Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3798

Appeal PA16-164-2

Ministry of Community Safety and Correctional Services

December 21, 2017

Summary: The appellant made a request to the ministry under the *Act* for access to a specific record related to a fatal incident involving her son. This request followed multiple prior requests submitted to the ministry over the preceding few years whereby she sought access to records relating to the same incident. In response to the particular request at issue, the ministry issued a decision taking the position that the request was "frivolous or vexatious" for the purpose of section 10(1)(b) of the *Act* and section 5.1(a) of Regulation 460 made under the *Act*.

In this order, the adjudicator finds that this particular request is not frivolous or vexatious for the purpose of the *Act*, and orders the ministry to issue an access decision in response to it.

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

Orders and Investigation Reports Considered: Orders MO-1782, PO-2151, PO-3188, PO-3539, PO-3559, and PO-3674.

OVERVIEW:

[1] The Ministry of Community Safety and Correctional Services (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

> Record of Destruction/ a Certificate of Destruction regarding [specified file number].

[2] The ministry denied access to the responsive record on the basis that the request is frivolous or vexatious.

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

[4] During mediation, the appellant advised that she is of the view that the request is not frivolous or vexatious. The ministry advised that it maintains its position that it is.

[5] As a mediated resolution could not be reached, the appeal was transferred to the adjudication stage of the appeal process for an adjudicator to conduct an inquiry. I began my inquiry into this appeal by sending a Notice of Inquiry setting out the facts and issues on appeal to the ministry, initially. The ministry provided representations which were shared with the appellant in accordance with this office's *Practice Direction Number 7*. The appellant provided representations, in turn.

[6] In this order, I find that the appellant's request is not frivolous or vexatious for the purposes of the *Act*, and I order the ministry to issue an access decision in response to it.

DISCUSSION:

Is the request for access frivolous or vexatious?

[7] The sole issue to be determined in this appeal is whether the appellant's request for access to a record of destruction or a certificate of destruction regarding a specified file number is frivolous or vexatious.

[8] Section 10(1)(b) reads:

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

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

Background provided in the ministry's representations

[11] In its representations, the ministry sets out the context in which it received the request that is at issue in this appeal and as a result of which it decided to take the position that it was frivolous or vexatious as contemplated by section 10(1)(b) of the *Act*.

[12] The ministry explains that the file number identified in the request at issue relates to a motor vehicle accident that occurred in 2007 and which resulted in the death of the appellant's son. It submits that the Centre for Forensic Science (CFS), the Office of the Chief Coroner (OCC) and the Kapuskasing Detachment of the Ontario Provincial Police (OPP) created records in accordance with their statutory mandates. The ministry submits that the OPP's investigation into the matter resulted in criminal charges being laid against the driver of the vehicle, which in turn resulted in his conviction and imprisonment. The ministry advises that the OPP investigation is now closed and no further work is being done on this matter by any of the OPP, CFS or OCC.

[13] The ministry submits that the request at issue is the appellant's eleventh request for access to records relating to the incident involving her son.[3] The ministry submits that in its decision letter it explained to the appellant that the records responsive to her request have already been produced as a result of one of her earlier, broadly worded requests, for all OPP reports and officers' notes, as well as OCC and CFS records relating to the death of her son.

[14] In its representations, the ministry confirms its position that all records relating to the incident have been disclosed to her and that none of the OPP, the CFS or the OCC possess any additional records relating to the death of the appellant's son.

[15] The ministry submits that it did not make the decision to deny the appellant's request on the basis that it is frivolous or vexatious lightly and that it does not often resort to applying this provision in response to access requests. The ministry also submits that it is aware that the appellant is seeking records for compassionate reasons

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[1] Order M-850.
[2] Order M-850.
[3] The ministry explains that subsequent to the request at issue in this appeal, the appellant has submitted two additional requests for records relating to the same subject matter, bringing the total number of requests that she has filed to thirteen.

and it made its best efforts to provide the appellant with responsive records. It explains that it is aware that the appellant continues to seek information because she is having a difficult time with the fact that prior to 2010, the OCC had a policy whereby organs from people whose deaths were investigated by the OCC were not returned to their families after the post-mortem investigation.[4] It concludes by submitting that the request is frivolous or vexatious is based on the fact that "further requests by the appellant for records related to this incident would not be productive, because there are no further records to be disclosed."

Grounds for a frivolous or vexatious claim

[16] Taking into consideration this background information, I will determine whether the appellant's request is frivolous or vexatious based on three specific grounds set out in the *Act*: whether it results in a pattern of conduct that amounts to an abuse of the right of access; whether it results in a pattern of conduct that interferes with the operations of the institution; and, whether the request was made in bad faith.

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

[17] To determine whether an appellant's request forms part of a pattern of conduct that amounts to an "abuse of the right of access" as set out in section 5.1 of Regulation 460 a number of factors can be considered. Those that are relevant in the circumstances of this appeal are set out below.

Number of requests:

[18] As noted above, the ministry submits that it has received thirteen requests from the appellant and that this is "excessive by reasonable standards" because they all relate to the same incident, a fatal motor vehicle accident that occurred in 2007, involving the appellant's son. The ministry submits that typically when they receive a request for records relating to a single motor vehicle request it is only one request.

[19] The appellant disagrees that she has submitted an excessive number of requests, stating that she relies on Order PO-3539 which, she states, found that thirteen requests for access over a period of 4 years was not an abuse of the right to access, nor vexatious, nor frivolous.

[20] In my view, the determination of whether the number of requests filed by an appellant demonstrates a pattern of conduct that amounts to an abuse of the right of access must be determined on a case by case basis. I accept that, in some circumstances, thirteen requests over a period of four years may be found to be excessive while in other circumstances, it may not. In this case, I find that I have not been provided with sufficient evidence to support a finding that the appellant's requests for records relating to the same subject matter is "excessive by reasonable standards."

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[4] The ministry also advises that as a result of amendments to the Regulation 180 made under the *Coroners Act*, this earlier policy is no longer in effect.

[21] The appellant's requests were not filed all at the same time but rather, were spread out over a four-year period. Additionally, the ministry has not provided any evidence why this number of requests over that period of time can be described as "excessive." Strictly considering the number of requests (and not other elements such as their nature or scope to be discussed below), thirteen requests over a four-year period is not, in my view, particularly excessive.

[22] I acknowledge that in certain circumstances thirteen identical requests, or substantially similar requests, might be considered an excessive number by reasonable standards. However, in the case before me I have not been provided with specific evidence to demonstrate that the request at issue is identical in nature or even substantially similar to any of the preceding requests. In its representations, the ministry has not described the other requests that it has received from the appellant or demonstrated how closely they resemble each other and the request at issue in this appeal.

[23] Accordingly, I find that the ministry has not provided sufficient evidence to support a conclusion that the number of requests submitted by the appellant is a factor that demonstrates that the appellant is, by the submission of the request that is at issue in this appeal, engaged in a pattern of conduct that amounts to an abuse of the right of access.

Nature and scope of the requests:

[24] The ministry submits that the nature and scope of the appellant's thirteen requests support its position that they create a pattern of abuse. It submits that the first request was "extremely broad, and it was for all reports and officer's notes held by the OPP, the OCC and the CFS." It submits that although subsequent requests have been "narrower" in scope, the responsive records mostly duplicated records that were responsive and disclosed under the appellant's first request. The ministry submits that the appellant has previously acknowledged that her requests are duplicative. It submits that one appeal was closed at mediation on this basis.

[25] The ministry also submits that prior reasonable search appeals resulting from similar requests from the same appellant were resolved in Orders PO-3559 and PO-3674 wherein the ministry's search efforts were upheld and the appellant was found not to have been able to provide a reasonable basis for believing additional responsive records should exist.

[26] The ministry submits that the appellant is adopting a similar approach in this appeal, by insisting that her requests are not frivolous or vexatious but is not providing "any apparent rationale to support her position."

[27] The ministry also points to one of the appellant's other requests which it describes as a 6-part request for records, including records created by the appellant herself. The ministry submits that although requesting such records is permitted under the *Act*, when placed in context, it is part of a pattern of conduct of abuse of the

Freedom of Information process because there is no reason which would require the appellant to request records that she herself had created.

[28] First, I accept that in matters where the reasonableness of an institution's search is at issue, previous orders have established that an appellant must provide a reasonable basis for concluding that such records exist.[5] However, where an institution takes the position that it need not respond to a request for information on the basis that the request is frivolous or vexatious, no such burden is placed on the appellant and the institution bears the onus of demonstrating that the request is, in fact, frivolous or vexatious in accordance with the *Act*.[6] As a result, I do not accept that my findings with respect to the issue of reasonable search addressed in Orders PO-3559 and PO-3674 can be relied upon to support a conclusion that the request at issue is frivolous or vexatious simply because the appellant has not provided "any apparent rationale to support her position."

[29] Addressing the nature and scope of this request, I note that the ministry submits that the original request was "extremely broad" in scope and that subsequent requests have been narrower. I also note that the ministry submits that the requests have generated "mostly duplicated records" that were responsive and disclosed under the first request. Although I acknowledge that in many circumstances repeated identical or substantially similar requests of an "extremely broad" nature that generate responsive records that have already been disclosed in early requests could amount to a factor when considering whether a pattern of conduct exists that amounts to an abuse of the right of access, I do not accept that, in this case I have been provided with sufficient evidence to make such a finding.

[30] In my view, a pattern of narrowing requests, as the ministry suggests the appellant has submitted, indicates that with each disclosure the appellant believes that she is more precisely able to identify records of the types that she seeks. I accept that this would generate, at minimum, overlapping records. However, as previously noted, the ministry has not provided specific evidence outlining the wording of these prior requests, their responsive records or any other specific evidence describing how their nature and scope would generate records that are duplicative in nature rather than just overlapping. The fact that related requests may have some overlapping records does not support a finding that the requests are identical or sufficiently similar to each other.[7]

[31] Also, given that the request before me is specifically for a "record or certificate of destruction" rather than general investigative records relating to the incident which the ministry suggests formed the subject of the first, broad request, I have insufficient evidence to conclude definitively that such record might have fallen within the scope of that first request or any of the appellant's previous requests for records relating to the investigation into the incident.

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[5] Order MO-2246.
[6] Order M-850.
[7] Order PO-3775.

[32] As previously mentioned, I acknowledge that thirteen identical requests or even substantially similar requests could, in some cases, be considered an excessive number of requests by reasonable standard. However, in the case before me I have not been provided with specific evidence to demonstrate that the request at issue is identical in nature or even substantially similar to any of the preceding requests. In its representations, the ministry has not described the other requests that it has received from the appellant or demonstrated how closely they resemble each other and the request at issue in this appeal. Additionally, the request that is the subject of this appeal appears to be a quite narrow and specific request for identified information rather than the broad and expansive general requests for information that the ministry suggests make up the appellant's earlier requests.

[33] In the absence of more detailed evidence regarding the specific wording of the appellant's prior requests that the ministry submits are similar in nature and scope to the request at issue or more detailed evidence regarding the duplication of the records that are responsive to these requests, I find that the ministry has not established that the nature and scope of the request in this case demonstrates that the appellant is engaged in a pattern of abuse of the right of access.

Purpose of the requests:

[34] The ministry acknowledges that the purpose of the request at issue (as well as the other requests that the appellant has made) appears to be to obtain access to records. However, the ministry takes the position that "submitting multiple, often duplicative and repetitive requests has the effect of being frivolous and vexatious" for the reasons set out under the other factors.

[35] Having considered the circumstances of this appeal, I agree with the ministry that the purpose of the appellant's requests appears to be to obtain access to records. In my view, the evidence before me supports a conclusion that the appellant continues to submit requests as she legitimately seeks access to all existing records relating to the fatal accident involving her son. Accordingly, I am not satisfied that the purpose of the request at issue in this appeal was to accomplish any objective other than to gain access including making such request for the purpose of harassing the ministry or burdening its system.

Cumulative effect

[36] The ministry submits that the cumulative effect of the appellant's requests has been harmful to the operations of the Kapuskasing Detachment of the OPP which is a small detachment[8] that conducted the law enforcement investigation and which is therefore where most of the responsive records were originally located. It also submits that all of the OPP records have now been transferred to the ministry's Freedom of Information Office to relieve the burden on the Kapuskasing OPP.

[8] The ministry submits that all 8196 people in Kapuskasing are served by a single OPP detachment.

[37] The ministry points to Order MO-1782, in which the Adjudicator found that "in examining whether a pattern of conduct exists, the focus should be on the cumulative nature and effect of a requester's behavior." It submits that not only have the requests resulted in a significant drain on local policing resources, but detachment staff have spent a significant time meeting with the appellant and answering the same kinds of questions over and over again.

[38] The ministry also relies on Order PO-3188 which upheld the University's of Ottawa's decision under section 10(1)(b), "where records targeted only two professors of the faculty." It submits that its decision should be upheld because the burden of the request has fallen primarily on one small detachment within the OPP, and not the entire police force.

[39] Addressing how the request forms part of a pattern on conduct that would interfere with the operations of the ministry by obstructing or hindering the range of effectiveness of its activities, the ministry submits that the fact that the Kapuskasing Detachment of the OPP is relatively small in size is critical as the interference in its operations must be considered in relation to the detachment's size. The ministry submits that a similar argument could be made with respect to the OCC and the CFS as both are relatively small organizations relative to the overall size of the ministry.

[40] The ministry submits that the appellant is acting in bad faith by submitting multiple and duplicative requests for records even after it has advised her of the effect that these requests are having.

[41] While I accept the ministry's submission that a small detachment of the OPP (as well as the OCC and the CFS) has born the brunt of responding to the appellant's requests, I find that I have not been provided with sufficient evidence to support a conclusion that the cumulative effect of these requests demonstrates a pattern of conduct that amounts to an abuse of the right of access. The ministry states very generally that the requests submitted by the appellant have had a cumulative effect but has not described in sufficient detail what impact the processing of these requests has had.

[42] Additionally, I note that in both Order MO-1782 and Order PO-3188 upon which the ministry relies to support its position, this office was provided with detailed descriptions of many, if not each, of the prior requests submitted by the requester in those appeals to support the institutions' positions on their cumulative effect together with submissions on how the nature and scope of the requests overlapped or captured the same responsive records.

[43] Accordingly, I am not satisfied that I have been provided with sufficient evidence to conclude that, in this case, the cumulative effect of the appellant's requests demonstrates that she is engaged in a pattern of conduct that would amount to an abuse of the right of access.

Conclusion

[44] In summary, and considering the factors set out above, I find that the ministry has not established that by filing the request that is at issue in this appeal the appellant was engaged in a pattern of conduct that amounts to an abuse of the right of access. I make this finding based on the specific and focused nature of the request that is before me here, as well as the evidence that has been provided to me by the ministry. I note that I may have come to a different conclusion had the request at issue been broader in scope or had the ministry provided more detailed evidence to support a conclusion that the request at issue is duplicative in nature, generating the very same responsive record(s) as those that were previously disclosed to the appellant as a result of earlier requests.

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

[45] 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.[9]

[46] 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 then with the operations of a large provincial government ministry, and the evidentiary onus on the institution would vary accordingly.[10]

[47] As noted above under its submission on the cumulative effect of the requests, the ministry submits that the appellant's requests have resulted in a significant drain on local policing resources, and that detachment staff have spent significant time meeting with the appellant and answering the same kinds of questions over and over again.

[48] Addressing how the request forms part of a pattern on conduct that would interfere with the operations of the ministry by obstructing or hindering the range of effectiveness of the ministry's activities, the ministry reiterates that the fact that the Kapuskasing Detachment of the OPP is relatively small in size is critical as the interference in its operations must be considered in relation to the detachment's size. The ministry submits again that a similar argument could be made with respect to the OCC and the CFS as both are relatively small organizations relative to the overall size of the ministry.

[49] Order PO-2151 identified the nature of the information required to establish an "unreasonable interference with the operations of an institution" as follows:

> Previous orders of this office have considered the meaning of the term "unreasonable interference with the operations of an institution" in the

[9] Order M-850.
[10] Order M-850.

> context of claims that a request is frivolous or vexatious. Although made in a different context, they provide some guidance in assessing this issue.
>
> Applying the findings in these previous orders, it appears that in order to establish "interference," an institution must, at a minimum, provide evidence that responding to a request would "obstruct or hinder the range of effectiveness of the institution's activities" (Order M-850) ….
>
> …[W]here an institution has allocated insufficient resources to the freedom of information access process, it may not be able to rely on limited resources as a basis for claiming interference (Order MO-1488).

[50] In the circumstances of this appeal, I find that I have not been provided with sufficient evidence to conclude that the processing of the request that is before me would amount to a pattern of conduct that interferes with the operations of the ministry. I acknowledge that the Kapuskasing Detachment of the OPP which originally had custody or control of the majority of the records is a small detachment.[11] I also acknowledge that the OPP, as well as other ministry employees have spent a considerable amount of time responding to the appellant's requests and concerns. However, other than the ministry's submissions on the size of the OPP detachment, I have little information on how the appellant's submission of the specific request at issue demonstrates a pattern of conduct that would interfere with the operations of the ministry, including how it obstructs or hinders the range of effectiveness of its activities.

[51] Additionally, I note once again that the request that is at issue is quite specific in terms of the record being sought. It is not a broad request for general records. Without further and more detailed evidence to demonstrate how the processing of this specific request demonstrates a pattern of conduct that would interfere with the operations of the ministry, I do not accept that it would.

[52] Accordingly, in the circumstances, I find that the ministry has not provided sufficient evidence to establish a pattern of conduct that would interfere with the operations of the institution thereby supporting a finding that the request is frivolous or vexatious under the *Act*.

Bad faith or a purpose other than to obtain access

[53] Where a request is made in bad faith, the institution need not demonstrate a "pattern of conduct."[12]

[54] 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

[11] I note that the records have now been transferred to ministry's Freedom of Information office.
[12] Order M-850.

> by an hones mistake as to one's rights, but by some interested or sinister motive…."[B]ad 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.[13]

[55] The ministry submits that "the appellant is acting in bad faith by submitting multiple and duplicative requests for records, even though [it] has advised her of this, without [its] concerns having an appreciable effect on her subsequent actions".

[56] On my review of the circumstance of the current appeal, I am not satisfied that the request at issue was made by the appellant in bad faith. Based on the nature and wording of the request as well as on its subject matter, I find that this request was made by the appellant for a genuine purpose, to obtain access to as much information as possible regarding the circumstances surrounding her son's death. Although I acknowledge that with more substantive evidence demonstrating how the appellant's requests are repetitive or duplicative in nature this office might find them to be frivolous or vexatious in nature, I do not accept that it has been established that this particular request was made for the purpose of harassing the ministry or for a purpose other than to obtain access to the information sought.

[57] As previously noted, decisions issued by this office have confirmed that "bad faith" is not simply bad judgment or negligence, but rather implies the conscious doing of a wrong because of a dishonest purpose or moral obliquity. Having considered this, I do not accept that there is sufficient evidence before me to conclude that the appellant's requests have been made in "bad faith." Although she has indeed made a number of requests all seeking records on the same subject matter, many of which the ministry submits cover records which overlap each other, I am of the view that the appellant legitimately seeks access to the information that she has requested and I am unable to ascribe "furtive design or ill will" on her part. As a result, I find that the ministry has failed to establish that the request before me was made by the appellant in bad faith or for a purpose other than to obtain access.

Conclusion

[58] For the reasons set out above, I find that the appellant's request is not frivolous or vexatious under the *Act*, and I will order the ministry to issue an access decision in response to it.

[59] As a final comment, I note that in its representations the ministry submits that given that this office has the authority to impose conditions on the appellant it requests that it be authorized not to respond to two subsequent requests submitted by the appellant which both relate to records relating to her son's death and that the appellant be restricted from submitting further requests relating to the death of her son. The

[13] Order M-850.

ministry requests this remedy as it takes the position that both of those requests address records covering the same subject matter as that covered in the request at issue in this appeal, and a number of the appellant's previous requests.

[60] As neither of the two requests mentioned by the ministry are currently before me and I have not been provided with any evidence about them (including their nature or scope or the circumstances surrounding them), at this time I am unable to determine whether either of them can be characterized as frivolous or vexatious under the *Act.* Therefore, the ministry is required to respond to them under the *Act*. However, if the ministry believes that the circumstances surrounding either of those requests support a finding that one or both of them are frivolous or vexatious under section 4(1)(b) of the *Act*, they are not precluded making a decision on that basis.

ORDER:

1. I do not uphold the ministry's decision that the appellant's request is frivolous or vexatious under section 4(1)(b) of the *Act*.

2. I order the ministry to issue an access decision for the request at issue in this appeal in accordance with section 26 of the *Act*, treating the date of this order as the date of the request.

Original signed by
Catherine Corban
Adjudicator

December 21, 2017