Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-4412

Appeal MA21-00750

The Corporation of the City of Cornwall

July 14, 2023

Summary: The Corporation of the City of Cornwall (the city) received a detailed request, consisting of 11 main questions (some of which contained comments and other questions), regarding a certain recruitment process. The city denied the request on the basis that it is frivolous or vexatious, but in this order, the adjudicator finds that the city has not sufficiently established this claim, within the meaning of section 4(1)(b) of the *Municipal Freedom of Information and Protection of Privacy Act*.

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

Orders Considered: Orders 17, MO-1924, MO-2096, MO-2285, MO-2957, and MO-3590.

OVERVIEW:

[1] This order addresses the determination by the Corporation of the City of Cornwall (the city) that a freedom of information request is frivolous or vexatious. In this order, I do not uphold that determination because I find that the city did not sufficiently support its claim.

[2] The city received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), for access to information regarding a certain recruitment process. The request contained 11 main questions, which themselves

contained comments, and sometimes other questions. I have decided not to describe this recruitment process or set out the wording of the request because doing so may identify the requester,[1] in the particular circumstances of this appeal.

[3] The city refused to process the request, issuing a decision stating that it had reasonable grounds to believe that the request is frivolous and vexatious.

[4] The requester (now the appellant) appealed the city's decision to the Information and Privacy Commissioner of Ontario (IPC).

[5] The IPC appointed a mediator to explore resolution, but the parties did not reach a mediated resolution.

[6] The appeal moved to the adjudication stage, where an adjudicator may conduct an inquiry. I conducted a written inquiry under the *Act* on the issue of whether the request is frivolous or vexatious within the meaning of section 4(1)(b) of the *Act*, by sending the city a Notice of Inquiry on that issue. The city provided representations in response. On my review of the city's representations, I determined that I did not need to hear from the appellant.

[7] For the reasons that follow, I allow the appeal, finding that the city has not sufficiently established that the request is frivolous or vexatious. As a result, I order the city to issue another access decision to the appellant.

DISCUSSION:

[8] The only issue in this appeal is whether the access request is frivolous or vexatious. An institution that concludes that an access request is frivolous or vexatious has the burden of proof to justify its decision.[2] For the following reasons, I find that the city has not done so.

Background information

[9] As noted, the request relates to a certain city recruitment process. According to the city, the context of the request is a recruitment process that did not result in an outcome to the liking of the appellant, as well as other personnel issues.

Section 4(1)(b)

[10] Section 4(1)(b) of the *Act* provides institutions with a straightforward way of dealing with frivolous or vexatious requests. However, institutions should not exercise

[1] Likewise, I have decided not to provide the links to the two publicly available records that the city referenced in its representations because doing so would identify the recruitment process, and may identify the appellant and at least one other person, in these particular circumstances.
[2] Order M-850.

their discretion under section 4(1)(b) lightly, as this can have serious implications for access rights under the *Act*.[3]

[11] 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."

[12] Section 5.1 of Regulation 823 under the *Act* elaborates on the meaning of the phrase "frivolous or vexatious."[4]

[13] Reading these sections together, under the *Act*, there are four grounds for claiming that a request is frivolous or vexatious:

- the request is part of a pattern of conduct that amounts to an abuse of the right of access,
- the request is part of a part of a pattern of conduct that would interfere with the operations of the institution,
- the request is made in bad faith, and/or
- the request is made for a purpose other than to obtain access.

The city's representations

[14] In response to the detailed background information about each of the above four grounds set out in the Notice of Inquiry, the city's relevant representations are minimal. The relevant representations essentially amount to: assertions that the four grounds apply, a history of the appellant's past requests, and correspondence between the parties showing an escalating tone. The vast majority of the city's representations in this appeal set out substantive answers to the questions about the recruitment process. However, since the recruitment process itself has nothing to do with whether the request for access to information is frivolous or vexatious, and is not governed by the *Act*, I will not refer to these answers in this order and have not considered them in making my decision about whether the request is frivolous or vexatious.

[15] Furthermore, rather than substantively addressing each of the four grounds

---

[3] Order M-850.

[4] Section 5.1 of Regulation 823 says:

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.

claimed, the city also took three positions about whether responsive records exist in relation to the questions found in the request. I will discuss these briefly in considering whether the request is part of a pattern of conduct that would interfere with the operations of the institution, further below.

The request is part of a pattern of conduct that amounts to an abuse of the right of access

[16] The following factors may be relevant in determining whether a pattern of conduct amounts to an "abuse of the right of access":

- *Number of requests*: Is the number excessive by reasonable standards?
- *Nature and scope of the requests*: Are the requests overly broad and varied in scope or unusually detailed? Are they identical or similar to previous requests?
- *Purpose of the requests*: Are the requests intended to accomplish some objective other than to gain access to the requested information? For example, are they made for "nuisance" value, or is the requester's aim to harass the institution or to break or burden the system?
- *Timing of the requests*: Is the timing of the requests connected to the occurrence of some other related event, such as court proceedings?[5]

[17] Other factors specific to the case can also be relevant in deciding whether a pattern of conduct amounts to an abuse of the right of access.[6]

[18] The IPC has found that the focus should be on the *cumulative* nature and effect of a requester's behaviour. In many cases, ascertaining a requester's purpose requires the drawing of inferences from their behaviour because a requester seldom admits to a purpose other than access.[7]

Number of requests

[19] The city states that the appellant abused the right of access because of the number of requests, stating that he previously filed five requests (requests 1-5), three of them on one day, before the request that is the subject of this appeal.

[20] The city explains that the files for requests 1-5 all closed. The city disclosed a record in response to request 1, denied requests 2 and 3 as frivolous or vexatious, took certain corrective actions in relation to request 4 (which was later closed on appeal to the IPC), and advised the appellant that there was no record responsive to request 5.

---

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

[21] In my view, five is not an unreasonable number of requests in the circumstances. It is noteworthy that the city did not even engage with two of them, having declared them frivolous or vexatious.[8] In the circumstances, I find that the number of past requests weighs against accepting that the request that is before me is part of a pattern of conduct amounts to an abuse of the right of access.

Nature and scope of the request

[22] The city's position is that the request in this appeal consists of 11 parts (labeled by the appellant as "Questions"), and actually total 39 questions. The city submits that many of those questions are not seeking records but, rather, justification for the city's hiring process for a certain position.

[23] The city states that it determined that the appellant abused the right of access because of the unusually detailed questions, "or, more importantly, with his comments."

[24] Having reviewed the questions that make up the request, I agree that they are, overall, lengthy and overly detailed, which is one factor that weighs in favour of upholding the city's decision.

[25] However, that is not determinative of the whether the request is part of a pattern that amounts to an abuse of the right of process.

[26] Furthermore, I am only prepared to give this ground (nature and scope of the request) little weight given that the city turned its mind to whether responsive records exist.

[27] Therefore, based on the evidence before me, the nature and scope of the request, in these particular circumstances, have limited weight in favour of upholding the city's decision.

Purpose of the request

[28] Here, I am to consider whether the request was intended to accomplish some objective other than to gain access to the requested information (such as "nuisance" value, or an alleged aim on the part of the requester to harass the institution or to break or burden the system).

[29] The city's position on the purpose of the request appears to be based on an objection to the format of the request (a series of questions, including comments and sub-questions), and also due to the city's belief that the appellant is essentially seeking to harass city staff.

[8] I make no findings about whether those determinations would have qualified as frivolous or vexatious under the Act, as those requests are not before me.

[30] With respect to the question of format, the city states that the purpose of the *Act*, in part, is to provide a right of access to information under the control of institution, "not to provide a right to answers." However, on this, I draw the city's attention to Order MO-3590, which summarized the jurisprudence on the *Act* and answering questions:

> Taken together, Orders 17, MO-2096, MO-2285, and MO-2957 establish that a "right to information" does not require an institution to provide an answer to a specific question; rather, the institution must consider what records in its possession might contain information that would partly or fully answer the questions asked in a request.[9]

[31] In light of these orders, and one of the purposes of the *Act* (to provide access to information held by government institutions, as set out in section 1(a) of the *Act*),[10] I am not prepared to find that the format of the request is a factor that supports a conclusion that the request was made for a purpose other than to obtain access to information.

[32] Turning to the city's concern regarding the nature and quality of the appellant's interaction with its staff, the city describes this as "an escalation of a requester's uncooperative and harassing behaviour." The city says it believes that the appellant made the request to defend a specified individual, who did not successfully acquire a certain position of employment with the city. The city states that it believes the facts outlined in its representations "show that many of those comments are unsubstantiated and that the Requester's opinion of the City, and in particular, the Human Resources Department, is very negative." The city attached a number of sample documents, which it says demonstrate the appellant's mindset.

[33] I have reviewed these attachments, and in general, they can be described as correspondence reflecting the strained relationship between the appellant and the city. Although such a relationship may weigh towards questioning the purpose behind the request, that it not determinative of the question of why the appellant made the request. In my view, it is difficult to read the request and not come away with the impression that it was made to seek information about a hiring process that the appellant wanted some (or further) transparency into. I find that this is not an improper reason for making a request under the *Act*, but rather reflects one of the main purposes of the *Act*. The discussion under "purpose other than to obtain access below" are also

---

[9] Order MO-3590, para. 28.

[10] See section 1(a) of the *Act*, which says, in part:

> The purposes of this Act are,
>
> (a) to provide a right of access to information under the control of institutions in accordance with the principles that,
>
> (i) information should be available to the public,
>
> (ii) necessary exemptions from the right of access should be limited and specific[.]

applicable in considering the factor of the purpose of the request under the ground "the request is part of a pattern of conduct that amounts to an abuse of process."

[34] Therefore, I find that the city has not sufficiently established that the purpose of the appellant's request is a factor that weighs in favour of upholding the city's position that the request is part of a pattern of conduct that amounts to an abuse of the right of access.

The city's conduct

[35] The IPC may 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."[11]

[36] In my view, the city's decision not to disclose two publicly available responsive records is a relevant factor in considering this ground of its frivolous or vexatious claim. I find that the city's decision to identify two responsive records and refuse to disclose them – or to claim the discretionary exemption at section 15(a) (information currently available to the public) of the *Act*,[12] which would have required the city to lead the appellant to the public records – is conduct on the part of the city that weighs against accepting that the request is frivolous or vexatious.[13] The decision to claim section 4(1)(b) instead of providing the appellant with information about how to access the two responsive records, is a factor that weighs against upholding the city's determination that the request is part of a pattern that amounts to an abuse of the right of access.

[37] The city repeatedly claims in its representations that there are no responsive records to most of the questions in the request. The fact that no responsive records exist is not relevant to the determination of whether a request is frivolous or vexatious. The city could have chosen to respond to the request and provided the response that no records exist instead of claiming that the request was frivolous or vexatious.

[38] Considering and weighing the factors above (the number of requests, the nature and scope of the request, the purpose of the request, and the city's conduct), I find that the city has not sufficiently established that the request is frivolous or vexatious on the ground that it is part of a pattern of conduct that amounts to an abuse of the right of access.

---

[11] Order MO-1782.

[12] Section 15(a) says: "A head may refuse to disclose a record if, […] the record or the information contained in the record has been published or is currently available to the public[.]" Section 15(a) is intended to provide an institution with the option of referring a requester to a publicly available source of information where this is a more convenient way to access the information. It is not intended to be used in order to avoid an institution's obligations under the *Act (see* Orders P-327, P-1114 and MO-2280). In order to rely on the section 15(a) exemption, the institution must take adequate steps to ensure that the record that they allege is publicly available is the same record that was requested (see Order MO-2263).

[13] See, for example, Orders MO-2470 and MO-4365-I.

Purpose other than to obtain access

[39] If a request is made for a purpose other than to obtain access, the institution does not need to demonstrate a "pattern of conduct."[14]

[40] 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.[15]

[41] The IPC has previously found that an intention by the requester to take issue with a decision made by an institution, or to take action against an institution, is not enough to support a finding that the request is "frivolous or vexatious."[16] In order to qualify as a "purpose other than to obtain access," the requester would need to have an improper objective above and beyond an intention to use the information in some legitimate manner.[17]

[42] As discussed above, the city states that it believes the appellant is upset about the result of a certain recruitment process and other personnel issues, and has negative views of city staff.

[43] However, for the reasons discussed above regarding the purpose of the request, and the IPC's finding in Order MO-1924, I do not accept that the city has sufficiently established that there are reasonable grounds to conclude that the request was made for a purpose other than to obtain access. In Order MO-1924, the IPC recognized that motives such as seeking information to assist a requester in a dispute with the institution, or publicizing what a requester considers to be an institution's inappropriate or problematic decisions/processes are examples of clearly permissible motives. That is because access to information legislation *exists* to ensure government accountability and to facilitate democracy.[18] In fact, to find that such reasons for making a request are "a purpose other than to obtain access" would contradict the fundamental principles underlying the *Act*,[19] including the principle that "information should be available to the public."[20]

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

[44] Interference is a relative concept that must be judged on the circumstances faced by the institution in question.[21] A pattern of conduct that would "interfere with

---

[14] Order M-850.
[15] Order M-850.
[16] Orders MO-1168-I and MO-2390.
[17] Order MO-1924.
[18] Order MO-1924.
[19] See section 1 of the *Act*.
[20] Order MO-1924.
[21] While the IPC has recognized 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 ministry (see Order M- 850).

the operations of an institution" is one that would obstruct or hinder the range of effectiveness of the institution's activities.[22]

[45] Besides asserting that responding to the request would interfere with its operations, the city did not provide evidence or representations in support of its position. However, it is clear that the city either searched or consulted with staff to identify the following information:

- no responsive records exist (relating to most of the questions in the request),
- there are two responsive records (which are publicly available on its website), and
- the records responsive to the request would be excluded from the scope of the *Act*, under section 52(3) (employment or labour relations), so it is not required to provide the appellant with responsive records.

[46] As the city's representations do not sufficiently address this ground, I find the appellant's request is not part of a pattern that would interfere with its operations.

Bad faith

[47] If a request is made in bad faith, the institution does not need to demonstrate a "pattern of conduct."[23]

[48] The IPC has defined "bad faith" 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.[24]

[49] The city asserts bad faith on the part of the appellant. It did not point me to evidence specifically in support of this serious allegation.

[50] Given that the city did not provide representations or evidence on this issue, I considered whether any of the city's representations would establish bad faith on the part of the appellant. I have already found that the evidence does not establish an

[22] Order M-850.
[23] Order M-850.
[24] Order M-850.

improper purpose, so it is not reasonable to conclude from that there is bad faith. Similarly, I find that the correspondence does not establish that there are reasonable grounds to conclude that the request was made in bad faith, as that term has been defined by the IPC. As a result, I find that the city has not supported its assertion that the request was made in bad faith.

[51] For these reasons, I do not uphold the city's determination that the request is frivolous or vexatious under the *Act*, and I allow the appeal.

ORDER:

I allow the appeal. I order the city issue the appellant an access decision in accordance with the *Act*, without recourse to the time extension provisions in the *Act*, or section 4(1)(b) of the *Act*. For the purpose of this order, the date of this decision is to be treated as the date of the access request.

Original Signed by: July 14, 2023

Marian Sami
Adjudicator