Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3926

Appeal MA19-00315

City of Thunder Bay

May 27, 2020

Summary: The city of Thunder Bay (the city) received a six-part request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for specific information related to a splash pad in a specified park in the city. The city denied access to the records on the basis that the request was frivolous and vexatious within the meaning of section 4(1)(b) of the *Act*. In this order, the adjudicator finds that the request is not frivolous or vexatious within the meaning of the *Act*, and orders the city to issue an access decision.

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

Order Considered: Order M-850.

OVERVIEW:

[1] The city of Thunder Bay (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for information related to a splash pad in a specified park in the city. The request was for the following specific information:

- Unredacted copy of [a specified date and time] email from [a specified ward representative to city employee A], [city employee A to the same specified ward representative, of a specified date and time]

- *All* emails between [the requester and] [the specified ward representative] April 2017 to date. [The specified ward representative] did not comply with last FOI [freedom of information] and failed to submit relevant emails.

- All correspondence – [a specified company], [city employee B], [city employee C], [city employee A], [city employee D] re: [a specified park] year 2016 only

- Minutes 2018 [initials of specified park] public meeting

- *All* correspondence in complete form re: [the requester]/[the specified park] - [city employee A], [city employee D] April 2017 to date

- All correspondence in complete form re: [the specified park]/[the requester] - Oct 2018 to date, [city employee B], [city employee C], City Council, [city employee E].

[2] In response, the city denied access to the records on the basis that the request was frivolous and vexatious within the meaning of section 4(1)(b) of the *Act*.

[3] The requester, now the appellant, appealed that decision to the Office of the Information and Privacy Commissioner of Ontario (the IPC, or this office).

[4] Mediation was attempted but did not resolve the dispute. Accordingly, the file was referred to adjudication, where an adjudicator may conduct a written inquiry.

[5] As the adjudicator of this appeal, I began my inquiry under the *Act* by sending out a Notice of Inquiry, setting out the facts and issues on appeal, first to the city, then to the appellant. I sought and received written representations from the parties in response, which were shared amongst them. The city declined to reply to the appellant's representations.

[6] For the reasons that follow, I find that the city has not established that the appellant's request is frivolous and vexatious under section 4(1)(b) of the *Act*. As a result, I will order the city to issue the appellant an access decision.

DISCUSSION:

[7] The only issue to be decided in this appeal is whether the appellant's request for access was frivolous or vexatious under section 4(1)(b) of the *Act*.

[8] Section 4(1)(b) says:

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

[9] Section 5.1 of Regulation 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) 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]

[11] An institution has the burden of proof to substantiate its decision to declare a request to be frivolous or vexatious.[2]

[12] The city submits that the appellant's request was frivolous and vexatious in the following three ways:

- it exemplifies a recurring and sustained pattern of conduct that amounts to an abuse of process;
- it was made in bad faith; and
- it was for a purpose other than to obtain access pursuant to section 4(1)(b) of the *Act* and sections 5.1(a) and 5.1(b) of Ontario Regulation 823.[3]

[13] I will discuss each of these grounds, in turn, below.

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[1] Order M-850.
[2] Order M-850.
[3] A fourth possible ground was that the pattern 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. However, in its representations, the city stated that it would make no submissions on this point. Therefore, I will not consider references to operations made in the affidavit as sufficient evidence of this fourth ground.

Section 5.1(a) -- Pattern of conduct that amounts to an abuse of the right of access

[14] For the reasons set out below, there are several factors in this case which weigh against a finding that the request is part of a pattern of conduct that amounts to an abuse of the right of access.

[15] Factors that may be relevant in determining whether a pattern of conduct amounts to an "abuse of the right of access" include the number, nature, scope, purpose, and timing of the requests. 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] 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] The focus should be on the cumulative nature and effect of a requester's behaviour.

[16] Here, the city submits that the appellant's request is part of a pattern of conduct that amounts to an abuse of process for two reasons. Its "primary" reason relates to statements allegedly made by the appellant to city staff about having missed an IPC deadline. The city's second reason concerns the appellant's history of requests and communications with the city over two years.

The city's "primary" reason

[17] As mentioned, factors particular to a set of circumstances may be relevant in a section 4(1)(b) appeal, and in this case, the city's "primary" reason for invoking section 4(1)(b) is such a factor for consideration.

[18] The city alleges that the appellant told a city employee that she was only filing the request at issue because the appellant had missed the deadline for editing and amending her appeal submission to the IPC with respect to her previous FOI request. The city further alleges that the appellant told a city employee who was assisting her with her FOI request that she knew her request was substantially similar to her last one. The city also alleges that the appellant shared that her intent was to ensure that she could make a more complete appeal with additional details that she did not have time to add the first time around.

[19] The appellant entirely disputes this.

[20] Rather, she states that she told the city employee that she wanted "the missing information" in order to "bring this to a close;" she states that she said she just wanted the city to provide what she is "entitled to and that will resolve this."

[21] Based on the evidence before me, I find that the city's position regarding its

[4] Order MO-1782.
[5] Order MO-1782.

"primary" reason for invoking section 4(1)(b) is unsubstantiated. According to the city's summary of the appellant's requests, none of the appellant's previous requests can be fairly characterized as "substantially similar" to the request that is the subject matter of this appeal.

[22] In any event, even if evidence had established that the appellant was seeking to improve on her previous request or rectify an issue with it, I would not find that this amounts to a pattern of conduct that amounts to an abuse of the right of access.

[23] For these reasons, the city has not established that its "primary" reason for invoking section 4(1)(b) is valid. Accordingly, I do not accept it, and I will now turn to the city's second reason for claiming that the request is part of a pattern that is an abuse of process.

The city's second reason

[24] The city also claimed the request is part of pattern of conduct that amounts to an abuse of process because of the "history of numerous and substantial informal and formal communications between the appellant and various city employees requesting records over the span of two years." It submits that all of these "communications, interactions, and requests" of the appellant, "whether formal or informal, particularly the more recent ones," demonstrate the appellant's "increasingly agitated communications." The latter are described, in part, as being "no longer aimed at gaining access to information for reasonable or legitimate grounds, but rather were motived to harass the city or act as a nuisance."

[25] I find that the city's second reason encompasses the factors usually considered when determining whether a pattern of conduct amounts to an abuse of process (the number, nature, scope, purpose, and timing of the requests). I will discuss these factors below.

Number of requests

[26] The city submits that the appellant made eighteen requests over two years, nine of which were "email communications", and that this number of requests is excessive by reasonable standards. Accordingly, the city submits that the number of requests made by the appellant is a factor weighing towards a finding of pattern of conduct justifying reliance on section 4(1)(b).[6] In support of its position, the city provided a table containing a summary of the appellant's request history. Reviewing this table, I find that it does not assist the city, as I will explain below.

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[6] In its submissions, the city asserts that there is "nothing further" that it is able to release to the appellant which the appellant does not already have in its possession, that the appellant "has the entirety of the records that the city has in its possession regarding the splash pad, at this point in time." However, this submission is not relevant to the question of how many requests the appellant has made.

[27] The city counts one of the appellant's appeals to this office as a request. However, by exercising her right of appeal under section 39 of *MFIPPA*, the appellant was not submitting a "request" under section 17 of *MFIPPA*.

[28] Half of the eighteen requests listed in the city's table were "email communications" made to the city. The table provided by the city includes a "result" column, in which the city describes its response to a request (such as partial access granted). Some of these columns were blank, and others stated that the appellant was referred to a web link which was not specified. I note that if, in fact, the requested information was publicly available, the appropriate response would have been to claim section 15 of the *Act* and point the appellant to the very information she sought, but that does not appear to have occurred.

[29] In the circumstances, I do not find that seventeen requests in two years was an excessive number of requests, especially since the city did not respond to some of them. I accept that in some circumstances seventeen requests in two years may be excessive by reasonable standards, but I do not find that to be the case here considering the nature and scope of the requests.

[30] The city submits that the appellant "frequently asks not only for similar or identical information, but also continually asks for information that she is able to access online, such as [c]ity [c]ouncil meeting minutes." I find this position to be unsubstantiated by the evidence before me, and in particular, city's table summarizing the appellant's requests. The first requests were quite broad. I find that they reflect a general understanding on the appellant's part of the subject matter. As time progressed, and as disclosure was made to the appellant, her requests became more detailed and focussed. This can be seen, for example, in the requests for public meeting minutes: the first was for "any and all" meetings, then there was a request for a list of dates, and a request for a twelve-month period; the fourth and fifth requests included specific dates. I find that there is nothing unreasonable about the appellant's approach. This office also recognizes that requesters/appellants will rarely be in a position to indicate precisely which records an institution may have, and an institution has an obligation to assist the requester/appellant in clarifying or narrowing her request in order to get the specific information she is looking for.

[31] In addition, I do not find it reasonable to characterize the appellant's requests for other types of information as "similar" or "identical," either. While the city asserts that there were "duplicate requests" and "duplicate disclosures," I do not find that the evidence establishes that, in light of a plain reading of the descriptions of the requests listed in the city's table. Like the requests for public meeting minutes, some requests became more focussed over time, coinciding with further disclosures made to the appellant, but this does not make them "similar" or "identical." For example, requests for information regarding bids and invoices, went from language using "any and all" (without names) to requests involving names of specific companies that were tied to the splash pad).

[32] Because of the progressions described above, I do not find Order M-850, upon which the city relies, to be of assistance to it in the circumstances. Order M-850 states that a "pattern of conduct" requires "recurring incidents of related or similar requests on the part of the appellant (or with which the appellant is connected in some material way)." While it is agreed that the appellant made all the requests and that they all relate to the same splash pad, the city has not established that the appellant's requests were similar or otherwise illegitimately repeated. The fact that the requests were "related" in that all had to do with a particular splash pad is not enough to find that section 5.1(a) of the Regulation applies.

[33] The city also cites an example of an unacceptable pattern of conduct provided by Order M-850 that is not helpful to its case. Order M-850 says that an unacceptable pattern of conduct includes "situations where a process is used more than once, for the purpose of revisiting an issue which has been previously addressed." However, in this case, as discussed, it is not clear that the city even processed many of the requests. An issue that was not decided cannot be "revisited," or said to have been "previously decided."

[34] The city submits that the request at issue was substantially similar to a previous one, based on its claim that the appellant admitted as much to the city's staff as she filed her request. However, the evidence before me, including the city's table, describing each request, does not substantiate this. I find that the present request is clearly different from all the previous requests.

[35] Furthermore, I do not accept the city's argument that some of the appellant's requests were "unusually detailed" such that they should be considered in determining whether there is a pattern of conduct that amounts to an abuse of the right for access to a record. As an example of such "unusual detail," the city states that one of the appellant's requests was for "a breakdown of labour costs and weekly time sheets for labour done by a contractor, [a specified company], at the splash pad site, as well as asking for invoices, delivery slips etc., associated with different aspects of installing the splash pad." The city did not explain why such a request is unusually detailed, given the nature of the project and the issues that the appellant sought to explore in relation to it, and I am not satisfied that it was. The city's arguments about non-possession or non-existence of records, and about the public availability of other records do not establish that the appellant's requests were either overly broad or unusually detailed.

[36] In summary, based on the evidence before me, I am not satisfied that the nature and scope of the appellant's requests should weigh in favour of finding that the appellant's request was frivolous or vexatious.

Purpose of the requests

[37] In considering the purpose of the requests, I am to consider whether the requests were intended to accomplish some objective other than to gain access (such as being made for "nuisance" value, or to harass government or to break or burden the

system). As the city acknowledged, the IPC recognizes that it can be difficult to ascertain a purpose other than access to information because an appellant will seldom admit any other purpose.[7]

[38] The city submits that looking at the appellant's requests and other communications between the appellant and it, an underlying motivation for such requests amount to a nuisance or is aimed to harass government. In support of this position, the city again claims that the appellant was only making the request at issue in this appeal because she missed an IPC deadline, knowing that her request was substantially similar to her last one. As mentioned, the city also alleges that the appellant shared that her intent was to ensure that she could make a more complete appeal with additional details that she did not have time to add the first time around. However, for the reasons already discussed, I do not that the narrative is substantiated by the evidence, and even if it had been, in my view, such reasons would not be evidence that the appellant's purpose amounts to nuisance or harassment of government.

[39] The city also argues that when the larger pattern of the appellant's conduct is considered in conjunction with her "numerous" requests, "it can be deduced that there is some other purpose than to access information." The city points to the appellant's emails to city employees in the past two years as "clear" evidence that the appellant is asking for records "to try to uncover a problem with the splash pad so that she is able to push for something to happen with it that would satisfy her complaints." The city further states that it has made several attempts to resolve the appellant's issues with the splash pad, and that:

> these solutions have satisfied her neighbours, [but the appellant] continues to lament to [c]ity employees about the splash pad and has made it known that she sees this as an endeavour or fight that she will not back down from.

[40] It is clear from the parties' representations that they do not agree about substantive issues relating to the splash pad.

[41] Nevertheless, previous orders of this office have found that an intention by the appellant 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".[8] I see no reason to depart from this approach here.

[42] Accordingly, I find that the city has not established that the purpose of the appellant's requests was to accomplish some objective other than to gain access (such as to harass or be a nuisance to government). This weighs against upholding the city's determination under section 4(1)(b).

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[7] Order MO-3570.
[8] Orders MO-1168-I and MO-2390.

Timing of the Requests

[43] This office considers whether the timing of the requests is connected to the occurrence of some other related event, such as court proceedings.[9]

[44] In support of its position that timing is a relevant factor in this case, the city relies on its argument about the appellant's alleged missed IPC deadline as the reason for filing the request that is the subject of this appeal. However, for the reasons already discussed, I do not accept this position, so I am not persuaded to accept the city's argument about the significance of its timing.

[45] The city also submits that it appears that many of the "email communication" requests coincided with a request that was already made more formally under *MFIPPA*, and that other requests seem to coincide with disclosure that the appellant does not like. The city states that perhaps the appellant was getting impatient for the results of the requests made under *MFIPPA* and started resorting to "numerous requests via informal communication," despite the city's timely processing of the requests made under *MFIPPA*. Reviewing the city's table, it appears that sometimes the appellant sent email requests shortly after making other requests. However, it is also true that many requests had months between them. The fact that further requests were made after disclosure was reviewed is not a negative consideration. The appellant was free to review the disclosure and with additional understanding of the issues, make a new request.

[46] In conclusion, considering the number, nature and scope, purposes, and timing of the appellant's requests, I find that the city has not established that the request at issue is part of a pattern of conduct that amounts to an abuse of the right of access.

Section 5.1(a) -- Pattern of conduct that would interfere with the operations of the institution

[47] 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.

[48] 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.

[49] The city was asked whether there are reasonable grounds to conclude that

[9] Orders M-618, M-850 and MO-1782.

the request is part of a pattern of conduct that would interfere with its operations. In response, the city stated that it had no submissions to make on this ground. I note, however, that one of the city's employees made brief mention in an affidavit of a strain on resources in order to respond to the appellant's requests.

[50] In light of the minimal evidence before me regarding interference with city operations, I find that the city has not established a pattern of conduct that would interfere with its operations within the meaning of section 5.1(a).

Section 5.1(b) -- Bad faith

[51] The city claims that the request was made in bad faith, but as set out below, I do not find that it has established that there are reasonable grounds to conclude that the request is made in bad faith.

[52] Where a request is made in bad faith, the institution need not demonstrate a "pattern of conduct".[10]

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

> The opposite of "good faith", generally implying or involving actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfil some duty or other contractual obligation, not prompted by an honest mistake as to one's rights, but by some interested or sinister motive. ... "bad faith" is not simply bad judgement or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity; it is different from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with furtive design or ill will.[11]

[54] The city submits that in this case, the appellant made her most recent request in bad faith. The city states that her requests may have been made in good faith initially, as she sought to get information about the splash pad because she was not aware of the public consultation that took place in 2007 – 2009. However, the city now believes that "the intent behind the requests has changed over time." The city points to email samples and what it believes to be repetitive requests, but as discussed above, I did not find the request history summarized by the city to be as repetitive as alleged.

[55] The appellant denies making her request in bad faith. She made detailed submissions about conduct on the part of the city that she found problematic in processing her requests, apart from the substantive issues related to the splash pad.

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

[56] Both the city and the appellant provided me with evidence of what I consider to be a fractious relationship. I will not repeat the details provided by each party in this order, but those details are not sufficient to find bad faith on the part of the appellant.

[57] The city acknowledged that this office has taken an approach to the question of bad faith that includes the following considerations:

- a strained relationship is not enough to find that the request was made in bad faith, and that animosity has been held to not be the same as bad faith;[12]
- if the wording of a request alleges something against the institution being asked to disclose information, that does not show that the request was made in bad faith;[13]
- it is not bad faith for the appellant to pursue her issue through several different forums, and she is entitled to exhaust the complaint processes available to her,[14] and the IPC has held that exhausting one's legal rights and remedies does not demonstrate that a request was made in bad faith.[15]

[58] I find that these considerations are relevant to the circumstances of this case, based on the evidence presented by both parties in this appeal, and that the city has not established that the appellant made her request in bad faith.

Section 5.1(b) -- Purpose other than to obtain access

[59] A request is made for a purpose other than to obtain access if the requester/appellant is motivated not by a desire to obtain access, but by some other objective.[16]

[60] Previous orders have found that an intention by the requester/appellant 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".[17] The city acknowledged this.

[61] In order to qualify as a "purpose other than to obtain access", the appellant would need to have an improper objective above and beyond a collateral intention to use the information in some legitimate manner.[18]

[62] Where a request is made for a purpose other than to obtain access, the

[12] Orders M0-3570; M0-3049.
[13] Order MO-3621.
[14] Order MO-3674.
[15] Order Mo-3278.
[16] Order M-850.
[17] Orders MO-1168-I and MO-2390.
[18] Order MO-1924.

institution need not demonstrate a "pattern of conduct".[19]

[63] The city was asked to explain whether there are reasonable grounds to conclude that the request is made for a purpose other than to obtain access.

[64] In support of its position that the purpose was for something other than to obtain access, it relied on its argument that the appellant made the request at issue because she missed an IPC deadline, and to further edit her submissions. I disagree that such a reason, even if it had been substantiated by the evidence, would not "clearly" be for a purpose other than to obtain access.

[65] In addition, the city submits that looking to the larger pattern of requests and "other informal communication" between the appellant and city employees, "it could also be argued that the purpose behind the requests has changed and that it is no longer for the purpose of obtaining information." It argues that the appellant made "identical" or "similar" requests before her first formal request under *MFIPPA*, and has become increasingly "upset and aggressive" with city staff over time with the operation of the splash pad. The city also points to its efforts to address the appellant's substantive concerns about the splash pad. However, these efforts are not relevant to this appeal, and I note, again, that the table provided by the city does not demonstrate the level of repetition between requests that is claimed. Furthermore, I am mindful that the evidence before me establishes that the fractious relationship goes both ways between both parties. Both parties provided copies of email correspondence that establish the fractious relationship between them.

Finally, I disagree with the city's position that the appellant's belief that she will find a problem with the splash pad and "expose the truth of the matter" through requesting disclosure amounts to a purpose other than to access information. The appellant provided lengthy representations regarding why she is so interested in the records relating to the splash pad. I have read her reasons, and I accept that her purpose for making the request at issue was to access information. A requester does not need a reason to request records under the *Act*.

[66] Furthermore, seeking transparency from government is a key objective of *MFIPPA*. Therefore, I find no fault in an attempt to "expose the truth" related to the splash pad through making requests under *MFIPPA*.

Conclusion

[67] For the reasons set out above, the city has not established that the appellant's request was part of a pattern of conduct that amounted to an abuse of process or interfered with the city's operations, was made in bad faith, or was made for a purpose other than to obtain access. Accordingly, I do not uphold the city's determination that the request at issue was frivolous or vexatious under section 4(1)(b) of the *Act*, and I

[19] Order M-850.

will order the city to issue the appellant an access decision in accordance with the *Act.*

ORDER:

1. I do not uphold the city's determination that the request at issue was frivolous or vexatious. I order the city to issue the appellant an access decision in accordance with the *Act* without recourse to the time extension provisions in the *Act*.

2. For the purpose of order provision 1, the date of this decision is to be treated as the date of the access request.

3. The timeline noted in provision 2 may be extended if the city is unable to comply in light of the current COVD-19 situation. I remain seized of the appeal to address any such requests.

Original signed by May 27, 2020

Marian Sami
Adjudicator