

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3465

Appeal PA13-347

Sunnybrook Health Sciences Centre

February 24, 2015

Summary: The appellant filed a thirteen-part request with Sunnybrook for access to various records. Sunnybrook issued a decision denying the appellant access under section 10(1)(b) of the *Freedom of Information and Protection of Privacy Act* on the basis that the request was "frivolous and vexatious." The appellant appealed Sunnybrook's decision. Sunnybrook's decision is not upheld and it is ordered to issue an access decision to the appellant.

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

Orders and Investigation Reports Considered: M-850, MO-1168-I and MO-1924.

OVERVIEW:

[1] Sunnybrook Health Sciences Centre (Sunnybrook) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following:

- Security video on April 18th, 7:30am to 9am, northeast camera of power plant
- Power plant diesel purchases and returns for 2012

- Temporary diesel tank records fill/empty for 2012
- Description of investigation of reported theft on April 18th 2013 to security of materials belonging to Sunnybrook
- Sewage pump repairs for T wing 2010-2012
- Minutes of any meetings that I was spoken about 2011 – June 18, 2013 involving [three named individuals]
- Expense reports for [six named individuals] 2010-2013
- Chilled water and heating coil repair expense for 2013
- Results of reports of [named individual] drinking during work hours reported on [specified date] and two other dates to [named individual]
- Records relating to funds received re all scrap electric motors [named individual] had [named individual] take to scrap yard from energy retrofit in 2012
- Loss Report/Damage Report from all repetitive floods 2011 – June 18, 2013, each time it rains for L wing, M wing, and A wing
- Power plant staff skilled trade licenses of each employee 2011 – June 18, 2013
- In stock count of portable heaters in power plant at present, June 18, 2013.¹

[2] In response to the request, Sunnybrook issued a decision denying access to the requested records. Sunnybrook's decision stated:

[A]ccess has been denied to the records under section 10(1)(b) of the *Act*. The provision applies to the records because it is our opinion on reasonable grounds that your request is frivolous or vexatious.

Considered in the context of your record of disruptive behaviour directed toward numerous Sunnybrook employees as well as the hospital itself, we are satisfied that your request has been made in bad faith, and if

¹ This is the request as restated by Sunnybrook in its decision letter of July 9, 2013. The appellant confirmed during the appeal process, that he accepts Sunnybrook's restatement of his request as accurate; accordingly, this is the request for the purposes of the appeal and this order.

processed would interfere with the operations of the institution. The components of your request point to an ongoing vendetta against numerous Sunnybrook employees. They demonstrate an intention to revisit many of the numerous complaints you have previously made, that have been investigated and deemed unfounded.

[3] The requester, now the appellant, appealed Sunnybrook's decision to this office. Mediation was attempted but it did not resolve the appeal. The appeal was moved to the adjudication stage of the appeal process for an inquiry under the *Act*.

[4] I sought and received representations from the parties. Sunnybrook asked that portions of its representations be kept confidential. I determined that these portions met the confidentiality criteria set out in *Practice Direction 7* and, in accordance with section 7 of this office's *Code of Procedure*, I shared only Sunnybrook's non-confidential representations with the appellant.

[5] In this appeal, I do not uphold Sunnybrook's decision and I order it to issue an access decision to the appellant in response to his request.

DISCUSSION:

[6] Section 10(1)(b) of the *Act* and section 5.1 of Regulation 460, provide a summary mechanism to deal with requests that an institution deems frivolous or vexatious. This office has consistently recognized 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 accordingly, this power should not be exercised lightly.²

[7] Section 10(1)(b) states:

Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless,

the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

[8] Section 5.1 of Regulation 460 states:

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,

² Order M-850 and more recently, Orders MO-3108 and MO-3150.

- (a) the head is of the opinion on reasonable grounds that the request is part of a pattern of conduct that amounts to an abuse of the right of access or would interfere with the operations of the institution; or
- (b) the head is of the opinion on reasonable grounds that the request is made in bad faith or for a purpose other than to obtain access.

[9] Sunnybrook bears the burden of proof to substantiate its decision that the appellant's request is frivolous or vexatious under one of the four grounds articulated in section 5.1 of Regulation 460. These grounds are:

1. The appellant's conduct amounts to an abuse of the right of access.

The following factors may be relevant in determining whether a pattern of conduct amounts to an "abuse of the right of access":

- The number of requests and whether it is excessive by reasonable standards.
- The nature and scope of the requests. Whether they are excessively broad and varied in scope or unusually detailed, and whether they are identical or similar to previous requests.
- The purpose of the requests and whether they are intended to accomplish an objective other than gaining access. Whether they are made for "nuisance" value or for the purpose of harassing Sunnybrook or burdening its system.
- The timing of the requests connected to the occurrence of some other related event, such as court proceedings.³

The institution's conduct may also be a relevant consideration weighing against a "frivolous or vexatious" finding. However, misconduct on the part of the institution does not necessarily negate a "frivolous or vexatious" finding.⁴ 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. The focus should be on the cumulative nature and effect of a requester's behaviour. In many cases, ascertaining a requester's purpose requires the drawing of inferences from his behaviour because a requester seldom admits to a purpose other than access.⁵

³ Orders M-618, M-850 and MO-1782.

⁴ Order MO-1782.

⁵ Order MO-1782.

2. The appellant's conduct interferes with Sunnybrook's operations.

A pattern of conduct that would "interfere with the operations of an institution" is one that would obstruct or hinder the range of effectiveness of the institution's activities. Interference is a relative concept that must be judged on the basis of the circumstances a particular institution faces. For example, it may take less of a pattern of conduct to interfere with the operations of a small municipality than with the operations of a large provincial government ministry, and the evidentiary onus on the institution would vary accordingly.⁶

3. The appellant has acted in bad faith in making his request.

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

4. The appellant is seeking access for a purpose other than to obtain access.

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 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.¹⁰ Where a request is made for a purpose other than to obtain access, the institution need not demonstrate a "pattern of conduct."¹¹

⁶ Order M-850.

⁷ *Ibid.*

⁸ *Ibid.*

⁹ Orders MO-1168-I and MO-2390.

¹⁰ Order MO-1924.

¹¹ Order M-850.

Sunnybrook's representations

[10] Sunnybrook submits that the appellant's request is broad and relates to his "complex history" with it. Sunnybrook provides details of this history in its representations, some of which are confidential. As it is not necessary for me to discuss all of these details in this order, I refer only to the following background information provided by Sunnybrook that is relevant to my determination of the issues:

- The appellant is a former contractor of Sunnybrook who provided services to it. Starting in 2010, he engaged in threatening and harassing behaviour towards a Sunnybrook employee.
- Over the next three and a half years, the appellant continued to harass the employee. He also targeted other Sunnybrook employees and harassed them as well.
- During this time, the appellant was charged with criminal harassment, which resulted in him entering into a peace bond prohibiting him from being within fifty metres of the employee's workplace.
- The appellant then filed a complaint with this office claiming that the department in which the employee worked had inappropriately disclosed his personal health information. That complaint was dismissed.
- The appellant submitted a previous request to Sunnybrook for a wide range of records. Some responsive records were disclosed to him. His subsequent appeal of that decision was dismissed.
- The appellant filed a complaint about the Sunnybrook employee with her regulatory body.
- In January 2013, Sunnybrook representatives met with the appellant to attempt to salvage a working relationship with him, however, the appellant's harassing behaviour continued and included unfounded allegations of misuse of funds and theft by Sunnybrook employees.
- In June 2013, Sunnybrook advised him that he was no longer permitted to attend its premises for any reason other than a medical emergency, and he was not to contact any Sunnybrook employees.

[11] Sunnybrook submits that the nature and scope of the appellant's request is so broad, varied and detailed that it amounts to an abuse of the right of access. It states that the request has thirteen parts and relates to a range of matters and could result in a large volume of responsive records. It also asserts that the varied and unrelated

nature of the information requested provides a reasonable basis to conclude that the purpose of the appellant's request is its nuisance value and the continued harassment of Sunnybrook and its staff; this is bolstered by the contentious relationship between it and the appellant. Sunnybrook adds that the appellant's willingness to narrow the scope of his request during mediation, which he later withdrew, indicates that the request was overly broad and unreasonable and that the twelve parts he temporarily eliminated from his request are superfluous and frivolous. It further adds that the appellant reverted to his thirteen part request shortly after this office issued an order dismissing another appeal he filed; and thus, his action was retaliatory in nature and not for genuine access purposes.

[12] Sunnybrook states that it has already spent a disproportionate amount of its freedom of information resources dealing with the appellant's requests, appeals and his privacy complaint against it. And thus, overall, the appellant's conduct both within and outside the scope of the *Act* has interfered and continues to interfere with its operations. It submits that responding to the appellant's request will further impose an unreasonable burden on its operations because despite any fees it can collect, its staff would have to divert attention away from the pursuit of patient care; staff in several Sunnybrook departments would be required to search for and collect the required documents. It also notes that its privacy office is a very busy unit with important information security and privacy matters to deal with. Sunnybrook adds that the long escalating behaviour of the appellant toward it and its employees indicates that his request is a deliberate attempt to continue to harass it and its employees and to hinder its effectiveness.

[13] Regarding the issue of bad faith, Sunnybrook asserts that the history of the appellant's harassing behaviour as detailed in its representations provides a clear evidentiary basis for a finding that he submitted his request in bad faith and as a further act of harassment. Sunnybrook asserts that the appellant submitted his request in bad faith as an intentional act of malice due to his ill will toward it and its employees, and that this intention to continue burdening it and its employees, in circumvention of the administrative and legal barriers in place, demonstrates that the appellant has submitted the request for nuisance value, which is a purpose other than to obtain access. It adds that in addition to the request itself being a form of harassment, any information the appellant may obtain through it will be used by him to further harass its employees.

[14] Sunnybrook concludes that the appellant's behaviour indicates he has the ulterior motives of vindictiveness and retaliation for submitting the request, which are illegitimate purposes that are inconsistent with the spirit of the *Act*.

The appellant's representations

[15] The appellant submits that Sunnybrook's representations are a "skewed" attempt to paint a false picture of him. He alleges that Sunnybrook's motive for doing so is to continue to "prevent crucial information being released that will demonstrate the corruption, theft, lies and misuse" of taxpayers' and donors' funds. The appellant acknowledges that he was charged with criminal harassment in relation to a Sunnybrook employee, but he adds that the charges against him were withdrawn as there was no evidence against him. The appellant also makes specific allegations about the Sunnybrook employee in support of his position that her accusations were unfounded. He alleges that Sunnybrook is using the incident with the employee to prevent the truth from coming forward: that within Sunnybrook, taxpayer and donor funds are being misused, there is ongoing theft, lack of privacy, corruption at the management level and criminal behaviour.

[16] The appellant asserts that withholding the information he seeks is a disservice to taxpayers, donors and future patients, and that Sunnybrook's refusal to release the information demonstrates its lack of transparency. The appellant continues that he is interested in the information because he is a taxpayer and donor to Sunnybrook and the behaviour at Sunnybrook concerns him. He concludes by stating that his intentions are not malicious and he does not intend to burden Sunnybrook and its employees. Rather, his intentions are to bring the truth forward, to stop the wrongdoing at Sunnybrook, and to ensure that what happened to him is not repeated.

Analysis and findings

[17] The evidence before me is that the relationship between Sunnybrook and the appellant has deteriorated over time. Sunnybrook relies largely on the appellant's conduct during the three and a half year period between 2010 and the date of the appellant's request to assert that the appellant has demonstrated a pattern of conduct that amounts to an abuse of the right of access or that would interfere with its operations. Sunnybrook argues in the alternative that the appellant filed his request in bad faith or for a purpose other than to obtain access; namely, he filed his request in retaliation to Sunnybrook's previous access decision and the actions it took to address his harassing behaviour. Having reviewed the materials before me, including Sunnybrook's confidential representations, and considered the circumstances of this appeal, I conclude there is insufficient basis for finding that the appellant's request is frivolous or vexatious.

[18] While I acknowledge that the appellant's conduct as set out by Sunnybrook is serious and concerning, it largely does not relate to the exercise of his right of access and his use of Sunnybrook's access to information resources. Rather, the appellant's conduct relates to his deteriorating relationship with Sunnybrook over the three and a half year period during which Sunnybrook continued to permit him to work on its

premises as a contractor. A pattern of conduct that amounts to an abuse of the right of access must of necessity relate to the individual's exercise of his right of access and his use of the access to information resources of an institution. This office has interpreted the phrase "pattern of conduct" as "requiring recurring incidents of similar requests on the part of the requester (or with which the requester is connected in some material way)."¹² I adopt this interpretation in this appeal and find that Sunnybrook has not established such a pattern of conduct.

[19] The appellant has submitted only one access request other than the one at issue in this appeal and there is no evidence before me that the appellant's request here is similar to his first. The nature and scope of the present request is somewhat broad and varied, but not excessively so. While there are thirteen parts to it, each part is very specific in terms of the records sought and the related time period. The appellant has stated that his purpose for making the request is to shed light on theft and misuse of funds and resources that he alleges he witnessed during the time that he worked at Sunnybrook. I accept that this is a purpose of his request; perhaps there are more. However, even if the appellant has other motives in making this request, in addition to his desire to access the information in order to investigate his allegations, this is not sufficient to establish that his conduct in the face of two access requests is a pattern that amounts to an abuse of the right of access.

[20] Furthermore, I do not accept Sunnybrook's submissions that the appellant's conduct in making two requests and in filing a single privacy complaint against it, constitute reasonable grounds to conclude that his conduct is a pattern that interferes with its operations. Nor do I accept that the appellant's two access requests and privacy complaint would hinder Sunnybrook's activities, even if it had to deal with them concurrently, which it does not. The *Act* provides cost recovery mechanisms that would allow Sunnybrook to mitigate or avoid any interference that may arise from processing the appellant's request. Therefore, on the issue of conduct that would interfere with its operations, I find that Sunnybrook has not satisfied the evidentiary onus it has as a large urban hospital with significant resources at its disposal.

[21] On the issue of bad faith, I adopt the interpretation set out in Order M-850 that "bad faith" implies conscious wrongdoing for a dishonest purpose or moral underhandedness; it contemplates a state of mind affirmatively operating with secret design or ill will. Applying this interpretation, I find that Sunnybrook has not demonstrated that the appellant's request was made in bad faith. The fact that there is some history between Sunnybrook and the appellant is an insufficient basis for a finding that the appellant made his request in bad faith. As noted in Interim Order MO-1168-I, the question to ask is whether the appellant has some illegitimate objective in seeking access under the *Act*. Following this approach, I am not persuaded that because the

¹² Order M-850.

appellant may not have “clean hands” in his dealings with Sunnybrook that his stated reasons for requesting access to the records are not genuine.

[22] Turning to the final issue of whether the appellant’s request is for a purpose other than to obtain access, I accept the appellant’s submission that he seeks access in order to investigate his allegations and suspicions about various departments and individuals at Sunnybrook. While Sunnybrook refutes the appellant’s allegations and characterizes his request as a further act of his malicious intention to continue burdening it, it does not provide sufficient evidence to establish that the appellant’s request is not motivated by a desire to obtain access pursuant to a request; instead, it points again to the appellant’s conduct towards it and a number of its employees as evidence that the purpose of his request is to continue to harass it. I find that this conduct along with the ill will that exists between the parties, do not establish that the appellant made his access request for a purpose other than to obtain access. As noted in Order MO-1924, the *Act* allows requesters to seek information to assist them in a dispute with an institution or to publicize what they consider to be inappropriate or problematic decisions or processes of the institution; 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*.

[23] For the reasons set out above, I find that Sunnybrook has not discharged its onus to substantiate its decision that the appellant’s request is frivolous or vexatious under one of the four grounds articulated in section 5.1 of Regulation 460. I further find that section 10(1)(b) does not apply.

ORDER:

1. I do not uphold Sunnybrook’s decision that the appellant’s request is frivolous or vexatious.
2. I order Sunnybrook to issue an access decision in response to the appellant’s request, in accordance with section 26 of the *Act*, treating the date of this order as the date of the request and without recourse to a time extension under section 27 of the *Act*.

Original Signed By: _____ February 24, 2015
Stella Ball
Adjudicator