Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3908

Appeal MA17-638

City of Greater Sudbury

February 28, 2020

Summary: The City of Greater Sudbury received a request for access to information about the requester's business under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The city refused to process the request on the basis that it was frivolous or vexatious under section 4(1)(b) of the *Act*. The adjudicator finds that the request is not frivolous or vexatious and orders the city to issue an access decision in response to the request.

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

Orders Considered: Orders M-850, M-1071 and MO-1924.

OVERVIEW:

[1] The City of Greater Sudbury (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information relating to the requester and her business. The request was for:

> …internal & external correspondence that mention [three versions of a business name], or alternate spellings of above business or [requester's name], from 2013 to present. Please search the following individuals:
>
> Bylaw (licensing) [four individuals named]

Planning (zoning) [two individuals named]

Clerks [individual named]

[2] The city contacted the requester the next day for clarification and gave her additional direction regarding the request. Following this conversation with the city, the requester removed her name from the request and changed the request to:

> …internal and external correspondence that mention: [three versions of a business name], or alternate spellings of above business from March 2013 to present. Please search the following departments: By-law, Building Services, Planning Zoning, Clerk's Services, and Legal.

[3] The city issued a decision advising the requester that it would not be processing the request as it had deemed it to be frivolous or vexatious pursuant to section 4(1)(b) of the *Act*. The city wrote in its decision that:

- the requester had already received a number of records in response to 22 prior access requests as well as through other disclosure;[1]

- the request was overly broad and included records previously disclosed to the appellant; and that,

- given the requester's history of requests, the breadth of the latest request, and her "pattern of conduct," the city would not process the request because it has deemed it to be frivolous or vexatious.

[4] The requester (now the appellant) appealed the city's decision to this office. A mediator was appointed to explore the possibility of resolution. During mediation, the appellant again revised her request, based on an apparent willingness by the city to reconsider its decision if the request were limited to the individuals listed in the original version and not entire departments. The appellant revised her request once more, but this time identified 27 employees whose records she asked be searched. The third version of the request, which is at issue in this appeal, is for access to:

> Internal and external emails since March 2013, mentioning [business name] or any other spellings of my business name, or [appellant's name] by the following individuals who are employed OR HAVE BEEN employed by the City of Greater Sudbury (correspondence, even those no longer employed by the city, must legally be kept for a specific time period and therefore, destroying it would be illegal), since the application of my business license in 2013.

[1] The city says that the appellant received 97 pages of disclosure from the city's planning department as part of an application for a minor variance, discussed later in this order.

[list of 27 names of city staff]

[5] The mediator conveyed this revised request to the city. The city did not respond and did not issue a decision regarding the revised request.

[6] With no further mediation possible, the file was moved to the adjudication stage of the appeal process, in which an adjudicator may conduct a written inquiry. As part of my inquiry, I received representations from the city and the appellant which were shared between them.

[7] In this order, I find that the city has not established that the appellant's request is frivolous or vexatious. I order the city to issue an access decision in response to the request.

DISCUSSION:

Is the request for access frivolous or vexatious?

[8] The only issue to be determined in this appeal is whether the appellant's request for access is frivolous or vexatious under section 4(1)(b) of the *Act*. This section states that:

> 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 if frivolous or vexatious.

[9] Section 5.1 of Regulation 823 under the *Act* elaborates on the meaning of the terms "frivolous" and "vexatious":

> A head of an institution that receives a request for access to a record or personal information shall conclude that the request is frivolous or vexatious if,
>
> > a. the head is of the opinion on reasonable grounds that the request is part of a pattern of conduct that amounts to an abuse of the right of access or would interfere with the operations of the institution; or
> >
> > b. the head is of the opinion on reasonable grounds that the request is made in bad faith or for a purpose other than to obtain access.

[10] Section 4(1)(b) gives institutions 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*. It should therefore not be exercised lightly.[2]

[11] If the head is of the opinion that the request is frivolous or vexatious, the head is required by section 20.1 of the *Act* to give the appellant reasons in a notice given under section 19.

[12] An institution has the burden of proof to substantiate its decision that a request is frivolous or vexatious.[3]

[13] The city takes the position that the appellant's request is frivolous or vexatious based on all of the grounds set out in section 5.1 of Regulation 823. The city asks that this appeal be dismissed and that the appellant be limited to one active freedom of information request with the city at a time.

Background provided in both parties' representations

[14] The appellant owns and operates a kennel in the Sudbury area. In 2013, she converted a shed located on the property to a kennel without a building permit and in March 2013, applied for a business license to operate a kennel on the property. After assigning a by-law officer and inspecting the property, the city issued a business license for the kennel operation in July 2013 with an expiry date of December 31, 2015.

[15] The expiry date was an error, since business licenses are issued annually. In December 2014, the city issued a letter explaining the "print error" on the appellant's license and requesting payment to renew the license. The appellant paid. The kennel continued to operate, subject to annual inspections, without issue until December 2016.

[16] In or around December 2016, the appellant applied for a building permit to add a new building on the property that would provide enhanced indoor services to the kennel's clients. In response, the city contacted the appellant and informed her that the kennel's business license (issued in, renewed and inspected since July 2013) had been "issued in error." While the rural zoning on the property permitted a kennel at the time of the original license application, permission was subject to all structures associated with the kennel use being located at least 300 metres from the closest residential building. At the time the kennel was established in 2013, there were three residential dwellings located less than 300 metres from the kennel. Given the existence of the three dwellings closer than the minimum required setback, the city says the kennel did not comply with the by- law at that time.

[17] The appellant submitted a minor variance application to permit the construction of a new kennel building and to recognize the location of the previously converted shed

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

being used as a kennel. The Committee of Adjustment denied the minor variance application. The appellant appealed to the Ontario Municipal Board (OMB).[4] The appeal was adjourned so that the appellant could proceed with an application for rezoning. In June 2017, the appellant submitted a rezoning application to the city to permit the kennel as well as her proposed new buildings. Following public hearings, the rezoning application was granted, subject to conditions.

[18] During these proceedings, and from the time of the discovery of the licensing mistake, the appellant made a number of requests for access to information. Those requests, because of their nature and number, taken together with the appellant's allegedly escalating attitude toward the city, form part of what the city says is an escalating pattern of conduct, motivated by a desire for retribution for the city's "perceived mistakes." All of this, argues the city, has culminated in the current request which the city says is frivolous or vexatious because it amounts to an abuse of the right of access, would interfere with the city's operations, and is made in bad faith and for a purpose other than to obtain access.

[19] For the reasons that follow, I disagree.

Pattern of conduct that amounts to an abuse of the right of access or would interfere with the operations of the city

[20] As noted above, section 5.1(a) of Regulation 823 states 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 or would interfere with the operations of the institution." Previous orders of this office have explored the meaning of the phrase "pattern of conduct." For example, former Assistant Commissioner Tom Mitchinson wrote in Order M-850 that:

> [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).

[21] To determine whether an appellant's request forms part of a pattern of conduct that amounts to an "abuse of the right of access," a number of factors can be considered, including the number, nature, timing and scope of the requests.[5]

[22] To determine whether an appellant's request forms part of a pattern of conduct that would "interfere with the operations of" the city, the city must establish that the appellant's conduct obstructs or hinders the range or effectiveness of the city's activities.[6] Interference is a relative concept that must be judged by an individual institution's circumstances. For example, it may take far less of a pattern of conduct to

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[4] Now the Local Planning Appeal Tribunal.
[5] Orders M-618, M-850 and MO-1782.
[6] Order M-850.

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.[7]

[23] I have considered the number, timing, nature and scope of the appellant's requests as well as their cumulative effect and find that the current request does not form part of a pattern of conduct that amounts to an abuse of the right of access or that would interfere with the city's operations. My reasons follow.

Representations

[24] In their representations, the parties have made submissions regarding the appellant's various proceedings involving the city (the minor variance application and appeal, and the application for rezoning). These include submissions on hearings and procedural matters such as adjournments, information relating to public meetings and submissions by members of the community regarding those matters. Although I have reviewed those materials submitted by the parties, as well as emails, information relating to private disputes and materials associated with the kennel business, I have only summarized those portions of the parties' representations that I find relevant to the question of whether or not the appellant's request for access to information is frivolous or vexatious under section 4(1)(b) of the *Act*.

The city's representations

[25] The city submits that the most recent version of the appellant's request does not change its position that the request is frivolous or vexatious and it adds that the revised request is "even more so [sic] than her original request."[8] Instead of narrowing her request, the city says the appellant has made it significantly broader, and that this expansion of her request is an example of the appellant's pattern of escalation when dealing with the city, which has led to the city's decision to consider this request frivolous or vexatious.

Abuse of the right of access

[26] The city submits that the request is part of a pattern of conduct that amounts to an abuse of the appellant's right of access under section 5.1(a) of Regulation 823 because it is excessively broad, includes names of people who no longer work for the city or with whom the appellant had a private dispute, and overlaps with information previously disclosed to the appellant.

[27] The city submits that the appellant made 22 requests in the approximately ten months before the current request, which it says is excessive by reasonable standards. In addition to the records disclosed to the appellant in response to her previous

[7] Order M-850.
[8] The third version of the appellant's request, revised during mediation, is at issue in this appeal.

requests, the city says that its planning department gave the appellant 97 pages of documents relating to her minor variance application.

[28] The city takes the position that the appellant's requests are intended to accomplish some objective other than to gain access because in her previous requests the appellant sought access to information about:

- building files and permits for neighbouring properties that submitted objections to her minor variance and rezoning applications, and
- records associated with the licensing of other kennels.

[29] The city submits that the appellant made requests for access to neighbouring properties' building files and permits to find problems or deficiencies with those properties and to use anything she found as retribution for their objections to her application, as well as to see if there had been anything improper on the city's part.

[30] With respect to access to records associated with other kennels' licensing information, the city argues that the appellant was trying to find issues with those kennels and to use any deficiencies to further her own application for a minor variance or rezoning. The city also argues that the appellant was trying to find errors made by the city in relation to those kennels that she could then use against the city.

[31] The city says that the appellant has been suspicious of city staff, specifically of their integrity, and has accused the city of hiding records. It says that the appellant has no use for some of the requested information other than to compare it with what she already has to prove the city is hiding records or to challenge the completeness of its search.

[32] The city submits that the timing of the requests is also connected to the occurrence of other events, since the requests began after the appellant's application for a minor variance was denied, and continued while she appealed to the OMB and during consideration of her rezoning application. While making her requests, the city says the appellant has also threatened legal action against the city.

Interfere with city's operations

[33] The city argues that the current request is both part of a pattern of conduct that interferes with its operations and that responding to the request would itself interfere with the city's operations.

[34] The city says that the appellant has had many dealings with various of its departments since 2013. Most recently, the city says that the appellant has increased the frequency and volume of her communications with the city, especially with the planning department and the city clerk's department, which is responsible for access requests.

[35] In addition to the increased frequency of her contacts, the city submits that the appellant has become more demanding, accusatory and confrontational, which requires staff to spend more time with her. The city says that the appellant:

- has required significant guidance when completing and submitting request forms
- often submits incomplete requests that require staff to clarify by follow-up email or phone call
- monopolizes the time of one of the legislative compliance coordinators who typically deals with her requests, demanding the staff member's availability and that she be given information or documents right away
- has questioned the completeness of records provided to her, resulting in the need to contact other departments to allay her concerns,
- copies multiple people on her emails, which takes staff away from other tasks and increases the amount of time spent reading her emails,
- has cost the city a lot of time processing her requests, for which the city says it has not charged her, and
- has said she does not care about the costs associated with responding to her requests.

The appellant's representations

[36] The appellant submits that, before it issued her business license in 2013, the city inspected her kennel and has conducted annual inspections since. She submits that the city's mistake only came to light once she applied for a permit to build a new structure on the property that would provide improved indoor services and help with the business. It was then that the appellant says the city first told her that the existing shed (that had been converted to a kennel in 2013) was too close to a neighbouring property.

[37] The appellant submits that she has done everything the city has recommended. When the city first discovered the mistake, the appellant says that staff told her to apply for a minor variance although the city knew or ought to have known that the proposed variance was not minor. When the application was denied, the appellant says that it was city staff who suggested she appeal to the OMB and bring an application for rezoning that would allow for a kennel structure to be closer than 300 metres to the nearest dwelling.

[38] The appellant denies that her requests have interfered with the city's operations. She submits that the city never gave her any indication that she was "overloading the system," and that, if the city needed more time to respond to her requests, they never

asked for it. She writes in her appeal that emails pass through the city's servers so that a search using specific terms (her own and variations of her business name) should not be difficult.

[39] The appellant says that her requests were always handled by one person in the city clerk's office, a legislative compliance coordinator, whose job she believes was to assist her and who helped her complete request forms so that they could be clear to city staff. The appellant denies that she was demanding or insistent that staff accommodate her schedule. She says it simply takes time and money to drive into the city so that she only asked when certain staff or records would be available to avoid making wasted trips.

[40] She concedes that she has grown frustrated at times because of the situation, but denies being abusive. She submits that when she told the city she did not care about the costs associated with searching for records responsive to her requests, she simply meant that she did not want cost to be an obstacle to access, and expected to pay for paper and time.

The city's reply representations

[41] The city submits in reply that it did not require extensions to respond to the appellant's previous access requests because those requests did not interfere with its operations: after much guidance from staff clarifying the appellant's "multiple incomplete requests," those requests became specific, narrow, and succinct and could be therefore completed within the time specified in the *Act*.

[42] The city maintains that the appellant's behaviour has significantly increased the amount of time city staff spends interacting with her and that staff must continually explain existing and publicly available processes, procedures and requirements to the appellant that takes them away from other work.

[43] Finally, the city submits that the appellant is attempting to dictate the execution of a search because she has suggested that the city's IT department conduct a search using her and the business name as key words or search terms. The city says that hard copy records that are digitized by scanning are largely stored as .pdf image files in which key word searches are not possible. The city says that individual staff computers are not indexed and would require an unfeasible effort by IT to search multiple departments' worth of computers. Even if possible, the city says that this would be exceptionally burdensome, and would still require individuals familiar with the matters to search hard copy records. The city says this would interfere with the operations of the city due to the "exceptionally broad scope of the request" which affects multiple departments, and would require significant staff time to filter through a large number of records, many of which the city says the appellant has or are publicly available.

Analysis and findings

[44] Based on the circumstances of this appeal, I am not satisfied that the evidence supplied by the city has established, on reasonable grounds, that a pattern of conduct as contemplated by section 5.1(a) of Regulation 823 exists with respect to the appellant's request. Even if a pattern of conduct were found to exist, I do not accept that the city has established that it amounts to either an abuse of the appellant's right of access or would interfere with the city's operations.

Abuse of the right of access

[45] As set out above, a "pattern of conduct" requires recurring incidents of related or similar requests on the part of the requester.[9] The city says that the appellant's "excessive requests," the overlap with disclosure she received as part of her minor variance application, her disregard for the costs associated with access and the fact that the request is for the corollary purpose of finding other mistakes are part of a pattern of conduct that amounts to an abuse of her right of access.

[46] While there will be circumstances in which 22 requests made in ten months is excessive by reasonable standards, the city has not satisfied me that that is the case here.

[47] With its representations, the city provided copies of the appellant's previous requests. They are for single items, such as business licenses, inspection reports, and complaints made by or against the appellant. Ten of the 22 requests are for access to identical information (the business licenses of other kennels). The city has not explained whether those requests (which are undated) are simply duplicates that were clarified, or whether they were submitted and responded to twice. While the city says it granted access in each of the appellant's 22 requests, it does not say it did so 10 extra times or why, if the requests are, in fact, duplicates, the city would not have raised a concern at the time.

[48] Even if the previous requests are 22 discrete requests, I am not persuaded that they are excessive in the circumstances of this appeal. The prior requests all relate to the appellant's questions about the city's licensing process. I agree that the requests correspond to other events: but for the city's error, they may never have been made. Put simply, the appellant was granted a license to operate her business for more than three years before the city, without any forewarning, advised her that it had issued her license "in error." It is not unreasonable or unforeseeable in these circumstances that the appellant would have a heightened interest in understanding what led to the error and the subsequent need to spend what she says was more than $18,000 on variance and rezoning applications to fix the mistake. It is also not unreasonable or unforeseeable that the appellant's desire to better understand the processes or

[9] Order M-850.

circumstances that led to her current situation would involve making access to information requests about the licensing of other business that provide the same services as her own.

[49] I am also not persuaded that the appellant's request amounts to an abuse of her right of access because of some possible overlap between her request and the disclosure she already received during her matters before the Committee of Adjustment or the OMB. As noted by the Assistant Commissioner in Order MO-1427, "the scheme under [the Act] for obtaining access to records in the hands of government institutions exists separately from discovery processes associated with civil actions." Although I recognize that the minor variance and rezoning applications are not civil actions, I find that the same reasoning applies insofar as they are separate proceedings before administrative tribunals. With respect to this request for access, however, I am not persuaded that there is significant overlap between the request at issue in this appeal and the previous requests made by the appellant under the *Act*. As I stated above, I accept that in these circumstances, the appellant would have a greater interest in records relating to the errors associated with her business license application.

[50] I also reject the city's submission that the request is part of a pattern of conduct that amounts to an abuse of the right of access because it is for (or may have) the corollary purpose of finding other of the city's mistakes to help with the appellant's rezoning application or to sue the city. Previous orders of this office have determined that the abuse of the right of access described by section 5.1(a) of Regulation 823 refers only to the access process under the *Act*, and is not intended to include proceedings in other forums.[10] Therefore, while the appellant applied for a variance or rezoning, these proceedings are not determinative in a decision on whether the grounds in section 5.1(a) of Regulation 823 are established. The only proceedings that are relevant for the purpose of my analysis under section 5.1(a) are those arising under the *Act*. The totality of the appellant's various other proceedings may be relevant to whether an access request is made "for a purpose other than to gain access" under section 5.1(b), and I have referred to that below.

[51] Finally, I give no weight to the city's submission that the appellant showed a disregard for the time or costs associated with responding to her requests. Emails submitted by the city show that the appellant had inquired about less expensive alternatives to photocopies, asking whether disclosure, if voluminous, could be provided on a USB key instead of paper. The appellant's emails demonstrate an understanding that there would be a fee associated with access and stated that she did not care what the fee was because she did not want it to be an obstacle to disclosure.

[52] In sum, I find that the appellant's request does not amount to an abuse of her right of access for the purpose of section 5.1(a) of Regulation 823.

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[10] Orders M-906, M-1066, M-1071, MO-1519 and P-1534.

Interference with the operations of the institution

[53] I am also not satisfied that the city has established that the appellant's requests demonstrate a pattern of conduct that would interfere with its operations.

[54] The city argues that processing the appellant's request would take up significant time and resources and that a substantial amount of time would be required by many staff to search through hard copy records. While the city provides detail about the difficulties associated with hard copy communications because it scans and digitizes those as .pdf files, the appellant's request is limited to email communication that is already electronic. I find it highly unlikely that the city would print out emails as hard copies, scan and then digitize them as .pdf files that it says could then not be searched using key word search terms. In my view, the request itself is clear and limited to individuals whose emails the appellant believes ought to be searched. The city has not provided me with any basis on which to conclude that searching specific employees' email communications that are already electronic would interfere with its operations.

[55] In any event, the *Act* provides relief for the burden faced by institutions responding to requests that may be voluminous or onerous. In Order M-1071, the adjudicator wrote:

> There are a number of alternative measures available to relieve an institution faced with a request which may, on the surface, appear likely to interfere with its operations (Order M-906).
>
> They are the fee provisions in section 45 of [the *Act*] and the related provisions in the Regulation, and the interim access decision and fee estimate scheme described in Order 81. In some circumstances, a time extension under section 20(1) may also provide relief.

[56] It is open to the city to rely on the provisions described in Order M-1071, above, as well as other relief measures described in this office's jurisprudence in responding to the appellant's request.[11]

[57] I am also not persuaded that the time the city says it has spent assisting the appellant with her requests or helping to clarify them has interfered with the city's operations. Section 17(2) of the *Act* makes it mandatory for the city to help a requester reformulate a request that may be unclear. Section 17(2) states that:

> If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer

[11] As noted in Order M-1071, with reference to Order 81, which was further refined by Order PO-2634. These provisions are intended to mitigate the costs associated with processing requests under the *Act* by providing some cost recovery. They are not intended to operate as a complete cost-recovery mechanism for an institution covered by the *Act*.

assistance in reformulating the request so as to comply with subsection (1).[12]

[58] The appellant cannot be expected to know how the city's records are kept and I reject outright the city's argument in support of its frivolous or vexatious position that compliance with its positive obligations under the *Act* to assist the appellant interferes with its operations.

[59] Similarly, the city has provided emails it exchanged with the appellant to demonstrate that it has spent an inordinate amount of time with the appellant to explain existing or publicly available processes, procedures and requirements. In addition to emails relating to her prior requests, many are specific to the planning committee's approval of the rezoning application and deal with conditions of approval, such as noise testing and mitigation, particulars that the appellant might quite rightly want to clarify to ensure she has complied. In any event, I find that the time spent by the city to explain specific requirements associated with another proceeding before the planning committee cannot be said to interfere with the city's operations as they relate to the appellant's request for access to information about herself or her business under the *Act*.

[60] I therefore am not persuaded that clarifying requirements relating to other city proceedings, or assisting the appellant with clarifying her requests as it is required to do under the *Act* amounts to interference with the city's operations as contemplated by section 5.1(a) of Regulation 823.

Bad faith or purpose other than to obtain access

[61] Section 5.1(b) of Regulation 823 sets out the second ground for establishing that a request is frivolous or vexatious. Under section 5.1(b), an institution must establish that a request was made in bad faith or for a purpose other than to obtain access.

[62] "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 judgment 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

[12] Subsection 17(1) requires a person seeking access to a record to, among other things, make a request in writing with sufficient detail to enable an experienced employee of the institution to identify the record upon a reasonable effort.

in that it contemplates a state of mind affirmatively operating with furtive design or ill will.[13]

[63] 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]

[64] Previous orders have found that an intention by the requester to take issue with a decision by an institution, or to take action against an institution, is not sufficient to support a finding that the request is "frivolous or vexatious".[15]

[65] 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.[16]

The city's representations

[66] The city argues that the appellant's request has been made for a purpose other than to obtain access. As noted above, the city maintains that the appellant's request is motivated by a desire to:

- find other mistakes made by the city
- conduct a fishing expedition for anything that the appellant could use to sue the city
- retaliate against those who may have opposed her minor variance or rezoning applications
- ensure the completeness of the city's searches by comparing responsive records with records the city says the appellant already has
- create more work for city staff in retribution for perceived slights.

The appellant's representations

[67] The appellant submits that she revised her request according to the city's suggestions and instructions. She says that she has consistently followed the city's recommendations, from how to complete access requests to what to do after the city's mistake with her business license was discovered.

[68] The appellant submits that her request is solely to gain access to information about herself and her business and that she is willing to pay reasonable fees. She

[13] Order M-850.
[14] Order M-850.
[15] Orders MO-1168-I and MO-2390.
[16] Order MO-1924.

submits that the minor variance and rezoning applications have so far cost her more than $18,000. She says that she and her husband left their careers and invested their life savings to create their business, opened their property to the city for required inspections, and have followed the city's instructions and recommendations. She says that the city in turn has ignored some of her correspondence, accused her of acting out, and denied her access to information about herself and her business while threatening to take away her livelihood because of its own mistake.

Analysis and findings

[69] Having reviewed the materials before me, I do not find sufficient basis to conclude that the appellant's request is made in bad faith or for a purpose other than to obtain access.

[70] As set out above, this office has interpreted "bad faith" as implying the "conscious doing of wrong because of dishonest purpose or moral obliquity." Bad faith "contemplates a state of mind affirmatively operating with furtive design or ill will."

[71] Also as set out above, section 5.1(b) allows for requests to be deemed frivolous or vexatious if they have been submitted for a "purpose other than to obtain access." This term has been described as requiring an improper objective above and beyond a collateral intention to use the information in some legitimate manner."

[72] Previous orders, such as Order MO-1024, which I discuss below, 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.

[73] The city maintains that the request (taken with the appellant's prior requests) is retaliatory, driven by the appellant's desire to unearth other mistakes by the city and, citing the appellant's alleged comments that she intends to commence legal action, to bolster any potential such claim she may have against the city.

[74] I acknowledge that the licensing issue has created challenges for the relationship between the city and the appellant. However, in my view, the evidence provided by the city does not establish that the appellant consciously exercised her access rights in bad faith; that is, for a dishonest purpose or with furtive design or ill will.

[75] Even considering her requests as a whole, it is not, as I have already noted, unforeseeable or unreasonable that a mistake by the city (and one that could affect the appellant's livelihood) would spark an interest in records associated with the city's licensing process and the licensing of the appellant's business in particular. As also noted above, the appellant's requests began after the city notified her that it had issued her business license "in error." For the more than three years in between, the appellant had operated her kennel business with a license and subject to inspections by the city.

[76] Whether the appellant intends to pursue any claim against the city is separate and distinct from her right of access to information about herself held by the city and is not contingent on disclosure by the city. Even if the appellant's desire for access has the corollary purpose of potential litigation, such a purpose is permissible. In Order MO-1924, Senior Adjudicator John Higgins provided extensive comments on whether a request may be found to have a purpose other than to obtain access. In that case, the institution argued that the objective of obtaining information for use in litigation or to further a dispute between an appellant and an institution was not a legitimate exercise of the right of access. In rejecting that argument, the Senior Adjudicator wrote:

> 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 CanLII 358 (SCC), [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.

[77] I adopt this approach for the purpose of my analysis in this appeal. The city has not provided sufficient evidence to support that the appellant's request was made for a purpose other than to obtain access. I am also not persuaded that the appellant's access to information about herself or her business in the possession of the institution is made in bad faith, even if she were to exclusively use it to assist in deciding whether to bring a claim against the city. Her decision to exercise her right to claim damages that may have arisen from the city's conduct cannot be said to be an intention to use the information in a manner that is not legitimate. Once it is determined that a request has been made for the purpose of obtaining access or for legitimate reasons, this purpose is not contradicted by the possibility that the requester may also intend to use the

documents against the institution (or any other party).[17]

[78] I am also not persuaded that the city's argument that the appellant seeks to find other mistakes to use against the city supports a finding that the request is made in bad faith or for an improper purpose. The city is accountable to the public. The *Act* provides for disclosure of information under the control of institutions, with limited and specific exemptions, especially when that information is about the appellant and her own business. I conclude that the possibility that disclosure of information in the city's possession about the appellant and her business may (or may not) result in the discovery of other mistakes cannot support a finding that a request is made in bad faith or for an improper purpose, especially where the city already admits to mistakes associated with the licensing process of the appellant's business.

[79] Applying the analysis in Order MO-1924, above, I am not satisfied by the city's representations that the requirements under section 5.1(b) of Regulation 823 have been met. Accordingly, I find that the appellant's request does not fit within section 5.1(b) to provide a basis for the city to refuse to process her request.

Conclusion

[80] The tests under section 5.1 of Regulation 823 set a high threshold. I find that this threshold has not been met in the circumstances of this appeal. I find that the city has failed to establish reasonable grounds for finding that the request is frivolous or vexatious within the meaning of section 4(1)(b) of the *Act*. I therefore order the city to issue an access decision in response to the request.

ORDER:

1. I do not uphold the city's decision that the appellant's request is frivolous or vexatious.

2. I order the city to issue an access decision in response to the request in accordance with the *Act*, without relying on the frivolous or vexatious provisions of the *Act*. For the purposes of sections 19, 22 and 23 of the *Act*, the date of this order shall be deemed to be the date of the request.

Original Signed by: February 28, 2020

Jessica Kowalski
Adjudicator

[17] Order PO-2050.