Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3914

Appeal MA19-00293

The Corporation of the City of Cambridge

March 12, 2020

Summary: The City of Cambridge issued a decision refusing to process a request that it received under the *Municipal Freedom of Information and Protection of Privacy Act* on the basis that the request is 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 responding to the request.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, RSO 1990, c M56, as amended, section 4(1)(b); and section 5.1 of Regulation 823.

OVERVIEW:

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

> All records for [specified address].
>
> All "Daylight Triangle" complaints.
>
> I am requesting release of all documents in form of:
>
> 1. Complaints entry on principle (who, when, who entered).

2. All attending officers, notes, pictures, emails, all communication also in form of voicemails.

3. All communication emails, between – mayors office, councillor, city managers – office, Bylaw Department manager, city clerk and owner of property.

4. All other relevant documents pertaining to this address.

[2] The city issued a decision letter dated March 19, 2019, which stated:

> […] under the circumstances we will not be able to address your Freedom of Information request as per the attached letter indicating that the City is no longer in a position to maintain dialogue with you and will not be responding to any future enquiries.

[3] The attachment referred to in the city's decision letter was another letter dated January 8, 2019, which stated:

> Pursuant to correspondence that was personally provided to you on December 6, 2018, this correspondence serves as additional notice that your contract with the City of Cambridge has ended.
>
> It has come to my attention that there has been ongoing communications with city staff from yourself. We are not in a position to maintain dialogue and will be refraining from responding to any future enquiries.

[4] The requester, now the appellant, appealed the city's decision to this office.

[5] During the mediation stage of the appeal process, the city issued a revised decision stating that it considered the appellant's request to be frivolous or vexatious under section 4(1)(b) of the *Act*. In support of this position, the city explained:

> There is a history of your dealings with the City, and your engagement with staff has been questionable. Your conduct in making informal access requests to staff [poses] a concern of safety, and has forced a formal letter of notice to you, dated January 8, 2019 stating that your contact with the City of Cambridge has ended and we are not in a position to maintain dialogue and will be refraining from responding to any future inquiries.
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> This decision is based on past decisions by the IPC outlined in Orders MO-1519; MO-2444; and MO-2373; which are very much similar, if not identical, to your request and upheld by the IPC.

[6] The parties were unable to resolve the issue under appeal through mediation,

and the appeal was transferred to the adjudication stage where an adjudicator may conduct an inquiry under the *Act*. During my inquiry, I invited and received representations from the parties, which were shared in accordance with *Practice Direction Number 7* and the IPC's *Code of Procedure*.

[7] For the reasons that follow, I find that the city has not established that the appellant's request is frivolous or vexatious under section 4(1)(b) of the *Act*. Therefore, I order the city to issue an access decision responding to the request.

DISCUSSION:

Is the appellant's request frivolous or vexatious within the meaning of section 4(1)(b) of the *Act*?

[8] The sole issue to be determined in this appeal is whether the appellant's request is frivolous or vexatious as contemplated by section 4(1)(b) of the *Act*, which 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.

[9] This section provides institutions with a summary mechanism to deal with frivolous or vexatious requests. This discretionary power should not be exercised lightly, as it can have serious implications on the ability of a requester to obtain information under the *Act*.[1] The city has the burden of proof to substantiate its decision to declare the request frivolous or vexatious.[2]

[10] Where a request is found to be frivolous or vexatious, this office will uphold the institution's decision. In addition, this office may impose conditions such as limiting the number of active requests and appeals the appellant may have in relation to a particular institution.[3]

Grounds for a frivolous or vexatious claim

[11] Section 5.1 of Regulation 823 under the *Act* elaborates on the meaning of the term "frivolous or vexatious," as follows:

> 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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[1] Order M-850.
[2] Order M-850.
[3] Order MO-1782.

> (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 5.1(a) of Regulation 823 provides that a request is frivolous or vexatious if 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 have explored the meaning of the phrase "pattern of conduct." In Order M-850, for example, former Assistant Commissioner Tom Mitchinson 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).

[13] 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, such as the cumulative effect of the number, nature, scope, purpose, and timing of the request.[4]

[14] To find that the appellant's request forms part of a pattern of conduct that would interfere with the operations of the city, I must be satisfied that the appellant's conduct obstructs or hinders the range or effectiveness of the city's activities.[5] Interference is a relative concept that must be judged on the basis of the circumstances a particular institution faces. For example, it may take less of a pattern of conduct to interfere with the operations of a small municipality than with the operations of a large provincial government ministry, and the evidentiary onus on the institution would vary accordingly.[6]

[15] Under section 5.1(b) of Regulation 823, a request can be found to be frivolous or vexatious for the purposes of the *Act* if it was made in bad faith or for a purpose other than to obtain access. Where this is the case, the institution need not demonstrate a "pattern of conduct."7

[16] "Bad faith" has been defined as:

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

> The opposite of "good faith", generally implying or involving actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfil some duty or other contractual obligation, not prompted by an honest mistake as to one's rights, but by some interested or sinister motive. ... "bad faith" is not simply bad judgement or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity; it is different from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with furtive design or ill will.[8]

[17] 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.[9]

Representations

The city's representations[10]

[18] The city maintains that its decision to declare the appellant's request frivolous or vexatious was made based on the grounds in both sections 5.1(a) and 5.1(b) of Regulation 823.

[19] As background, the city explains that the appellant is a former city employee. The city maintains that when the appellant's employment contract was not renewed, he began requesting information about complaints and previous bylaw investigations "in order to do harm to constituents, city staff, or the city in general." The city says that as a result of these "questionable" engagements with the city and its staff, the city issued a "formal letter of notice" on January 8, 2019 advising the appellant that the city is no longer in a position to maintain dialogue with him. According to the city, this action was required because the appellant's conduct, and the nature and tone of his requests, raised a concern for safety.

[20] The city believes the appellant's request was made in bad faith, with malice, and "potentially for wrong doing and some dishonest purpose." In support of this position, the city maintains that the requested information was the subject of a complaint that was investigated during the appellant's time as a city employee. In the city's view, the appellant has subsequently become fixated on this particular complaint. According to the city, there is "no reason" for the appellant to be requesting the information that he seeks other than "personal self-satisfaction and [to] potentially harm members of the public."

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[8] Order M-850.
[9] Order M-850.
[10] The city's representations also address the various exemptions that it submits would apply to the requested information. Given that the only issue before me is whether the request is frivolous or vexatious, I have not summarized these representations in this order.

[21] As further support for its belief that the appellant's request was made in bad faith or for an improper purpose, the city provided an audio recording of a voicemail that the appellant left for the city's Deputy Clerk. The city maintains that in the recording, the appellant is "somewhat threatening."

The appellant's representations

[22] The appellant submits that the city is treating him as a former employee and not as an individual exercising their rights under the province's freedom of information legislation.

[23] With regard to the grounds under section 5.1(a) of the regulation, in particular, the appellant says that he only made one "official" request under the *Act*. He maintains that his previous contact with the city had "nothing to do with" the request at issue in this appeal.

[24] With regard to the grounds under section 5.1(b) of the regulation, the appellant says that the city's submissions about him making a request in bad faith are purely speculative. In the appellant's view, the city's position that he seeks information for "personal self-satisfaction" is a "groundless … abuse of authority." He explains that the only purpose of his request is to exercise his rights as a citizen of the city.

[25] The appellant also objects to the city's description of his voicemail being threatening towards the Deputy Clerk. He maintains that he was exercising his rights under section 2(b) (freedom of expression) of the *Charter*,[11] and that his tone of voice was normal.

Analysis and findings

[26] For the following reasons, I find that the evidence does not establish that the request at issue in this appeal demonstrates a pattern of conduct on the appellant's part that would amount to an abuse of his right of access or interfere with the city's operations under section 5.1(a) of Regulation 823. I also find that the evidence does not establish that the request was made in bad faith or for an improper purpose under section 5.1(b).

Section 5.1(a) - pattern of conduct that amounts to an abuse of the right of access or would interfere with the city's operations

[27] As set out above, section 5.1(a) provides that a request is frivolous or vexatious if 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." It must first be shown that there is a "pattern of conduct," which requires recurring incidents of related or similar

[11] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

requests on the part of the requester (or with which the requester is connected in some material way).[12]

[28] To demonstrate that the appellant's behaviour amounts to a "pattern of conduct," the city explains that before making the request at issue in this appeal, the appellant made several other "informal" requests. The city says that it endeavoured to cut off communication with the appellant because the nature and tone of his previous requests raised safety concerns. In my view, however, the city has not provided sufficient evidence about the volume, nature, scope, and tone of the appellant's past contacts with the city. Without more information, I am not satisfied that the city's evidence supports a finding that the appellant's behaviour amounts to a "pattern of conduct."

[29] Even if I were to accept that the appellant had exhibited a pattern of conduct, I am not persuaded that it would amount to an abuse of the right of access, as required by section 5.1(a). Past orders of this office have determined that factors such as the number of requests, nature and scope of the request, purpose of the request, and timing of the request may be relevant in determining whether an appellant's behaviour amounts to an abuse of the right of access.[13]

[30] In my view, the city has not demonstrated that the number of requests (only one on the evidence before me) made under the *Act* is excessive by reasonable standards; nor has it suggested that the request is unreasonably broad, unusually detailed, or identical or similar to past requests. The city has also not suggested that the request is temporally connected to some other occurrence or related event. To the extent that the city makes assertions of harm or concerns for safety respecting the appellant or his request, I note that these submissions may more properly form the basis of exemption claims.[14] Therefore, considering the evidence relating to the number, scope, nature, and timing of the request, I am not satisfied that the appellant has engaged in a pattern of conduct that amounts to an abuse of the right of access.

[31] Additionally, considering that the city did not provide any evidence demonstrating that the request would obstruct or hinder the range or effectiveness of its operations, I am also not satisfied that the second ground in section 5.1(a) is applicable in the circumstances.

[32] As a result, I find that the grounds in section 5.1(a) of Regulation 823 are not established in the context of this appeal. Next, I will consider whether the appellant's request is frivolous or vexatious based on the grounds in section 5.1(b) of the regulation.

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[12] Order M-850.
[13] Order M-850.
[14] See, for example, section 13 of the *Act*. However, I make no finding on whether this exemption claim, or any other exemption claim, would be upheld on appeal.

Section 5.1(b) - request made in bad faith or for an improper purpose

[33] Section 5.1(b) of Regulation 823 allows for a request to be deemed frivolous or vexatious if it was made in bad faith. As set out above, this office has interpreted "bad faith" as implying "the conscious doing of a wrong because of dishonest purpose or moral obliquity." Bad faith is different from negligence "in that it contemplates a state of mind affirmatively operating with furtive design or ill will."[15]

[34] Section 5.1(b) also allows for a request to be deemed frivolous or vexatious if it was 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.[16]

[35] The city submits that the appellant's request was made in bad faith or for a purpose other than to obtain access because, according to the city, there is "no reason" for the appellant to be seeking access to the requested information. The city explains that the request relates to an investigation that took place during the appellant's time as a city employee, and with which he has since become "fixated."

[36] On the evidence, I am not satisfied that the city has demonstrated that the appellant has engaged in "a conscious doing of wrong" or that his request is motivated by an improper objective. In my view, the city's submissions do no more than speculate about the appellant's motivation and ill-will. The only evidence that the city provided to support its position that an "intent to harm" underlies the appellant's request is an audio recording of a voicemail from the appellant to the city's Deputy Clerk. I have listened to the recording, and summarize its contents as follows: The appellant expresses his disappointment with the city's response to his request, and explains that he is requesting information as a citizen and not as a former city employee. He says he has rights under the *Act* and is willing to pay any required fees. He advises the clerk that he is working with two lawyers and will be contacting this office and higher courts, if necessary. He also advises that he may turn to the media.

[37] Considering both the content and tone of the appellant's voicemail, I disagree with the city's description of it as "somewhat threatening." In my view, the tone of the message is not threatening; the appellant is merely expressing his frustration with the city's response to his request, and explaining the lengths that he is willing, and entitled, to go to in order to pursue his rights under the *Act*. Accordingly, I am not satisfied that it, or the rest of the city's evidence, supports the city's claim that the appellant's request was made in bad faith or for a purpose other than to obtain access.

[38] Given that I am not persuaded that the appellant made his request in bad faith or for a purpose other than to obtain access, I find that the grounds in section 5.1(b) of Regulation 823 are not established.

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[15] Order M-850.
[16] Order MO-1924.

[39] As the city has not established either basis for a finding under section 5.1 of Regulation 823, I find that the appellant's request is not frivolous or vexatious for the purpose of section 4(1)(b) of the *Act*.

ORDER:

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

2. I order the city to issue an access decision in response to the appellant's request in accordance with the *Act*, without relying on the frivolous or vexatious provisions of the *Act*. For the purposes of section 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: March 12, 2020

Jaime Cardy
Adjudicator