Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-4513

Appeal MA22-00326

The Corporation of the City of Barrie

April 23, 2024

Summary: The appellant submitted a request to the city for information relating to the city's winter road maintenance program. The city denied the request on the basis that it was frivolous or vexatious. In this order, the adjudicator finds the city did not sufficiently establish its claim within the meaning of section 4(1)(b) of the *Act* and orders it to issue an access decision to the appellant.

Statutes 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).

Orders Considered: Order M-850.

OVERVIEW:

[1] The appellant submitted a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) with the Corporation of the City of Barrie (the city) for the following information:

> In 2021, possible between June and October, someone – possible from Barrie Operations, sent an e-mail or a paper document to the Simcoe Muskoka District Health Unit requesting a review "Street sweepings reuse for winter road maintenance". I would like a copy of this email request.

> Also, I would like any further e-mails/documents exchanged between the City of Barrie and the Simcoe Muskoka Health Unit on the subject. The time span for such documents may be October 2021 through April 2022. I do not need any of the 2017 or 2021 sample data.

[2] The city issued a advising the appellant it would not respond to his request because it is frivolous or vexatious. In its decision, the city explained,

> … this request is part of a pattern of conduct that amounts to an abuse of the right of access to information and interferes with the operations of the institution. In addition, the City is of the opinion that the submission of this request was placed in bad faith. Responding to these requests hinders the effectiveness of the City's activities by using staff resources. As such, no records will be provided for this or any future requests pertaining to these topics.[1]

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

[4] As mediation did not resolve the appeal, it was transferred to the adjudication stage of the appeals process. The adjudicator originally assigned to the appeal decided to conduct an inquiry and sought and received representations from the city and the appellant.

[5] The appeal was then transferred to me to continue the inquiry and I sought and received additional representations from the appellant.

[6] In the discussion that follows, I find the city has not established the appellant's request is frivolous or vexatious within the meaning of section 4(1)(b). As a result, I order the city to issue another access decision to the appellant.

DISCUSSION:

[7] The sole issue before me is whether the appellant's request is frivolous or vexatious. 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 their discretion under section 4(1)(b) lightly, as this can have serious consequences for access rights under the *Act*.[2] Section 4(1)(b) reads,

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[1] I note the city referred to section 20.1 in its decision. However, I will be considering the application of section 4(1)(b) of the *Act* because the city's decision was to deny the appellant's access request on the ground that his request is frivolous or vexatious. Section 20.1 of the *Act* describes the type of notice the institution should give a requester when it has decided a request is frivolous or vexatious.
[2] Order M-850.

> 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.

[8] 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
> >
> > (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.

[9] In this case, the city bears the onus to justify its decision to refuse the appellant's request on the basis that it is frivolous or vexatious.[3]

[10] Upon review of the city's decision and representations, it appears the city claims three grounds to support its frivolous and vexatious claim. Specifically, the city claims the appellant's request is part of a pattern of conduct that amounts to an abuse of the right of access, is part of a pattern of conduct that would interfere with the city's operations, and/or was made in bad faith. I will consider whether the appellant's request is part of a pattern of conduct that amounts to an abuse of the right of access, first.

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

[11] A pattern of conduct must be found to exist before determining whether that pattern of conduct amounts to an abuse of the right of access. Previous IPC orders have addressed the meaning of the phrase "pattern of conduct," 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. For example, in Order M-850, the adjudicator states,

> … 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).

[12] In Order M-850, the adjudicator also stated that, in determining whether a

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[3] Order M-850.

pattern of conduct has been established, the time over which the behaviour occurs is a relevant consideration. This reasoning has been followed in many subsequent orders which 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."[4]

[13] Once it has been established that a request forms 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.[5] 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]

[14] The institution's conduct may also be a relevant factor to consider when reviewing a frivolous or vexatious finding. However, an institution's misconduct does not necessarily mean the institution was wrong to conclude the request was frivolous or vexatious.[7]

[15] The IPC has found 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.[8]

The parties' representations

[16] The city submits the appellant submitted six formal access requests between 2020 and 2022 for records relating to street sweepings reuse for winter road maintenance. The city submits it disclosed the records responsive to the appellant's two 2020 requests to him in full. The city submits that two of the appellant's requests in 2021 did not result in records being located. The appellant's third request in 2021 was deemed frivolous or vexatious, which resulted in a denial of access. The city submits the appellant appealed the city's frivolous and vexatious claim, but the appeal was resolved during mediation when it provided him with a copy of the record and waived the fee. The city submits the appellant has now submitted a request for information concerning the same matter that was the subject of his other requests.

[17] The city states that during and between his formal access requests, the appellant contacted various city staff in multiple departments over 120 times regarding the subject of street sweepings reuse for winter road maintenance. The city states the appellant asked staff to provide him with information relating to this issue and asked it to undertake certain actions to address his concerns. The city submits that, in the spirit

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[4] Order MO-2390.
[5] Orders M-618, M-850, MO-1782 and MO-1810.
[6] Order MO-1782.
[7] Order MO-1782.
[8] Order MO-1782.

of the *Act*, its staff responded promptly, professionally, and comprehensively to many of the appellant's requests. Regardless, the appellant continued to contact staff in various areas and at different levels of the city, seeking further information and requesting specific actions to be taken. In support of its representations, the city provided me with an itemized log of the appellant's contacts, identifying the department contacted, the date and nature of the request.

[18] In his representations, the appellant provided some background information regarding his requests. The appellant submits that, in February 2020, he discovered the city had paved up to 100 roads with a hazardous Asbestos-Asphalt paving mix. The appellant submits he felt it was imperative for the city to deal with this asbestos pollution and submitted two requests in relation to this issue.

[19] The appellant submits that in May 2020, he discovered the city was "polluting all of Barrie with reused swept up Spent Winter Sand." The appellant submits this material is highly contaminated and says he submitted requests in relation to this issue. The appellant submits that while he was interested in the asbestos issue, initially, he is now focused on the city's use of spent winter sand. The appellant submits he wrote a 95-page report on the issue which he then distributed to city staff.

[20] The appellant submits the Medical Officer of Health (the Medical Officer) with the Simcoe Muskoka District Health Unit (the Health Unit) responded on April 7, 2022, to advise that, in fall 2021, the Health Unit requested a scientific and technical report on street sweeping reuse for winter road maintenance from Public Health Ontario. The Medical Officer provided a copy of Public Health Ontario's report to the appellant. The appellant reviewed the report and noted that it appears the city intends to continue using spent winter sand and asked the Health Unit for to provide comments on the plans.[9] Given these circumstances, the appellant sought further information from the city regarding the city's request for comment from the Health Unit.

[21] The appellant submits the current request is not related to the requests he submitted prior to the publication of his report. The appellant submits the current request relates to a "new and emerging topic." The appellant submits he intends to research and critique the city's plan to restart the use of spent winter sand and the information requested is of "utmost importance."

[22] In response, the city claims the appellant's requests for potential contaminants in spent winter sand and the asbestos-asphalt roadways are a single matter and not two separate matters. The city submits the appellant has expressed concern over the level of contaminants in the spent winter sand due in part to its contact with the asbestos-

[9] The appellant refers to a Public Health Ontario report dated November 26, 2021, titled "Response to Scientific/Technical Request: Street sweepings reuse for winter road maintenance." Specifically, the appellant refers to the Request and Scope portion which states, "The City of Barrie intends to reuse street sweepings as part of their winter road maintenance program and has asked [the Health Unit] to provide comments on the plan."

asphalt roadways in the winter season. As such, the city is of the opinion that the appellant's formal and informal access requests regarding these matters should be considered as relating to a single matter.

[23] The city refers to the appellant's specific requests, of which the earliest filed in 2020 refers specifically to the spent winter sand. Therefore, the city does not agree with the appellant's characterization of requests relating to spent winter sand to be separate from requests relating to asbestos-asphalt in roadways. The city reiterates the appellant has filed six formal access requests and contacted city staff in multiple departments more than 120 times between 2020 to 2022 regarding this issue. The city refers to its table of the appellant's contacts, which involved staff members from multiple departments at various levels of seniority, including a "direct confrontation with a street sweeper in the field." The city submits the appellant's current request, in conjunction with the total number of formal and informal requests on this matter, is excessive by reasonable standards and should be considered frivolous and vexatious.

[24] The city also submits that "significant steps and actions have been undertaken" by itself and the Health Unit to respond to and investigate the appellant's questions and concerns. The city submits it commissioned a scientific and technical report from Public Health Ontario on the street sweeping reuse for winter maintenance program. The city submits both Public Health Ontario and the Health Unit concluded that potential public health risks from the program are unlikely. The city submits these findings were provided to the appellant.

[25] In his sur-reply representations, the appellant submits that following the requests he submitted in 2020 and 2021 he was informed the reuse of spent winter sand had been suspended. Given these circumstances, he completed his study and published his 95- page report. However, since that time, it became clear the city intended to use spent winter sand again and the appellant submits the requests relating to this development are separate and distinct.

[26] The appellant addresses the city's claim that he submitted multiple FOI requests. The appellant submits that during the COVID-19 pandemic, staff was difficult to reach and the only reliable way for him to receive the information requested was through formal FOI requests. The appellant submits he conducted "copious amounts of research" in preparing his report and the city was his only source of information, for the most part.

[27] The appellant submits the information provided by Public Health Ontario on this issue is "fraught with errors and omissions" and based on bad information and should not be used by the city to justify a return to using spent winter sand. The appellant submits he filed his request to review the circumstances around the creation of the report.

Analysis and findings

[28] 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?[10]

[29] 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.[11]

[30] As stated above, the IPC has found the focus should be on the *cumulative* nature and effect of a requester's behaviour.

[31] Based on my review, I am not satisfied the city provided sufficient evidence to establish there is a pattern of conduct amounting to an abuse of the right of access. The city states the appellant submitted six formal access requests. In my view, six is not an unreasonable number of requests in the circumstances. The city reproduced the requests in its representations. I reviewed the requests and do not find they are overly broad or varied in scope or unusually detailed. Further, I find they are not similar to other requests beyond generally relating to a similar issue, i.e. the city's winter road maintenance program. In the circumstances, I find the number and scope of the formal access requests submitted by the appellant weighs against accepting the current request is part of a pattern of conduct that amounts to an abuse of the right of access. Furthermore, I find there is no indication the six requests filed by the appellant over the period of two years are evidence of a pattern of conduct that amounts to an abuse of the right of access.

[32] The city claims all the appellant's requests and contacts relate to the same issue, i.e. the spent winter sand use in the city's winter maintenance program. The appellant does not agree with the city's grouping of his requests as part of a single, larger issue. The appellant takes the position that the requests he filed prior to his publication of the 95-page report are distinct from the request at issue in this appeal. I agree with the city

[10] Orders M-618, M-850 and MO-1782.
[11] Order MO-1782.

that the appellant's requests related to a single, larger issue, i.e. the possible environmental issues resulting from the city's use of spent winter sand on its roadways for winter maintenance. However, I find the appellant's requests are not excessive in number nor are they too broad in scope.

[33] To support its claim, the city provided a log of the 120 contacts the appellant made to the city in relation to his request between 2020 and 2022. I reviewed the table provided by the city. I acknowledge the appellant contacted the city many times, including to provide comments regarding various reports, and to offer feedback regarding the city's use of asbestos and spent winter sand. I acknowledge the appellant also submitted informal requests for information with the city. For example, in March 2020, the appellant emailed a city staffer requesting information regarding the asbestos-asphalt issue. That same month, the appellant also asked the city for information regarding the roads that were tested for asbestos, lab results for various tests, and other information relating to the asbestos-asphalt issue. I acknowledge the city's claim that the appellant contacted the city many times for a variety of reasons from 2020 to 2022.

[34] Upon review of the city's log of contacts with the appellant, it is clear the appellant submitted informal requests for information. However, rather than directing the appellant to file a formal request for access under the *Act*, the city appears[12] to have agreed to respond to these requests in an informal manner and outside of the *Act*. I acknowledge the city was acting in good faith, responding to the appellant efficiently and provided good customer service. I also acknowledge the appellant had many interactions with city staff regarding the issues he has with the city's roads and use of spent winter sand. Further, it is clear the city is frustrated with responding to the appellant's numerous requests for comment, updates, and information.

[35] Regardless, the city's responses to the appellant's 120 contacts were outside the *Act* and are not equivalent to the formal access decisions made under the *Act* that are within the scope of my review. Moreover, while the city may be frustrated with the appellant's numerous contacts with its staff at various levels, not all these contacts relate to the appellant's formal access requests under the *Act*. Instead, the appellant takes issue with the city's use of spent winter sand in its winter maintenance program generally and raised his concerns with different departments of the city. Therefore, while the city's log of contacts is evidence of the appellant's interest in this issue, it is not evidence there is a pattern of conduct that amounts to an abuse of access.

[36] Regarding the purpose of the request, the city has not established that the appellant's request was intended to accomplish some objective other than to gain access to the requested information. On his part, the appellant makes it clear the purpose of his request is to collect information to support his research in relation to the

[12] The city did not provide me with its responses to the appellant; however, I assume the city responded to the appellant's informal requests for access.

city's use of spent winter sand. There is no indication the appellant submitted the request for any nuisance purpose. Therefore, I find the city has not established there are reasonable grounds to conclude the request was made for a purpose other than to obtain access.

[37] Therefore, in the absence of further evidence from the city, I am not satisfied the appellant's requests form a pattern of conduct that amounts to an abuse of the right of access.

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

[38] Interference is a relative concept that must be judged on the circumstances faced by the institution in question.[13] 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.[14]

[39] The city asserts the appellant's request is part of a pattern of conduct that would interfere with the operations of the city. To support its position, the city refers to the appellant's six formal access requests and the fact the appellant contacted the city over 120 times between 2020 to 2022 with respect to street sweepings reuse for winter road maintenance. However, the city offered no further evidence to support its claim. For example, the city did not provide any evidence to show how much time it has spent responding to the appellant's access requests nor did it provide any evidence to demonstrate how much time it would take for the city to respond to the appellant's current request.

[40] In the absence of more evidence from the city, I find the appellant's request is not part of a pattern that would interfere with its operations.

Bad faith

[41] If a request is made in bad faith, the institution does not need to demonstrate a "pattern of conduct."[15] The IPC has defined the term *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

[13] For example, 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).
[14] Order M-850.
[15] Order M-850.

> 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.

[42] The city submits it received a formal access request in 2021 concerning records related to street sweepings reuse for winter road maintenance. While the request was not filed by the appellant, the city submits the requester was acting on behalf of the appellant. The city submits this is evidence the current evidence was made in bad faith or for an improper purpose.

[43] The city also submits that while the appellant indicated that he would not require further information on the road maintenance issue during the mediation of an appeal that arose from a 2021 request, the appellant has now filed another request concerning the same issue.

[44] The city acknowledges these instances are not directly related to the current access request. Nonetheless, the city submits the appellant's behaviour is indicative of ill- will and bad faith on the appellant's part. The city reiterates the appellant has submitted an excessive number of informal and formal requests for information.

[45] The appellant submits the request filed by the individual in 2021 was not submitted on his behalf. The appellant alleges this individual was "sympathetic to my cause" and submitted their own FOI request hoping to obtain responsive records. The appellant submits the city did not question this individual regarding the purpose of their request prior to issuing a "bad faith" determination and denying the request.

[46] In response, the city submits the individual submitted their request, which was the same as the appellant's, to circumvent the city's decision under the *Act*. The city reiterates the appellant's current request is similarly frivolous or vexatious and reiterates the appellant's previous indication that he would not file any further requests regarding this issue.

[47] The two pieces of evidence submitted by the city to demonstrate its bad faith claim are the fact that another individual submitted the same request at the appellant at the same time and the appellant submitted the current request despite previously advising he would not file any further requests regarding this issue. I do not agree with the city that either instance demonstrates the appellant was acting in bad faith.

[48] With regard to the duplicated request, the appellant submits the individual submitted their own request independent of the appellant. While the individual may have been sympathetic to the appellant's cause, there is no evidence to demonstrate the appellant and this individual were acting together with the motive of misleading or deceiving the city.

[49] With regard to the appellant's indication that he would not file further requests, I reviewed the appellant's representations, and it is clear he filed the current request due

to the information contained in the Public Health Ontario report. The appellant takes the view the Public Health Ontario report contains a new development in relation to the city's winter road maintenance program, in that the city decided to start using spent winter sand again or to continue using spent winter sand. Upon my review, I find the appellant is making an earnest request for additional information to further his research and not in bad faith or to mislead or deceive the city.

[50] Based on my review, I find the city did not provide sufficient evidence to establish the appellant filed his access request in bad faith. In my view, the evidence provided by the city does not demonstrate bad faith. The appellant addressed the issue of the duplicated request, and I find the appellant is entitled to conduct research into the issue of concern to him. Overall, I find the evidence provided by the city falls short of demonstrating that this specific access request made under the *Act* was made in bad faith and/or to willfully mislead or deceive the city.

Summary

[51] I find there is insufficient evidence to support a finding that the appellant's request under the *Act* is part of a pattern of conduct that amounts to an abuse of access or that would interfere with the operations of the institution or was made in bad faith. I note that my decision does not preclude the city from deciding that a future request from the appellant is frivolous and vexatious under section 4(1)(b) where it finds the grounds under section 5.1(a) or (b) of Regulation 823 are met.

[52] As a result of my finding, I order the city to provide an access decision in response to the appellant's freedom of information request.

ORDER:

I order the city to provide a decision to the appellant regarding access to the records responsive to his request, in accordance with the requirements of the *Act*, and using the date of this order as the date of the request.

Original signed — April 23, 2024

Justine Wai
Adjudicator