

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER MO-4300

Appeals MA21-00700, MA21-00701 and MA21-00703

The Corporation of the City of Brantford

December 19, 2022

**Summary:** At issue in these appeals is whether the appellant's requests to the City of Brantford (the city) are frivolous or vexatious under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). In this order, the adjudicator finds that the city has established that the requests are frivolous or vexatious under section 4(1)(b) of the *Act*. He upholds the city's decisions to deny access on that basis and imposes conditions on current and future requests submitted by the appellant to the city, as well as conditions on appeals of the city's decisions.

**Statutes Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, RSO 1990, c M.56, as amended, sections 4(1)(b) and 51(1); Regulation 823, section 5.1(a).

**Orders Considered:** Order M-850.

### BACKGROUND:

[1] The appellant, a director of a company that owns property in the City of Brantford (the city), submitted three access to information requests to the city under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act* or *MFIPPA*).

[2] The city decided that the requests of the appellant are frivolous or vexatious

under 4(1)(b) of the *Act*, and denied the requests on that basis.<sup>1</sup>

[3] This order deals with the following three requests and appeals of the appellant.

**Appeal MA21-00700/Request file number COBFOI2021-116**

[4] This appeal relates to a request for access to the following information:

I request from [named individual], Customer Contact Centre all emails, letters, memos, text messages, voice mail recordings either sent or received in respect to [the appellant] and [his son] either sent or received from [named individual] for the specific period of September 08/21 to and including the end of September 20/21.

**Appeal MA21-00701/Request file number COBFOI2021-120**

[5] This appeal relates to a request for access to the following information in relation to a named individual:

I request all emails, text messages, voice mail, photos, reports, meeting minutes, information stored in Records or on any data file, and all FOI inquiries (other than those I have requested from him) which he has either sent or received from any municipal staff member (including the Customer Contact Centre) involving and in reference to [the appellant], [named company], [named street] or [the appellant's son] for the period of August 1/21 to September 20/21.

**Appeal MA21-00703/Request file number COBFOI2021-123**

[6] This appeal relates to a request for access to the following information:

I request all emails, letters, cell phone records, memos and any other information stored on a data file either sent or received by [named individual] to [named individual], [named individual] and any staff members employed in the Engineering Department including inspectors in respect to [the appellant] or [named company], for the period of September 1/21 until the end of Sept 27/21.

[7] The city issued decisions for each of the requests taking the position that they were frivolous or vexatious under section 4(1)(b) of the *Act* (frivolous or vexatious), and refusing the requests on that basis. In that regard, separate decision letters issued by the city with respect to each of the requests included the following:

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<sup>1</sup> The city also decided that a request made by the appellant's son is also frivolous and vexatious. The appellant's son's request is the subject of a separate appeal.

This request is part of a pattern of conduct that amounts to an abuse of the right of access. The first issue is the number of requests. From May 1, 2021 to October 1, 2021, you have submitted 35 requests. This is equivalent to 27.7% of all requests the city has received in 2021. While the number of requests made by a requester does not necessarily amount to an abuse of process, the fact that these requests have been submitted within a 5-month period indicates that many of your requests are frivolous and vexatious. The city's position in this regard is supported by decisions of the IPC.

...

This request is part of a pattern of conduct that interferes with the operations of an institution. The first issue concerns the number of requests you have made compared with the size of both the municipality and the number of staff who work in the Freedom of Information Office. The City of Brantford has a population of slightly less than 100,000, and the Freedom of Information Office in the municipality consists of one individual. Thirty- five requests in 5 months from one individual adversely affects the city's ability to meet the overall demand for access to information services from other citizens.

...

This request was made in bad faith. The requests are unusually detailed, singling out one individual in a pattern that is a burden to the system [...].

...

This request was made for a purpose other than to obtain access.

[8] The appellant appealed the decisions to the Information and Privacy Commissioner of Ontario (the IPC).

[9] I decided to adjudicate the appellant's three appeals together and they are all addressed in this order.

[10] I commenced my inquiry by sending a Notice of Inquiry to the city setting out the facts and issues in these appeals. The city provided responding representations and included an affidavit of its Supervisor of Records, Print & FOI Services (the FOI Supervisor) in support of its position. The city asked that portions of its representations and the affidavit be withheld due to confidentiality concerns. A Notice of Inquiry along with the city's non-confidential representations<sup>2</sup> were shared with the appellant who

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<sup>2</sup> Portions of the city's representations and the affidavit were withheld from the appellant as they met the criteria for withholding representations in *Practice Direction 7*.

responded with a series of emails and attachments.

[11] In this order, I find that the city has established that the appellant's requests are frivolous or vexatious within the meaning of section 4(1)(b) of *MFIPPA*. I uphold the city's denial of access on the basis of section 4(1)(b) of the *Act* and I also find that this is a suitable situation to impose conditions on current and future access requests submitted by the appellant to the city, as well as conditions on any appeals from the city's decisions.

## **DISCUSSION:**

### **Are the requests frivolous or vexatious under *MFIPPA*?**

[12] The frivolous or vexatious provisions in *MFIPPA* provide institutions with a straightforward way of dealing with frivolous or vexatious requests. This power can have serious implications for a requester's ability to obtain information under *MFIPPA*, and therefore it should not be exercised lightly.<sup>3</sup> Orders under *MFIPPA* and its provincial equivalent, the *Freedom of Information and Protection of Privacy Act (FIPPA)*, have also stated that an institution has the burden of proof to substantiate its decision that a request is frivolous or vexatious.<sup>4</sup>

### **Grounds for a frivolous or vexatious claim under *MFIPPA***

[13] Section 4(1)(b) of *MFIPPA* reads:

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.

[14] Section 5.1 of Regulation 823 under the *Act* elaborates on the meaning of the phrase "frivolous or 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

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<sup>3</sup> Order M-850.

<sup>4</sup> See, for example, Order M-850.

(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.

[15] In other words, under *MFIPPA*, the head of an institution is required to conclude that a request for access is frivolous or vexatious if he or she is of the opinion on reasonable grounds that it fits into one or more of the following categories:

- 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, or
- it is made in bad faith, or
- it is made for a purpose other than to obtain access.

[16] The city claims that the appellant's requests are frivolous or vexatious under *MFIPPA* because they are part of a pattern of conduct that amounts to an abuse of the right of access and that processing the requests would interfere with the city's operations. The city's representations also suggest that it believes that the appellant's purpose for making the requests is other than to obtain access and that they may have been submitted in bad faith.

[17] In the discussion that follows, I explain why I have concluded that the appellant's access requests are part of a pattern of conduct that amounts to an abuse of the right of access. For that reason, his access requests are frivolous or vexatious and I uphold the city's decisions to deny them on that basis. It is therefore not necessary for me to consider the other reasons the city argues that the requests are frivolous or vexatious.

### ***The city's representations***

[18] In her affidavit the FOI Supervisor explains that the appellant is a director of a company that owns a historical building that was converted into a residential apartment building. She says that for more than three decades the appellant has raised concerns with the city's services generally and of its maintenance of a small street near the apartment building. She says that this has resulted in court actions initiated by the appellant naming the city and city staff as defendants.

[19] The city submits that the appellant has since May 2021 submitted 145 access requests for all manner of correspondence between city staff as it relates to the appellant, a company and the appellant's son. The city submits that these requests are, in many cases, duplicative, repetitive, unusually detailed and based on earlier or concurrent access to information requests. The city submits that they represent a significant portion of all the access to information requests it receives and provided a

breakdown of the number of requests received over certain time periods since May 2021 compared to the total number of requests it received for those time periods. The city submits that the appellant has made an unreasonably high volume of access to information requests which has overburdened the city.

[20] As set out in the FOI Supervisor's affidavit, the city responded to a great number of the appellant's access requests before it decided to rely on *MFIPPA's* frivolous and vexatious provisions. She says that at one point she asked the appellant to limit himself to one access to information request per week, but to no avail.

[21] Addressing more specifically how the requests of the appellant form part of a pattern of conduct that interferes with the city's operations, including the city's ability to process access to information requests and the ability of the FOI Supervisor and her current replacement to perform all of their job duties, in her affidavit the FOI Supervisor provides the following examples:

- the appellant sometimes submits multiple access to information requests a day and will follow up on the status of his requests by email 3 to 4 times a day;
- the appellant sends the employee currently performing the FOI Supervisor's role copies of emails he has sent to other city staff members to keep on file, sometimes 2 to 3 times a day;<sup>5</sup>
- the appellant has made frequent attempts to contact the employee currently performing the FOI supervisor's role and has had family members call on his behalf;
- the appellant's tone has been aggressive, he has questioned the employee currently performing the FOI supervisor's role regarding his professionalism and ethics and has advised him to retire.

[22] The city adds that the tone of the emails sent by the appellant to the FOI Supervisor and her current replacement has been accusatory insulting and abusive, and has resulted in a series of escalating communication controls that have been imposed through letters from the city solicitor as an attempt to protect the well-being of staff in general. The city advises that the city's FOI Supervisor and her current replacement have "been impacted by the tone and relentless nature of the appellant's correspondence."

[23] In her affidavit, the city's FOI supervisor provides the following examples of what

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<sup>5</sup> The FOI supervisor states that the current FOI supervisor received 43 emails for the period from May 31, 2022 to June 16, 2022 to keep on file, along with a complaint that the appellant made against the city's CAO. The FOI supervisor states in her affidavit that at the same time that the appellant was making his access to information requests he sent approximately 5,020 emails on other topics to various city staff between July 1, 2020 and October 31, 2022.

she says is duplication and/or overlap of the appellant's requests at issue in these appeals:

- a. The appellant had made one similar request (COBFOI2021-099) and two duplicative requests which cover the same records (COBFOI2021-112/COBFOI2021-115) as request COBFOI2021-116 (MA21-00700);
- b. The appellant's request COBFOI2021-099 is duplicative of request COBFOI2021-120 (Appeal MA21-00701) and covers almost all of the same records;
- c. The appellant's requests COBFOI2021-115 and COBFOI2021-119 are very similar to request COBFOI2021-123 (Appeal MA21-00703).

[24] The city's FOI Supervisor adds that the appellant made many of these requests before receiving responses to previous access to information requests which might have resulted in the disclosure of responsive records. She takes the position that the appellant unnecessarily inundated the city with access to information requests that were designed to harass city staff. She adds that the appellant made many of his access requests while alleging misconduct and inappropriate conduct on the part of her and other city staff.

[25] She says that in response to her advice to the appellant that some of the requests involved overlapping records she says that he replied as follows in an email:

[The FOI Supervisor's first name], it is okay if the information is repetitive. I require consolidated requests again for other legal purposes ... Also, many of my former request are not contemporary. Thanks.

[26] The city also explains that it has limited staffing resources available for responding to access to information requests:

The city employs one individual that is responsible for processing all FOI requests that are received under *MFIPPA*. That employee is required to receive the request for records, review the request, coordinate the receipt of responsive records, review and compile responsive records, collect appropriate fees, respond to inquiries regarding the city's FOI services and apply appropriate exemptions to responsive records. The Supervisor of Records, Print & FOI Services also carries out a supervisory role and has other non-FOI related job functions that must be carried out.

[27] The city submits that the volume of calls and e-mails received from the appellant as well the number of the appellant's access to information requests the acting FOI Supervisor was tasked with addressing, have prevented him from meeting legislatively-imposed response timelines for other access to information requests. In the confidential portion of her affidavit, the FOI Supervisor also provided a statement of the impact that the appellant's course of conduct has had on the operations of the institution.

## **The appellant's representations**

[28] The appellant takes issue with the city's evidence and his representations set out his concerns about the city's actions in relation to him and his son as well as the city's services in relation to the property. He asserts that the city's access to information office has abused its function and the appeal process to circumvent the purposes of the *Act*.

[29] He denies that his requests are an abuse of process and asserts that his actions were justified in light of the conduct of city staff and the communication controls imposed upon him. He acknowledges that he has sent many emails to the city but asserts that the parties they were sent to never received them because they were directed to a special mailbox established through the communication controls imposed upon him.

[30] He states that the communication controls were improperly imposed upon him through the actions of the city solicitor. He also states that as a consequence of what he says is the city solicitor's misconduct he has commenced civil actions against the city and the city solicitor.

[31] He asserts that the city solicitor has acted "in collusion" with the acting FOI Supervisor to "redact information and to prevent access to information for specific reasons". He states that as a result he has "[recently had] to file a private prosecution against the city solicitor for filing false police reports in respect to myself." He further asserts that the city solicitor is now attempting to manipulate the IPC to restrict access to any information related to the city's solicitor's abuse of authority and other staff whom he has convinced he must protect from the appellant. He submits that the city solicitor has attempted to undermine the appellant's character and reputation, without foundation.

## **Analysis and finding on a pattern of conduct that amounts to an abuse of the right of access**

[32] For the following reasons, I find that the three access requests at issue in the appeal before me form part of a pattern of conduct that amounts to an abuse of the right of access. On that basis, I uphold the city's decision to deny the access requests in accordance with section 4(1)(b) of the *Act*.

[33] The first part of section 5.1(a) of Regulation 823 under *MFIPPA* sets out that one way that a request can be determined to be frivolous or vexatious is if the institution establishes reasonable grounds for concluding that the request forms part of a pattern of conduct that amounts to an abuse of the right of access. What constitutes "reasonable grounds" requires an examination of the specific facts of each case.<sup>6</sup>

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<sup>6</sup> Order MO-3292.



***Pattern of conduct***

[34] A pattern of conduct must be found to exist, prior to determining whether that pattern of conduct amounts to either an abuse of the right of access or would interfere with the operations of the institution.

[35] Previous IPC orders under *MFIPPA* have addressed the meaning of the phrase "pattern of conduct." For example, in Order M-850, 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).

[36] The former Assistant Commissioner also pointed out that, in determining whether a pattern of conduct has been established, the period over which the behaviour occurs is a relevant consideration. The reasoning in Order M-850 has been considered in many subsequent orders issued by the IPC, which have also established that the cumulative nature and effect of a requester's behaviour may be relevant in the determination of the existence of a "pattern of conduct".<sup>7</sup>

[37] In my view, the evidence demonstrates that the appellant has made recurring related or similar requests and that the access requests before me form part of that pattern of conduct.

[38] Given these circumstances, I find that the appellant's requests form part of a pattern of conduct as contemplated by section 5.1(a) of Regulation 823.

[39] As I have found that the requests form part of a pattern of conduct, I will now consider whether that pattern of conduct amounts to an abuse of the right of access.

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

[40] Once it has been established that a request forms part of a pattern of conduct, it must be determined whether that pattern of conduct amounts to "an abuse of the right of access." In making that determination, institutions may consider a number of factors, including the cumulative effect of the number, nature, scope, purpose and timing of the requests.<sup>8</sup> 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.<sup>9</sup> Previous orders have also stated that the focus should be on the cumulative nature and effect of a requester's behaviour because, in many cases, ascertaining a requester's

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<sup>7</sup> Order MO-2390.

<sup>8</sup> Orders M-618, M-850 and MO-1782.

<sup>9</sup> Order MO-1782.

purpose requires the drawing of inferences from his or her behaviour.<sup>10</sup>

[41] The IPC may also consider an institution's conduct when reviewing a "frivolous or vexatious" finding. However, an institution's misconduct does not necessarily mean that it was wrong in concluding that the request was "frivolous or vexatious."<sup>11</sup>

[42] I find the number of requests made by the appellant is excessive by reasonable standards. In reaching this conclusion, I have also considered the cumulative effect of all the requests that have been made by the appellant. I find that the sum total of the appellant's requests, however counted, is sufficiently high to be considered a factor weighing heavily in favour of a finding that the pattern of conduct amounts to an abuse of the right of access.

[43] I say this while acknowledging that an appellant is not prevented from making an access request to obtain information relating to litigation. Furthermore, a finding that the appellant's requests are frivolous or vexatious does not limit their rights to "information otherwise available by law to a party to litigation."<sup>12</sup>

[44] However, and furthermore the nature and scope of many of the requests are duplicative, excessively broad and unusually detailed. In addition, many of the appellant's requests constitute recurring incidents of related or similar access requests on the part of the appellant. In that regard, although the requests may not all be exactly identical, because they pertain to different information, individuals and/or different time frames, the type of information that he seeks in all of his requests is substantially similar.

[45] In these circumstances, I have sufficient evidence to conclude that the nature and scope of the appellant's requests are excessively broad or have the cumulative effect of being excessively broad by reasonable standards.

[46] Another factor that has been considered in previous IPC orders is the purpose of an individual's access requests and specifically whether the requests are intended to accomplish some other objective other than to gain access to records. The city submits that the appellant's purpose for making his requests is other than to obtain access and that this is a factor in favour of finding that the requests are part of a pattern of conduct amounting to an abuse of the right of access. The appellant disagrees.

[47] I am satisfied that there is sufficient evidence for me to conclude that by his conduct the appellant is attempting to burden the system with his access requests, including the requests that are at issue here. In the circumstances of this appeal, I find the impact of his pattern of conduct, culminating with his excessively broad and

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<sup>10</sup> Order MO-1782.

<sup>11</sup> Order MO-1782.

<sup>12</sup> See in this regard section 51(1) of the *Act*.

unusually detailed requests, amount to an abuse of the right of access.<sup>13</sup> Even if that is not his intent, however, the effect is the same – his repetitive and numerous requests, collectively, amount to an abuse of the right of access.

[48] I have also considered the appellant's suggestion that there has been bad faith on the part of the city, or its solicitor, in responding to his requests or imposing the communication controls, and that this should be a factor in determining whether the requests are frivolous or vexatious. In my view, the appellant has made bald assertions of bad faith without providing sufficient evidence to support those assertions. I accept the city's evidence that it responded to all the requests submitted by the appellant until it determined that the number of the appellant's requests had passed the point of reasonableness.

[49] Accordingly, I accept that the city has provided me with sufficient evidence to establish that the appellant's requests form part of a pattern of conduct that amounts to an abuse of the right of access under section 5.1(a) of Regulation 823 under *MFIPPA*. Therefore, I find that the city has established reasonable grounds for making a finding that the appellant's requests are frivolous or vexatious and I uphold its decisions to deny them on that basis under section 4(1)(b) of *MFIPPA*.

## **Remedy**

[50] I have found the appellant's access requests at issue in these appeals to be frivolous or vexatious, and I uphold the city's decisions to deny the access requests on that basis. I will now consider whether I should impose conditions such as limiting the number of active requests and appeals the appellant may have in relation to the city.<sup>14</sup>

[51] I invited representations from the parties on the appropriate remedy in the event that I uphold the city's decisions at issue in these appeals. The city responded by stating that I should grant the following:

- a. that the appellant be limited to one active access to information request and one IPC appeal at any given time;
- b. any request shall be limited to a maximum of two-parts and the appellant must choose only two-parts of a multi-part request to proceed in the event that he makes a multi-part request with more than two parts;
- c. all existing IPC appeals (other than the ones that are the subject of this order) be placed on hold and if the appellant wishes to pursue any of the existing IPC appeals, he shall notify the IPC Registrar and advise which appeal he wishes to proceed. Any existing or future appeals will be reactivated only when the active appeal is resolved.

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<sup>13</sup> See in this regard the discussion in Order MO-3763.

<sup>14</sup> Order MO-1782.

[52] The appellant made no specific submission on remedy.

[53] In my view, given the appellant's pattern of conduct, he should be restricted from submitting an excessive number of further requests or requests that are similarly excessively broad and unusually detailed. However, in my view, it is also necessary not to foreclose the appellant's right to seek access to records under the *Act*. Indeed, the city has suggested that I not do so.

[54] I have decided that a just order in the circumstances is that the appellant be restricted to having no more than one active request with the city and one active appeal with the IPC at any given time for the next year starting from the date of this order. In addition, to prevent the appellant from submitting multi-part access requests that are similar to any that are the subject of these appeals, I will stipulate that any access requests that he submits to the city for the next year may only have a maximum of two parts.

[55] The appellant is to provide the city with the active request he wishes to pursue now. The balance of the requests will be deemed to be withdrawn, without prejudice to the appellant being permitted to refile a request in accordance with the terms of this order.

[56] Further, the appellant may only pursue one IPC appeal, in respect of the city at any given time for the next year. All other appeals (other than the appeals that are dismissed by this order) will be placed on hold and reactivated at the discretion of the IPC Registrar. The appellant will be asked to identify the active appeal that will proceed.

## **ORDER:**

1. I uphold the city's decision to deny the access requests at issue in these appeals on the basis that they are frivolous or vexatious under section 4(1)(b) of *MFIPPA*. As a result, these appeals are dismissed, without prejudice to the appellant's right to submit new requests for information in accordance with the conditions set out in provision 2 below.
2. I impose the following conditions on the appellant's access requests to the city, and his appeals to the IPC from decisions of the city:
3. I am limiting the appellant to one active request and one active appeal with the IPC, involving the city that may proceed at any given point in time, including any requests and appeals (other than the appeals that are dismissed by this order) that are outstanding as of the date of this order.
4. If the appellant wishes any one of his currently outstanding requests that exist with the city to continue to be processed, the appellant shall notify the city by **January 23, 2023** and advise as to which request he wishes to proceed. For

the purposes of this provision, a multi-part request shall be considered to be multiple requests and the appellant must choose a maximum of two parts to proceed with. Any outstanding requests with the city are deemed to be withdrawn, without prejudice to the appellant's right to make the same request in the future, in accordance with order provision 1.

- a. If the appellant wishes any IPC appeal (other than the appeals that are dismissed by this order) from a decision of the city to proceed to completion, the appellant shall notify the IPC Registrar by **January 23, 2023** and advise as to which appeal he wishes to proceed. The remaining appeals will be placed on hold and reactivated only when an active appeal is resolved.
- b. Any access requests that the appellant submits to the city in the next year may only have a maximum of two parts.
- c. The terms of this order shall apply to any requests and appeals made by the appellant or by an individual, organization or entity acting on his behalf or under his direction but excluding the appellant's son who is the subject of a separate appeal.
- d. At the conclusion of one year from the date of this order, the appellant, the city and/or any person or organization affected by this order, may apply to the IPC to seek to vary the terms of this order, failing which its terms shall continue in effect until such a time as a variance is sought and ordered.

Original Signed By: \_\_\_\_\_  
Steven Faughnan  
Adjudicator

December 19 , 2022 \_\_\_\_\_