its solicitor well aware of his intent to reverse the judgments made against him, even though such a result is no longer available to him.

[33] The town also submits that the appellant has used the access to information process as a means to delay complying with the order requiring his payment of the town's legal fees as directed by the court.

[34] The town states that:

> It is the opinion of the town that [the appellant's] actions are a pattern of conduct that amounts to an abuse of the right of access and have interfered significantly with the operations of the institution, impacting quite a few of the town staff, at all levels at different times, across many departments. Many of the staff have spent an inordinate amount of time dealing with this matter and [the appellant]. This pattern of conduct - and [the appellant's] own admission that his intent is to reverse judgements made by the courts – also demonstrates that his purpose is to accomplish an objective other than to gain access to information.

[35] The town's position is that given the appellant's pattern of conduct, had it not claimed that this request was frivolous or vexatious, the appellant "would have continued to submit requests in an effort to find information to justify his allegations, information which does not exist." The town submits:

> The requests of [the appellant] have become repetitive, both in the nature of the information being requested and for the fact that it relates to a matter that has been fully decided by the courts. Though it has been made clear to him that no further records will be released on these issues, namely the financial documents submitted to the town by its hired solicitor relevant to this case which have already been released to him, he persists in submitting similar requests. This continuation indicates that he is acting in bad faith and with the intent to disrupt the operations of this institution.

[36] The town further states that the majority of the records that would be responsive to the request at issue in this appeal have already been provided to the appellant through the court proceeding.

The appellant's representations

[37] The appellant denies that his request is frivolous or vexatious or is made in bad faith. The appellant submits:

> The [town] has hired staff for the purpose of providing information, provided it is paid for. We do not expect to get the information for free. We are not asking to violate the privacy of anyone. The information we request concerns us alone. Therefore, it is not a privacy issue.

[38] The appellant expresses amazement over how the town addresses matters concerning him. He submits:

> … We gave the town a simple request, and that's it. Why certain people at [the town] have overreacted is beyond comprehension. We do not deserve to be treated with such hostility. If [the town] has some fear, that is not our problem. If [the town] is worried about what we will do with the information we pay for, they need not worry, because it doesn't concern them. That is our business. If anything comes about which does concern them, then they have the right to act accordingly. Otherwise they should behave professionally.

[39] The appellant submits:

> Our point here is, if [the town] has nothing to hide, then be transparent, and stop behaving like there is something to hide. Why such a fuss over a minor, simple request.
>
> We are not required to give them a reason as to why we request information concerning us. … Therefore, it is unreasonable for [the town] to make crazy accusations about what they think we might do with our information and based upon their own fears, try to stop a simple request.
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> Why doesn't [the town] just wait and see, hope for the best, and deal with it when it comes.

[40] The appellant included a newspaper clipping pertaining to town expenditures in support of his position.

<u>Analysis and finding</u>

[41] 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*,[10] 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 institutions.

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[10] 2009 ONCA 20 (CanLII) (reversing [2007] O.J. No. 2441).

[42] In support of its position, amongst other things, the town refers to the manner in which the appellant interacted with individuals working for or representing the town, the cost award in the court proceeding and the appellant's six previous requests.

[43] I acknowledge that the request at issue was made after the court proceeding and 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. On the contrary, it may lend support to the appellant's expressed intention to reverse the judgment made against him.

[44] 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 he requests or the uses to which he puts any information he may receive are either illegitimate or dishonest, however misguided they may appear to be to the town.

[45] Furthermore, while the town alleges that there are overlapping requests, they do not provide sufficiently detailed and convincing evidence to establish specifically in particular how they overlap. In my view, the evidence provided by the town in this regard is simply not sufficient to satisfy the burden of proof to substantiate its decision that a request is frivolous or vexatious.

[46] The town states that the appellant has received certain records in the court proceeding. The processes are distinct. 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 52 or an analogous provision, or qualify for an exemption according to its terms.

[47] In many of the authorities where a request has been held to be frivolous or vexatious, 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.

[48] It must also 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 town 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.

[49] Furthermore, the town 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 tribunal. In my view, based on previous orders of this office the number of the

requests for information made by the appellant to the town does not amount to a multiplicity of requests made by the appellant under the *Act*.

[50] Furthermore, a claim that a request is frivolous or 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. In my view, in the circumstances of this appeal and considering 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, the conduct of the appellant alleged by the town does not satisfy the requisite threshold.

[51] 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 would interfere with the operations of the institution as set out in section 5.1(a) of Regulation 823 under the *Act*.

Bad faith

[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:
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> > 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.
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> 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.
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> 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.
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> 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] I have acknowledged above that the request was made after the court proceeding. 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's expressed intention to reverse the judgment made against him.

[54] On the face of the request, the requester seeks access to information relating to the court proceedings. It is not my role in this proceeding to consider the merits of the court proceedings, but to examine the request in its factual context.

[55] As set out above, 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 he requests or the uses to which he puts any information he may receive are either illegitimate or dishonest, however misguided they may appear to be to the town.

[56] I acknowledge that the relationship between the parties is acrimonious and that the appellant has previously expressed negative comments about the town, or individuals working for or representing the town. I have also considered the circumstance set out in the confidential portion of the town's representations. I also acknowledge that the appellant 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 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." 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."

[57] 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, and I am unable to ascribe "furtive design or ill will" on his part. As a result, I find that the town 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 823.

For a purpose other than to obtain access

[58] I am well aware that should the appellant 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*, I am satisfied that his purpose for making the request is genuine and he legitimately seeks access to the responsive records.

[59] In summary, I find that the town has failed to demonstrate that the request at issue was made in "bad faith" or "for a purpose other than to obtain access" as required by section 5.1(b) of Regulation 823.

[60] Accordingly, I do not uphold the town's decision that the request that is at issue in this appeal is frivolous or vexatious as contemplated by section 4(1)(b) of the *Act*. Accordingly, I will order the town to provide the appellant with a decision letter in response to his request.

ORDER:

1. I order the town to provide the appellant with a decision letter in response to his request, in accordance with the provisions of the *Act*, without claiming that the request is frivolous or vexatious and treating the date of this order as the date of his request.

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

Original Signed By: January 15, 2015
Steven Faughnan
Adjudicator