Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3585

Appeal MA17-422

The Corporation of the City of Cambridge

March 29, 2018

Summary: The City of Cambridge (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* for access to information pertaining to the sale of a property. The city claimed that the request was frivolous and vexatious and later confirmed that no responsive records exist. The appellant appealed the city's decision and alleged that the city did not conduct a reasonable search for responsive records. The adjudicator finds that the city has not established that the request made by the appellant is frivolous or vexatious, but that the city conducted a reasonable search for responsive records. The appeal is dismissed.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 4(1)(b), 17, 20.1(1); sections 5.1(a) and 5.1(b) of regulation 823.

Orders Considered: M-850, MO-1924, MO-3273-I and MO-3362-F.

OVERVIEW:

[1] The City of Cambridge (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act* or *MFIPPA*) for access to the following information:

> Copies of documents related to the city's purchase of the Old Post Office building located at 12 Water St., South, Cambridge, ON - specifically:

> 1. Complete and Total Agreement of Purchase and Sale between the city and vendor of 12 Water St. South – A.K.A The Old Post Office. I am requesting the complete document – all clauses, sections, pages.
>
> 2. Any Memorandum of Understanding or similar document and subsequent voiding or cancellation of any or all clauses between the Purchaser and Vendor.

[2] Relying on section 20.1(1) (frivolous request) of the *Act* and section 5.1 of regulation 823, the city took the positon that the request was frivolous and/or vexatious.

[3] The requester (now the appellant) appealed the city's decision. The appellant's Appeal Form indicated that the reasonableness of the city's search for responsive records was an issue in the appeal.

[4] As set out in the Mediator's Report, the appellant provided some additional information to the Mediator regarding the information that she seeks:

> With respect to item 1, the appellant indicated she is seeking access to the clause in the purchase agreement or addendum to the agreement or subsequent agreement, which gives the former owner the right to operate a restaurant in the renovated library. The appellant indicated that she had received a severed copy of the agreement earlier from the city and was under the impression that the only severance was the vendor's name. However, she believes she received an incomplete copy of the agreement (i.e. other severance(s)) or that there is an addendum or subsequent agreement, which contains such a clause. …
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> With respect to item 2, the appellant indicated she is seeking access to the cancellation or revocation of the agreement to operate the restaurant in the library. She is not sure what the document(s) is(are) called. The appellant further indicated that the cancellation occurred, after Appeal MA14-319 had been filed. (Appeal MA14-319 was the subject of Order MO-3273-I and MO-3362-F.)

[5] The city maintained that all records have been provided to the appellant under Orders MO-3273-I and MO-3362-F, and that no other records exist.

[6] 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*.

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

appellant provided responding representations. I determined that the appellant's representations raised issues to which the city ought to be provided an opportunity to reply. Accordingly, I sent a letter to the city inviting their reply representations along with a copy of the appellant's representations. The city then sent a series of emails to this office which I have treated as their reply.

[8] In this order, I find that the city has not established that the request made by the appellant is frivolous or vexatious, but that the city conducted a reasonable search for responsive records. The appeal is dismissed.

ISSUES:

A. Is the request for access frivolous or vexatious?

B. In the event that the request is found not to be frivolous or vexatious, did the institution conduct a reasonable search for records?

DISCUSSION:

Issue A: Is the request for access frivolous or vexatious?

[9] Section 4(1)(b) of the *Act* 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,
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> > the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

[10] Section 20.1(1) of the *Act* states:

> A head who refuses to give access to a record or a part of a record because the head is of the opinion that the request for access is frivolous or vexatious, shall state in the notice given under section 19,
>
> > (a) that the request is refused because the head is of the opinion that the request is frivolous or vexatious;
> >
> > (b) the reasons for which the head is of the opinion that the request is frivolous or vexatious; and
> >
> > (c) that the person who made the request may appeal to the Commissioner under subsection 39(1) for a review of the decision.

[11] Similarly, sections 5.1(a) and (b) of Regulation 823 prescribe that:

> A head … shall conclude that the request for a record or personal information 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.

[12] Section 4(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]

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

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

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

> *Number of requests*
>
> Is the number excessive by reasonable standards?
>
> *Nature and scope of the requests*
>
> Are they excessively broad and varied in scope or unusually detailed? Are they identical to or similar to previous requests?
>
> *Purpose of the requests*
>
> Are the requests intended to accomplish some objective other than to gain access? For example, are they made for "nuisance" value, or is the requester's aim to harass government or to break or burden the system?
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> *Timing of the requests*

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[1] Order M-850.
[2] Order M-850.

> Is the timing of the requests connected to the occurrence of some other related event, such as court proceedings?[3]

[15] The institution's conduct also may 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]

[16] Other factors, particular to the case under consideration, can also be relevant in deciding whether a pattern of conduct amounts to an abuse of the right of access.[5]

[17] The 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 or her behaviour because a requester seldom admits to a purpose other than access.[6]

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

[18] 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.

[19] 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).

[20] 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.[7]

[21] 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.[8]

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[3] Orders M-618, M-850 and MO-1782.
[4] Order MO-1782.
[5] Order MO-1782.
[6] Order MO-1782.
[7] Order M-850.
[8] Order M-850.

Bad faith

[22] 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".[9]

The term "bad faith" has been defined in Order M-850 by former Assistant Commissioner Mitchinson 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 fulfill 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.

Purpose other than to obtain access

[23] 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.[10] 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".[11]

[24] Where a request is made for a purpose other than to obtain access, the institution need not demonstrate a "pattern of conduct".[12]

The appellant's requests and previous orders

[25] It appears that the appellant's request at issue in this appeal arose out of her understanding of certain references contained in the decisions of the Adjudicator in Interim Order MO-3273-I and Final Order MO-3362-F. The appellant's position is set out in more detail below.

[26] At issue in Interim Order MO-3273-I was the appellant's request for records relating to the city's purchase of the Old Post Office building, including records regarding the construction of a restaurant in the new library to be built at the site.

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[9] Order M-850.
[10] Order M-850.
[11] Orders MO-1168-I and MO-2390.
[12] Order M-850.

[27] In Order MO-3273-I, the Adjudicator ordered the city to conduct further searches for records that responded to the appellant's questions about the proposed restaurant and appraised value of the site. She also found that the third party information exemption at section 10(1) did not apply to the records that were identified by the city as responsive to the request. She ordered the city to disclose the portions of the records which did not contain the "personal information" of identifiable individuals.

[28] After receiving the city's submissions on the search that she ordered the city to conduct, the Adjudicator issued Final Order MO-3362-F. As set out in Final Order MO-3362-F, the Adjudicator confirmed that the city conducted a further search for responsive records and located no additional records responding to the appellant's request for records relating to the proposed restaurant. In Final Order MO-3362-F, the Adjudicator found that the city's further search for records responsive to the appellant's questions about the proposed restaurant and appraised value of the site was reasonable. However, she ordered the city to disclose to the appellant the portions of a 2011 appraisal report prepared by a real estate appraisal company which did not contain "personal information".

[29] The appellant then made a similar request to the one at issue in the appeal before me, which the city claimed to be frivolous or vexatious. The appellant appealed the city's decision and appeal file MA17-40 was opened. However, that appeal was dismissed at the intake stage on the basis that the appellant had missed the deadline to file an appeal of the city's decision. The Intake Analyst ended her letter to the appellant dismissing Appeal MA17-40 with the following:

> I would suggest that you re-submit your request and obtain a new decision from the city in order to reinstate your right to submit an appeal. Upon receiving the city's new decision, you may submit a new appeal to the IPC within thirty days of receiving the decision.

[30] It would appear that the appellant then filed the request at issue before me, which the city again claimed to be frivolous or vexatious.

The city's representations

[31] The city takes the position that there are no memorandums of understanding or similar documents that void or cancel any of the clauses in the agreement of Purchase and Sale.

[32] The city submits that the appellant's request at issue in this appeal is a duplication of the request that was at issue in the Adjudicator's Orders MO-3273-I and MO-3362-F as well as the appellant's request that was dismissed in Appeal PA17-40 and that:

> Requesting the same information again would require staff to perform duplicate actions and would once again place an undue strain on the staff

> and operations of the city, which would interfere with the operations of the institution. The city has shared in full the purchase agreement with [the appellant].

[33] The city submits that there are no reasonable grounds for requesting already distributed information and that:

> It has become evident that the purpose of the request is not access and results in unrealistic demands on the city. We have taken every reasonable step to answer the 2014 request through the appeal process; …
>
> We feel that this action is unreasonable persistent behaviour. A proceeding is said to be vexatious when the party bringing it is not acting bona fide, and merely wishes to annoy or embarrass his opponent, or when it is not calculated to lead to any practical result.
>
> The issue has already been determined in the past, therefore it is considered trivial, frivolous, vexatious, and in bad faith. It is being seen as persistent and a refusal to accept the orders placed by the IPC.
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> [The appellant] has indicated in the past that her issue is in the tendering process, which in fact did not occur until 2015. There has never been an agreement/tendering with the previous owner to run a restaurant at the Old Post Office known as the new library; and therefore no cancellations or voids.

[34] The city asks that "this request not be received again and that there be no further FOI's pertaining to this nonexistent agreement from [the appellant]".

[35] In its reply email submissions, the city provides a copy of the Agreement of Purchase and Sale and the city's Deputy Clerk submits that she has reviewed the agreement "several times" and has not found any reference to a right of the former owner to operate a restaurant.

The appellant's representations

[36] The appellant acknowledges that she was provided with what she believed to be a complete copy of the Agreement of Purchase and Sale between the city and the vendor of the Old Post Office building and states that her understanding was that only the name of the vendor was redacted. However, she adds that:

> Subsequently, upon receipt of Interim Order MO-3273-I, I noticed on Page 8, clause 28, a reference to partial access to an Agreement of Purchase and Sale (5 pages). I followed up on this with both [the IPC and the city].

[37] The appellant submits that upon receipt of Final Order MO-3362-F, she noted that the Adjudicator wrote at paragraph 22 of her decision that "based on the submissions of both parties there appears no dispute that the agreement contains a term which gives the former owner a right to operate a restaurant in the renovated library." She further submits that the Adjudicator wrote that "a copy of the purchase agreement is not one of the records at issue in this appeal and thus I was not provided a copy…". She submits that from that statement she understood "that in some way, the city conveyed to Ms. James that there was a clause in the agreement." The appellant submits that she sought clarification but was unsatisfied with the response she received, and she filed the request at issue in this appeal.

[38] The full text of paragraph 22 of the Adjudicator's decision in Final Order MO-3362-F reads:

> In my view, the appellant's evidence suggests that before the city made its decision to proceed with its purchase and restoration of the old post office building, it reviewed records or business plans regarding the advisability of the proposed project. However, there is insufficient evidence to suggest that the same type of documentation regarding the proposed restaurant should also exist. A copy of the purchase agreement is not one of the records at issue in this appeal and thus I was not provided a copy. However, based on the submissions of both parties there appears no dispute that the agreement contains a term which gives the former owner a right to operate a restaurant in the renovated library. In my view, the existence of this term on its own does not provide sufficient evidence that the city reviewed background documents regarding the advisability of adding this term to the purchase agreement.

[39] Regarding the issue of whether the current request is frivolous or vexatious, the appellant submits the within appeal does not demonstrate unreasonable or persistent behaviour. She states that she tried to explain to the city why she submitted subsequent requests but received no response, which resulted in her missing a deadline to file an appeal of appeal file number MA17-40. She says that based on advice she received from the IPC, she filed another request. She submits that:

> The city response of July 21, 2017 again accuses me of repeating the request from MA14-319 and refusing to accept the IPC orders. It is the city who has refused to accept that this was not dealt with in MA14-319 and instead has provided unprofessional and off-point responses when it has responded.

Analysis and findings

Pattern of conduct

[40] As set out above, a "pattern of conduct" requires recurring incidents of related or similar requests on the part of the requester.[13] The request at issue in Appeal MA17-40 was determined to be filed late and dismissed at the intake stage. The appellant then decided to file another appeal for similar information, as was suggested by the Intake Analyst who dismissed the appeal. Although there appears to be overlap in the request at issue in the appeal that resulted in Orders MO-3273-I and MO-3362-F, the request before me does differ in a subtle way. This is because it is the result of the appellant's misunderstanding of the import of the Adjudicator's comment at paragraph 22 of Final Order MO-3362-F. Accordingly, the actions of the city in processing this request would not be entirely duplicative. In any event, the city has not provided sufficient evidence to establish that processing the request would interfere with its operations. In all the circumstances, I am not satisfied that the city provided sufficient evidence to establish 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 city.

Bad faith

[41] Applying the definition of bad faith referred to above, 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. Again, in my view the request at issue in this appeal was motivated by a misunderstanding. In my opinion, the evidence tendered by the city in support of its assertion that the request was made in bad faith, is far from the kind of evidence required to establish this ground.

[42] In my view, the city has failed to meet the threshold of establishing on reasonable grounds, that the access request is made in bad faith.

Purpose other than to obtain access

[43] 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.[14] Previous orders have discussed whether requests made for a purpose other than to obtain access qualify as "frivolous or vexatious" within the meaning of section 5.1(b) of Regulation 823.

[44] 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

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[13] Order M-850
[14] Order M-850.

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 information. Clearly, such purposes are permissible. Access to information legislation exists to ensure government accountability and to facilitate democracy (see *Dagg* v. *Canada (Minister of Finance)*, [1997] 2 S.C.R. 403). This could lead to requests for information that would assist a journalist in writing an article or a student in writing an essay. The *Act* itself, by providing a right of access to one's own personal information (section 36(1)) and a right to request correction of inaccurate personal information (section 36(2)) indicates that requesting one's personal information to ensure its accuracy is a legitimate purpose. Similarly, requesters may also seek information to assist them in a dispute with the institution, or to publicize what they consider to be inappropriate or problematic decisions or processes undertaken by institutions.
>
> To find that these reasons for making a request are "a purpose other than to obtain access" would contradict the fundamental principles underlying the *Act*, stated in section 1, that "information should be available to the public" and that individuals should have "a right of access to information about themselves". In order to qualify as a "purpose other than to obtain access", in my view, the requester would need to have an improper objective above and beyond a collateral intention to use the information in some legitimate manner.

[45] I adopt the approach set out by former Senior Adjudicator Higgins for the purposes of this appeal. The request stems from the appellant's interpretation of the Adjudicator's comment in her decision and I find that the city has not provided sufficient evidence to support a finding that the appellant's request was made for a purpose other than to obtain access. In the circumstances before me, I am not satisfied that the appellant is making the request for a purpose other than to obtain access to the requested records that she understood to possibly exist.

[46] In my view, the city has failed to meet the threshold of establishing on reasonable grounds, that the access request is made for a purpose other than to obtain access.

CONCLUSION

[47] The tests under 5.1 of Regulation 823 set a high threshold that, in my view, has not been met in the circumstances of this appeal. Based on this analysis, I find that the city has not established the requirements of either section 5.1(a) or (b) of the

regulation and has not established reasonable grounds for finding that the request made by the appellant is frivolous or vexatious within the meaning of section 4(1)(b) of the *Act*.

[48] Accordingly, I will turn to the second issue in the appeal.

Issue B: In the event that the request is found not to be frivolous or vexatious, did the institution conduct a reasonable search for records?

[49] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17.[15] If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[50] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.[16] To be responsive, a record must be "reasonably related" to the request.[17] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.[18] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.[19]

[51] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.[20]

[52] The appellant's position regarding the reasonableness of the city's search for responsive records is also related to her understanding of certain references contained in the decisions of the Adjudicator in Interim Order MO-3273-I and Final Order MO-3362-F. Namely, that if a clause in the agreement, or an addendum to the agreement, or a subsequent agreement, gave the former owner the right to operate a restaurant in the renovated library, which never occurred, then records must exist that relate to the cancellation or revocation of the clause.

[53] With respect to the reasonableness of its search for responsive records, the city submits that in accordance with Interim Order MO-3273-1, a search was conducted in

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[15] Orders P-85, P-221 and PO-1954-I.
[16] Orders P-624 and PO-2559.
[17] Order PO-2554.
[18] Orders M-909, PO-2469 and PO-2592.
[19] Order MO-2185.
[20] Order MO-2246.

2015/2016 of the Archives Database and the Documentum database but no additional records were located.

[54] The Deputy City Clerk writes:

> I spoke to the Manager of Building Construction who directed me to discussions on such matters regarding the restaurant that were done at the Steering Committee level and those minutes are all posted on the City's Website as provided to the IPC in my letter … ; also [the appellant] was present at many of those meetings as they were open to the public. The Manager of Building Construction works under the Director of Sustainable Design and Development, who I had previous conversations with pertaining to this matter, as evidence shows in emails I have forwarded to the IPC in past letters. I also spoke to our City Manager (previous title "CAO"), who started his position at the City of Cambridge at the tail end of these discussions. I also spoke to our Chief Financial Officer, who has advised me that he has no documents in his possession, and further searches in the Clerk's documents has indicated no such documents exist.
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> An RFP [Request for Proposal] was initiated by the Library Board in 2015 for a restaurant at the Old Post Office and any result from that RFP can be found with the Library Board. I also contacted [named individual], Officer at the Library who has advised me several times that these documents do not exist.
>
> I also shared with the IPC an additional search on the query "Old Post Office" in our Documentum database that pulled up minutes and agendas all found on the city website.
>
> Therefore, I would like to affirm that the city has no memorandum of understanding or similar document and subsequent voiding or cancelling any or all clauses between the Purchaser and Vendor of the Old Post Office. …

Analysis and findings

[55] The city identified the Agreement of Purchase and Sale as responsive to the request. The city located no other responsive records. The city has already disclosed a severed version of the Agreement of Purchase and Sale to the appellant. The city states that there are no memorandums of understanding or similar documents that void or cancel any of the clauses in the Agreement of Purchase and Sale. I have reviewed a copy of the Agreement of Purchase and Sale provided by the city with its reply representations, and there is no clause in it of the nature discussed at paragraph 22 of the Adjudicator's decision in Final Order MO-3362-F. It should be noted that, as

acknowledged by the Adjudicator, she did not have the Agreement of Purchase and Sale before her. It appears her discussion was based on the submissions of the parties rather than a review of the Agreement of Purchase and Sale itself.

[56] As set out above, the *Act* does not require the institution to prove with absolute certainty that further responsive records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records. Based on the evidence before me, I am satisfied that a search was conducted by an experienced employee of the city knowledgeable in the subject matter of the request, who expended a reasonable effort to locate records, which are reasonably related to the request.

[57] I am satisfied that, in all the circumstances, the city conducted a reasonable search for records responsive to the request.

ORDER:

I uphold the reasonableness of the city's search for records responsive to the request and dismiss the appeal.

Original Signed by: March 29, 2018

Steven Faughnan
Adjudicator