Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3931

Appeal MA19-00257

The Corporation of the Township of Red Rock

June 17, 2020

Summary: The Corporation of the Township of Red Rock (the township) received nine requests under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records. The township initially issued a fee estimate, then subsequently issued a decision refusing to process the requests on the basis that they were frivolous or vexatious. The requester, now the appellant, appealed the township's decision to this office. In this order, the adjudicator finds that the requests are not frivolous or vexatious, and orders the township to continue processing all nine requests according to the terms of this order.

Statutes Considered: The *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, MO-1427, MO-1792, MO-1924 and PO-4046.

OVERVIEW:

[1] The Corporation of the Township of Red Rock (the township) received nine requests under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for:

1. Invoices, documentation relating to materials or work conducted by the Township of Red Rock for removal of trees;

2. Copies of invoices/vouchers for 5 listed cheques;

3. 865th meeting of Red Rock Council, December 3, 2018;

4. Invoices relating to gifts for [specified individual];

5. Copies of Minutes of the Red Rock Recreation Advisory Committee for the years 2016, 2017 and 2018, copies of invoices for 4 listed cheques, and information re: Red Rock Curling Club stones;

6. Cheques issued to [specified individual];

7. Invoices/vouchers for 4 cheques issued by the Township of Red Rock as listed;

8. Invoices/vouchers for 4 cheques issued by the Township of Red Rock as listed; and,

9. Invoices/vouchers for 8 cheques issued by the Township of Red Rock as listed.

[2] The township issued one fee estimate of $950 for the nine requests, and asked the requester to pay $604.84 before it would process them. The township stated that this amount was calculated by adding $475 (50% of the fee estimate) and $129.84, which was the outstanding balance the township alleged the requester owes for a previous access request. The requester paid the 50% fee estimate deposit in full and the outstanding balance in part.

[3] Subsequently, the township issued another decision stating that it had further reviewed the requests, and, relying on section 4(1)(b) of the *Act*, decided that it would not process them on the basis that they are frivolous or vexatious.

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

[5] During mediation, the township maintained its position that these nine requests are frivolous or vexatious. The township reimbursed the appellant the 50% deposit that he had paid in response to the interim decision and fee estimate.

[6] As a mediated resolution was not possible, the appeal proceeded to the adjudication stage, where an adjudicator may conduct an inquiry under the *Act*. I decided to commence the inquiry by inviting representations from the township, initially. I received and shared representations from the township and the appellant. The township also submitted reply representations.

[7] In this order, I find that the township has not established that the appellant's requests are frivolous or vexatious under section 4(1)(b) of the *Act*. I order the township to continue to process all nine requests and to issue a final access decision to the appellant, according to the conditions set out in this order.

DISCUSSION:

Are the appellant's access requests frivolous or vexatious within the meaning of section 4(1)(b)?

[8] The sole issue to be determined in this appeal is whether the appellant's requests are 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] 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]

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

[11] 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

[12] 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,
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> > (a) the head is of the opinion on reasonable grounds that the request is part of a pattern of conduct that amounts to an abuse of the right of access or would interfere with the operations of the institution; or

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

> (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.

[13] I have reviewed all the representations submitted by the parties in their entirety. Both parties included details about the ongoing civil litigation between them. However, given their limited relevance to my determination of whether the appellant's requests are frivolous or vexatious, I will only set out brief portions of these representations.

Representations of the township

[14] The township argues that the appellant's requests are part of a pattern of conduct that amounts to an abuse of the right of access; the township alleges that the appellant made the requests to use the information in ongoing litigation between the township and the appellant. The township submits that the appellant has lived in the township for 20 years and had not made a single access request prior to the commencement of litigation. The township argues, therefore, that it can reasonably be inferred that the appellant's requests are made in furtherance of litigation.

[15] The township further submits that the subject matter of the requests is not material or relevant to the ongoing litigation; the requested information relates instead to the internal workings of the township, including invoices paid to various individuals/companies and to its current legal counsel. The township submits that it is impossible to see how the requested information furthers any legitimate purpose, including the claims made by the appellant in ongoing litigation. The township argues that the requests are part of a pattern to obtain "character evidence" against the township, and this amounts to an abuse of the right of access.

[16] The township submits that the appellant made 17 requests (including the nine that are before me) over the year preceding the appeal. The township further submits that these 17 requests made up 100% of the overall requests the township received in both 2018 and 2019, which amounts to an abuse of the right of access. In support of this, the township cites Order MO-1782, where the adjudicator concluded that a request from an individual who made approximately half of the total access requests received by the City of Niagara, over four years, was an abuse of the right of access under section 5.1(a) of Regulation 823.

[17] The township submits that the appellant's requests interfere with the operations of the township, because it is a small municipality with a total population of 900 people, and it does not have the resources to continue responding to the appellant's numerous requests. The township relies on Order PO-2151, where the adjudicator noted that 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 institution.

[18] The township argues that the appellant's requests are made in bad faith, because the appellant is intending to use the information requested to present "character evidence" in ongoing litigation, or for other completely irrelevant purposes,

and the information is therefore being requested for a dishonest purpose.

Representations of the appellant

[19] The appellant argues that his requests are not frivolous or vexatious. The appellant submits that his requests were submitted for the purpose of obtaining information and not to harass the township. The appellant further submits that these requests were not made for a dishonest purpose, or in bad faith, and would not constitute a burden on the resources of the township.

[20] The appellant argues that his requests do not meet the high test for establishing bad faith, and that the township has provided no evidence that he has made any of his requests with an ulterior motive, with an intention of abusing the Freedom of Information (FOI) process. The appellant argues that all his requests are reasonable and are within the scope of the township's ability to respond toe. The appellant further argues that his requests are neither numerous nor so broad or overly detailed as to interfere with the operations of the township.

[21] The appellant submits that he made these requests as a resident, taxpayer and a concerned citizen of the township, and he is entitled to information concerning the operation and governance of the township. The appellant submits that as he was engaged in ongoing litigation with the township, he uncovered a number of alleged irregularities in the township's operation and governance and, as a concerned citizen, he sought to pursue access at a time coinciding with the litigation.

[22] The appellant further argues that given the township's position that the requested information is not material or relevant to ongoing litigation, it is likely that the township would not include this information in its affidavit of documents in the litigation. The appellant argues, therefore, that it is unlikely that he would be able to obtain the information requested through the litigation process. The appellant suggests that the township has an interest in preventing him from receiving information, which may be adverse in interest to the township, while there is ongoing litigation between them.

[23] The appellant explains that the disclosure he received as a result of a few of his 2018 requests along with publicly obtained information led to his further requests in 2019. The appellant submits that he suspects there may have been some inappropriate action taken by a government body. The appellant argues that to find a pattern of conduct that amounts to an abuse of the right of access just because someone continues to request information after making prior requests is unjust, and would effectively prevent someone from making follow-up requests for information relating to information disclosed under a prior request.

[24] The appellant submits that his requests are not duplicate requests, and they are not of a trivial or unimportant nature. The appellant further submits that his requests were made on reasonable grounds and not to harass the township, or to accomplish

some other objective unrelated to the process being used. The appellant submits that he did not make additional requests to revisit an issue, which has previously been addressed, and the information he seeks has not been previously disclosed in any other form, or in any other proceeding.

[25] The appellant argues that the situation in Order MO-1782 is completely different from this appeal because, in that order, the appellant's requests were broad and onerous, and the cost of fulfilling those requests was estimated to be several thousand dollars each (starting at $7,000) by the City of Niagara. The appellant points out that the cost estimate provided to him by the township for his nine requests was $900 to $1,000.

[26] The appellant submits that even if his requests are in furtherance of litigation, he has made these requests for the purpose of obtaining access to the information, which is neither frivolous nor vexatious.

Reply of the township

[27] The township argues that the appellant admits in his representations that some of his requests are related to and are in furtherance of his civil action against the township. The township further argues that the relevance of any information to the appellant's civil action, and whether he is entitled to its disclosure is within the jurisdiction of the Ontario Superior Court of Justice.

[28] The township notes that the appellant's requests range from information relating to expenditures for tree removal to the disposal of used curling stones, and the township submits that some of the appellant's requests appear to be based purely on his subjective whims or knowledge.

[29] The township submits that it is concerned that no information is going to satiate the appellant and his requests will continue to perpetuate themselves. The township further submits that the appellant is unfairly focusing the township's limited financial and human resources on responding to his requests. The township submits that the appellant has been inaccurate and deceptive in his representations, and his requests should be denied.

Analysis and findings

[30] Based on the evidence before me, I am not satisfied that the township 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 nine requests at issue. Furthermore, even if a pattern of conduct were found to exist, I find that the township has not established that the pattern of conduct amounts to an abuse of the right of access or would interfere with its operations.

[31] Section 5.1(a) of Regulation 823 states 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."

[32] 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).

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

[33] 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]

[34] The main basis for the township's argument that the appellant's requests form a pattern of conduct that amounts to an abuse of the right of access is that the appellant intends to use the information from his requests as "character evidence" in ongoing litigation between the township and himself.

[35] 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.[5] Therefore, while the appellant and the township may be engaged in ongoing litigation, it is not relevant to or determinative of my finding on whether the grounds in section 5.1(a) of Regulation 823 are established. Furthermore, even if the appellant intends to use the information requested in litigation against the township, that does not constitute a pattern of conduct that amounts to an abuse of the right of access as contemplated by section 5.1(a) of Regulation 823.

[36] The township's representations appear to imply that the appellant's requests amount to an abuse of his right of access, because he should be accessing the information from his requests through the civil litigation process, instead of under the *Act*. However, as noted by Assistant Commissioner Sherry Liang 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." Therefore, I am not satisfied that the appellant's requests amount to an abuse of his right of access, simply because he could also obtain the requested information through the civil litigation process. Furthermore, the fact that the appellant may be seeking

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[4] Orders M-618, M-850, and MO-1782.
[5] Orders M-906, M-1066, M-1071, and MO-1519.

information that the township itself suggests is not relevant to the ongoing litigation does not amount to an abuse of the right of access.[6]

[37] The township also argues that the number of requests the appellant has made over 2018 and 2019 account for 100% of the township's total access requests, which demonstrates a pattern of conduct that amounts to an abuse of the right of access. The township cites Order MO-1782 in support of this argument.

[38] I have reviewed Order MO-1782, but I do not find that it is supportive of the township's argument. While the appellant in Order MO-1782 did make approximately half of the total access requests to the City of Niagara, over a span of four years, that was only one factor that the adjudicator weighed in finding that the appellant in that appeal demonstrated a pattern of conduct that amounted to an abuse of the right of access. Furthermore, I accept the appellant's argument that in Order MO-1782, the adjudicator found that the requests were overly broad, resulting in fee estimates that totaled thousands of dollars per request, which is not the case in this appeal.

[39] I reject the township's argument that because the appellant's requests accounted for 100% of the access requests received by the township, it demonstrates a pattern of conduct that amounts to an abuse of the right of access. That fact alone is not sufficient to establish a pattern of conduct that amounts to an abuse of the right of access. Many factors must be considered in making that determination.

[40] As noted above, the township's evidence is that the appellant has made 17 access requests over a span of a year. Neither party has provided me with the details of the appellant's prior requests. The nine requests before me seek access to:

1. Invoices, documentation relating to materials or work conducted by the Township of Red Rock for removal of trees;

2. Copies of invoices/vouchers for 5 listed cheques;

3. 865th meeting of Red Rock Council, December 3, 2018;

4. Invoices relating to gifts for [specified individual];

5. Copies of Minutes of the Red Rock Recreation Advisory Committee for the years 2016, 2017 and 2018, copies of invoices for 4 listed cheques, and information re: Red Rock Curling Club stones;

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[6] I note that the purposes of the *Act* include providing "a right of access to information under the control of institutions in accordance with the principles that …information should be available to the public" (section 1(a)(i) of the *Act*). This is discussed below under section 5.1(b) of the *Act.*

6. Cheques issued to [specified individual];

7. Invoices/vouchers for 4 cheques issued by the Township of Red Rock as listed;

8. Invoices/vouchers for 4 cheques issued by the Township of Red Rock as listed; and,

9. Invoices/vouchers for 8 cheques issued by the Township of Red Rock as listed.

[41] While the appellant made all nine requests at the same time, they are not of a nature that could be considered overly onerous. Many of them are for photocopies of invoices or vouchers. Furthermore, I do not find the appellant's requests to be excessively broad or duplicative. In some of his requests, the appellant specifically lists the records that he is seeking. I have considered the timing, number, nature and scope of the appellant's requests as well as their cumulative effect, and find that the requests do not form part of a pattern of conduct that amounts to an abuse of the right of access.

[42] Based on the evidence before me, I find that the township has not established, on reasonable grounds, that the appellant's requests form a pattern of conduct that amounts to an abuse of the right of access as contemplated by section 5.1(a) of Regulation 823.

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

[43] I also find that the township has not established that the appellant's requests demonstrate a pattern of conduct that would interfere with the operations of the township.

[44] A pattern of conduct that would "interfere with the operations of an institution" is one that would obstruct or hinder the range of effectiveness of the institution's activities.[7]

[45] The township argues that it has limited financial and human resources to respond to the appellant's requests, because it is a small municipality with a population of 900, and the appellant's requests make up 100% of the township's requests.

[46] In Order M-1071, Inquiry Officer Marianne Miller noted that the *Act* provides relief for the burden faced by institutions responding to requests, and stated:

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[7] Order M-850.

> 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).
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> 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.

[47] As noted in Order M-1071, with reference to Order 81, this office's jurisprudence allows an institution to issue an interim access decision requiring payment of a deposit, as described in a fee estimate, before processing a request.[8] This is what the township had done in this appeal. In its interim decision, the township provided a fee estimate in response to the appellant's requests, and required the appellant to pay 50% of the fee estimate before the township would process his current access requests.[9] The appellant paid the fee deposit. Therefore, it is evident that the township is aware of, and has already used some of the relief measures provided in the *Act* to alleviate such burdens.

[48] The township also argued that responding to the appellant's numerous requests puts a strain on its human resources. However, the township does not specify how, or why, beyond stating that the appellant's requests make up the entirety of the township's access requests in 2018 and 2019. I do not have any further submissions before me on what human resources or staff are available to the township to respond to access requests. The evidence is not sufficient to establish that processing the appellant's requests would interfere with the township's operations. Therefore, I find that the township has not established that the appellant's requests amount to a pattern of conduct that would interfere with the township's operations as contemplated by section 5.1(a) of Regulation 823.

Bad faith or purpose other than to obtain access

[49] Section 5.1(b) of Regulation 823 states that a request is frivolous or vexatious if it can be established that the request was made in bad faith or for a purpose other than to obtain access. Having considered the appellant's requests and the representations of the parties, I am not persuaded that the requests satisfy either of the grounds described in section 5.1(b).

[50] The township argues that the appellant's requests were made in bad faith and for a purpose other than to obtain access, because they were made for the purpose of

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[8] See also Order PO-2634 for further guidance on the timing (in relation to a fee estimate) of a claim for an extension under section 27, the equivalent in the provincial act to section 20 of the *Act*.

[9] I make no comment on the appropriateness of the township, in its interim decision, seeking payment for past requests in response to new ones, as there is no appeal of that issue before me.

furthering ongoing litigation between the parties.

[51] "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.[10]

[52] 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.[11] 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".[12]

[53] 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.[13]

[54] In Order MO-1924, former Senior Adjudicator John Higgins provided guidance on when a request may be found to have a purpose other than to obtain access. In response to the institution's argument that the objective of the request was to obtain information for the purpose of litigation, and therefore, not a legitimate exercise of the right to access, he stated:

> This argument necessitates a discussion of whether access requests may be for some collateral purpose over and above and 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). This could lead to request 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 inaccuracy is a

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[10] Order M-850.
[11] Order M-850.
[12] Orders MO-1168-I and MO-2390.
[13] Order MO-1924.

> 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.
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> 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 request would need to have an improper objective above and beyond a collateral intention to use the information in some legitimate manner.

[55] I adopt the approach set out by former Senior Adjudicator Higgins in this appeal. Whether the appellant's requests were made for the purpose of gathering information for the ongoing litigation between the parties or not, I am not persuaded by the township's evidence that he has a purpose other than to obtain access under the *Act*.

[56] I acknowledge that the appellant appears to have concern with some of the operations of the township, and that this concern has caused some friction between the parties, to the point of litigation. However, I am not persuaded that the appellant's requests were made in bad faith. As noted above, bad faith implies the conscious doing of a wrong. The appellant's intention to use the information from his requests in his ongoing litigation with the township (if that is what he intends to do) is a legitimate exercise of his right to access. However, the appellant does not need to provide a reason for requesting access. 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).[14]

[57] Applying the analysis in Order MO-1924, above, I find that the township has not established the requirements for a frivolous or vexatious finding under section 5.1(b) of Regulation 823.

Conclusion and remedy

[58] 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 township has failed to establish reasonable grounds for finding that the appellant's requests are frivolous or vexatious within the meaning of section 4(1)(b) of the *Act*.

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[14] Order PO-2050.

[59] Given this conclusion, this effectively returns the parties to the position they were in just before the township issued the decision declaring the appellant's requests to be frivolous or vexatious, which is the appellant having paid the deposit of 50% of the fee estimate. Had things proceeded in the usual manner, the township would have then processed the nine requests and issued a final access decision to the appellant. Having said that, I acknowledge that the township may need more time to process the appellant's requests.

[60] In Order PO-4046, Adjudicator Daphne Loukidelis found an appellant's request to a university not to be frivolous or vexatious, and noted that "there appears to be no precedent for an adjudicator allowing recourse to additional time extensions where a request is found to not be frivolous or vexatious". However, with reference to Order PO-2634, Adjudicator Loukidelis considered the university's evidence with respect to the challenges of processing the appellant's request, which could result in thousands of pages of responsive records, and found it reasonable to allow the university additional time to process the request.

[61] I adopt the same approach in this appeal, because the township is small and has limited resources. I do find it reasonable that the township may need longer to process all nine of the appellant's requests, which were submitted at the same time. I order the township to issue a final decision for all nine requests to the appellant by August 19, 2020. This does not preclude the appellant from withdrawing or narrowing the scope of any of his nine requests.

ORDER:

1. I do not uphold the township's decision that the appellant's nine requests are frivolous or vexatious. Accordingly, the township is required to issue a final access decision in response to them.

2. This order does not preclude the appellant from narrowing the scope of any of the nine requests and, if he does so, the township would be in a position to issue a revised fee estimate. Alternatively, the township may issue a revised fee estimate based on the nine requests as they are currently worded. In either case, the township may require the appellant to pay a 50% deposit towards the fee estimate prior to proceeding with the request.

3. Whether or not the appellant narrows any of the nine requests and/or the township issues a new fee estimate, I order the township to issue a final access decision to the appellant no later than **August 19, 2020**, subject to the provisions of sections 21 and 22 of the *Act* and without recourse to a further time extension under section 20.

4. The timelines noted in order provision 3 may be extended if the township is unable to comply in light of the current COVID-19 situation, and I remain seized to consider any resulting extension request.

Original Signed by: June 17, 2020

Anna Truong
Adjudicator