Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER M-947

Appeals M-9600386, M-9600387, M-9600388, M-9600389, M-9600390, M-9600391, M-96500392, M-9600393, M-9600394, M-9600395, M-9600396, M-9600397, M-9600398, M-9600399, M-9600400, M-9600401, M-9600402 and M-9600403, M-9500118, M-9500778, M-9600056, M-9600183, M-9600184, M-9600185, M-9600186 and M-9600187
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THE REQUESTS AND APPEALS:

This order will resolve 26 appeals filed by the appellant from decisions of the City of Mississauga (the City) under the Municipal Freedom of Information and Protection of Privacy Act (the Act). These appeals fall into the following categories:

(1) Three appeals relate to the City's decisions of **September 18, 1995** not to open new files with respect to the appellant's requests. The City stated that these three requests, dated September 13, 1995, were the same as those previously submitted by the appellant. On May 21, 1996, the appellant appealed these three decisions as deemed refusals.

(2) One appeal, filed on December 19, 1995, relates to the decision of the City dated **December 14, 1995** in response to one request dated November 17, 1995 and five requests dated November 10, 1995. In this decision, the City responded by stating that the requests constituted an abuse of process. The City advised the appellant that, until this office had disposed of the appellant's outstanding appeals, it would not process any further requests. After the appeals were resolved, the City stated that it would then process one request at a time.

(3) Fourteen of the appeals relate to a decision issued by the City on **October 10, 1996** related to requests submitted to the City during the period of September 29, 1995 to August 7, 1996. In each case, the City's decision was to deny access to the requested records on the basis that the head was of the opinion that the requests were frivolous or vexatious pursuant to sections 4.1 and 20.1(1) of the Act. Appeals from these decisions were filed by the appellant on December 20, 1996.

(4) One appeal relates to the City's refusal to issue a decision letter with respect to the appellant's request of November 9, 1995. The City has indicated that it did not do so, as the appellant requested the same information from one of its program areas, outside of the Act

(5) The balance of the appeals relate to requests submitted by the appellant for access to specific records, to a confirmation of where the file was held in the City's records management system, as well as by whom. In its decision letters, issued between **January 12, 1995 and January 4, 1996,** the City did not respond to those portions of the requests regarding the locations of the records and by whom they were held. The appellant appealed these decisions, raising the issue of the City's failure to respond to the portions of the requests identified above.

To summarize, the appeals described in categories (1), (4) and (5) are deemed refusals in the sense that the City either refused to open a file or did not, in the appellant's view, respond to all portions of the requests. The category (2) appeals flow from a decision that the requests are an abuse of process. The category (3) appeals stem from a decision that the requests are frivolous or vexatious.

The appellant disputes the City's characterization of his requests as an abuse of process. He also disputes the City's claim that his requests are frivolous or vexatious. He further claims that the City should comply with the provisions of the Act and process his requests as it does for other individuals using the Act.

THE INQUIRY PROCESS:

None of the above-described appeals could be resolved by mediation. Accordingly, on January 6, 1997, a Confirmation of Appeal/Notice of Inquiry (the Notice) was sent to the City and the appellant advising the parties that an inquiry would be conducted by way of written and oral representations.

The Notices set out the three-stage process to be followed in the inquiry. The parties were advised that the first stage would involve written representations which would be shared with the other party. The second stage would involve supplementary written representations in response to those issues raised in the initial set of submissions. The supplementary written representations would also be shared with the other party. The third stage of the inquiry would consist of oral representations from each party in response to the issues raised in the written submissions. A schedule for the timing of the receipt of the written and oral submissions was included in the Notices.

The deadlines for the receipt, by this office, of the written representations and supplementary written representations were January 27 and February 25, respectively. The parties were advised that arrangements for the time and place for oral representations were to be made through the Registrar's office.

During the inquiry, the appellant proposed settlement of all of his appeals. The City responded by outlining the circumstances in which it would agree to settle the appeals without proceeding with the inquiry. These matters could not be settled, so the inquiry proceeded.

The City requested and was granted an extension for the provision of its first set of representations from January 27 until February 10. The parties' representations were subsequently exchanged as set out in the Notice. The appellant requested an extension of at least a month for submitting his supplementary written representations. I agreed that the supplementary representations of both parties could be provided by March 10. The supplementary representations were then exchanged.

On March 18, the Registrar contacted the appellant with a list of 16 dates and times, from March 26 to April 8, for him to present his oral representations. The appellant advised this office that all of the dates were "too soon" and that he would "... not have any time until after April 15 to even consider attending Orals". He asked the Registrar if he could attend in the evening.

On April 2, I wrote the appellant advising that this office schedules oral representations in the morning and afternoon and that he would have three hours during which to present his submissions. The Registrar called the appellant on April 9 to attempt to schedule a date and time for his oral submissions. He was given eight choices from April 28 to May 2. The appellant maintained that there were several outstanding issues regarding the inquiry to which I should

respond prior to his agreeing to a date for the oral submissions. Accordingly, the appellant would not arrange a date at that time.

On April 11, I again wrote the appellant confirming the availability of the eight time slots and advising him to contact the Registrar on or before April 25 if he intended to present oral submissions. I indicated to him that he did not have to attend if he did not wish to do so and that, if he did not contact the Registrar by that date, I would proceed to issue my order after having heard from the City and on the basis of the materials the appellant had previously submitted. I also responded to a number of matters which the appellant continued to maintain had to be resolved prior to his scheduling a date.

On April 14, I sent both the City and the appellant a facsimile transmission in which I set out eight questions on which I wished the parties to comment during their oral submissions.

The appellant continued to contact this office with questions dealing with the inquiry process and with these eight questions, in particular. As he had in the past, the Appeals Officer assigned to these files spent several hours on the telephone trying to assist the appellant with his questions.

I then received a facsimile transmission from the appellant on April 25, in which he raised several questions which I had previously addressed in my letter of April 11. He stated that he would "... ask for the last possible date and time", and set out three reasons why he was extremely busy during the latter part of May. He did not, as I required in my April 11 letter, fix a date and time for his oral submissions. He also asked that he be allowed to present evidence "disqualifying himself from representing himself".

On April 28, I responded to the appellant by advising him that, despite the fact that he had not contacted the Registrar by April 25, I was still prepared to hear his oral submissions on May 2, if he advised the Registrar by May 1 that he wished to attend. I explained why I would not grant him a time extension to present his oral submissions.

The appellant, on April 29, responded to the above by stating that "2:00 in the afternoon could be too early" and that "Much later in the day is necessary 3:30 - 4:00". The appellant continued to state that he wished to attend the City's oral submissions, a request which I had previously denied when I decided that the representations were to be heard in the absence of the other party.

Later that day, the appellant called the Appeals Officer with more queries regarding the process. At that time, he suggested that he may wish to withdraw all of his appeals at issue in this inquiry. The next day, April 30, the appellant again contacted the Appeals Officer asking what was the "last possible moment" at which he could withdraw his appeals. He was advised that he could seek to do so any time before the inquiry was concluded, but that an order might still issue in any event.

The City attended to present its oral submissions at 10:00 a.m. on May 1. At approximately 4:40 p.m., the appellant contacted this office with further questions concerning the inquiry and, in particular, my letter of April 14. As the Appeals Officer was not available, the appellant spoke with the Appeals Supervisor who put the appellant "on hold" while he retrieved the file. When the Appeals Supervisor returned to the phone, the appellant had disconnected. He subsequently

called back and told the Supervisor that he had to hang up as he had "another matter to attend to".

About five minutes later, the appellant called the Supervisor again and continued to request an explanation of the various points set out in my letter of April 14. The Supervisor discussed these matters with the appellant and then, close to 5:00 p.m. transferred him to the Registrar.

When he then spoke with the Registrar, the appellant asked her if she had received his most recent fax. As she had not, the Registrar went to retrieve the fax and read it. After confirming with the Registrar that she had received all the pages and that the content was clear, the appellant hung up.

The time on the fax is 4:44 p.m. - it was obviously sent to this office during the time the appellant advised the Supervisor that "he had another matter to attend to". Given that it is three pages long, it is also probable that it was written before the appellant even began his conversation with the Supervisor. In the fax, the appellant "cancels" his May 2 date for oral representations. He also states that "... I am forced to withdraw all Appeals in the current Inquiry owing to the fact that I am not capable or qualified to represent myself under the current circumstances".

STATUS OF THE APPEALS:

In these circumstances, I must consider what consequences should flow from the appellant's fax communication late in the day on May 1 in which he did not confirm the May 2 date for oral representations, and stated that he "was forced to withdraw all appeals in the current inquiry" due to his alleged inability to represent himself.

There is no express right under the Act to withdraw an appeal commenced under section 39(1) once it has proceeded to inquiry under section 41(1), nor is there any express indication of the consequences of withdrawal or attempted withdrawal after the inquiry has commenced. In the vast majority of cases, the Commissioner and other decision-makers with this office, will, in their discretion, decline to make an order disposing of the issues raised by an appeal where the appellant indicates that he or she is no longer interested in securing access to the records at issue, or otherwise indicates a wish to withdraw an appeal. In most such cases, the issues arising in the appeal would be rendered entirely moot so that the issuance of an order could serve no useful purpose.

The situation before me is one of first impression, where different considerations may be said to apply. In this inquiry, the immediate issue is not the right of access to requested records in the usual sense, where the question is whether one or more exemptions from the right of access has been properly claimed by the institution. Rather, the issue is of a more fundamental and preliminary nature. Here, the City has raised the question of the appellant's basic entitlement to the right of access on two grounds:

(1) the head is of the opinion on reasonable grounds that the requests are frivolous or vexatious under section 4(1)(b) of the Act; and

(2) the appellant has engaged in a pattern of conduct in respect of his requests and appeals amounting to an abuse of process.

The City's right to be free of frivolous or vexatious requests, or to be free of conduct that amounts to an abuse of process, is the primary focus of this inquiry. An order of this office favourable to the City on either of these grounds can be of considerable importance to the extent that specific factual findings are made, or terms or conditions are imposed in the order provisions, which can provide guidance or govern the appellant's conduct in the future and thereby eliminate or reduce any abuse or potential for abuse. Indeed, the failure of this office to proceed to make an order in the face of facts which would otherwise support a case for abuse can have the unintended effect of perpetuating that abuse. Abusive requesters could appeal and litigate the denial of their requests up until any stage of the proceedings prior to the issuance of an order, and then withdraw the appeal to avoid the consequences of an adverse finding. This could lead to the absurd result that institutions and this office would be required to expend considerable resources in an effort to resolve questions regarding specific instances of abuse without ever achieving that objective. Accordingly, far from rendering the question moot, the appellant's late attempt to withdraw all appeals subject to this inquiry underscores the potential for this kind of abuse and the need to preserve the integrity of the important rights and processes set out in the Act by making a considered response.

I would note, before proceeding, that a decision to disallow an appellant's purported withdrawal of his appeals is not without precedent before other tribunals and the courts. For example, the Rules of Civil Procedure governing civil actions in this province make provision for certain consequences flowing from the unilateral discontinuance of a plaintiff's action against a defendant, depending on the stage of the proceedings at which the withdrawal occurs. In the absence of the consent of all parties, a plaintiff may only discontinue an action after the close of pleadings with the leave of the Court.
Where leave is not granted, a plaintiff is expected to proceed to prosecute the action in a timely way, and failure to do so, or to attend at the trial of the action, may result in dismissal of the action. Further, a defendant making a counterclaim against the plaintiff may be permitted by the court to proceed with the counterclaim even where leave to discontinue the action was granted to the plaintiff, or where the action was dismissed for delay or non-attendance at trial. (See Rules 23, 24 and 52 of the *Rules of Civil Procedure)*.

There may also be cost consequences for the plaintiff whose action has been discontinued or dismissed. Finally, I would note that, in exercising their discretion to refuse to grant leave to discontinue, the courts will consider such factors as whether the plaintiff merely seeks to avoid adverse consequences of continuing the action or whether discontinuance would frustrate the other party's efforts to finally determine the matters at issue.

On my instructions, the appellant was clearly advised by the Appeals Officer, in advance, that an order could still issue in this inquiry even if he sought to withdraw his appeals at this stage in the proceedings, after all written representations had been submitted and exchanged and the oral representations were underway. I find the practice of the courts of this province, described above, to be of considerable assistance in approaching the issue now before me.

While not determinative of the issue, I find the reasons advanced by the appellant for seeking to withdraw his appeals at the last possible moment to be rather disingenuous. This appellant is a frequent user of the appeals procedures set out in the statute and has represented himself throughout numerous past and current appeals. The appellant has made lengthy written submissions in respect of the appeals now at issue, touching on those matters of abuse of the right of access and frivolous and vexatious requests which would have been the subject of oral representations. The appellant has been aware of the issues in these appeals from the outset and has had every opportunity to secure whatever counsel or other assistance he believed he might require in order to make out his case on appeal. Further, the Appeals Officer assigned to this file, and other staff members at this office, have on numerous occasions provided the appellant with whatever assistance they were able at every stage of the appeals process.

The sequence of events set out at some length above, and, in particular, the appellant's continuing discussions with the Appeals Supervisor, seeking explanations of various points set out in my letter of April 14 dealing with the parties' oral submissions, while simultaneously faxing to this office a communication purporting to unilaterally withdraw the appeals, in my opinion, demonstrates the complete absence of good faith with which this appellant has approached his rights of access and the processes under the Act, as discussed in greater detail below. Discontinuing the inquiry at this late stage would frustrate the City's rights to have these matters finally determined and would play into the appellant's clearly contrived efforts to avoid the consequences of an adverse order. In all of the circumstances, I have decided not to accept the appellant's withdrawal of these appeals and now turn to the substance of the main issues in this inquiry.

FRIVOLOUS OR VEXATIOUS REQUESTS:

As noted, in its decision letter of October 10, 1996, the City denied access to the appellant's 14 requests spanning the period of September 29, 1995 to August 7, 1996 on the basis that the requests were frivolous or vexatious.

The provisions which I must consider in determining whether the appellant's 14 requests are frivolous or vexatious are found in sections 4(1)(b) and 20.1(1) of the Act and section 5.1 of Regulation 823 made under the Act (the Regulation). The provisions of the Act relating to "frivolous or vexatious" requests were added by the Savings and Restructuring Act, 1996 and came into force on January 30, 1996. Regulation 823 was amended shortly thereafter.

Section 4(1)(b) of the Act specifies that every person has a right of access to a record or part of a record in the custody of or under the control of an institution unless the head of an institution is of the opinion on reasonable grounds that the request for access is frivolous or vexatious. The onus of establishing that an access request falls within these categories rests with the institution (Order M-850). The appellant suggests that the City must satisfy me "beyond a reasonable doubt" that its claims against him are true. In my view, the appropriate standard in this case is one of the "balance of probabilities", the civil, as opposed to criminal burden of proof (Order M-850).

Sections 20.1 (1)(a) and (b) of the Act go on to indicate that a head who refuses to provide access to a record because the request is frivolous or vexatious, must state this position in his or her decision letter and provide reasons to support the opinion.

Sections 5.1(a) and (b) of the Regulation provide some guidelines for defining the terms frivolous and vexatious. They prescribe that a head shall conclude that a request for a record or personal information 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.

In Order M-850, former Assistant Commissioner Tom Mitchinson observed that these legislative provisions confer a significant discretionary power on institutions which can have serious implications on the ability of a requester to obtain information under the Act. He went on to express the view that this power should not be exercised lightly. I agree with this position, and adopt it for the purposes of this appeal.

I will now consider whether the facts of this case fit within both or one of these definitions.

PATTERN OF CONDUCT THAT AMOUNTS TO AN ABUSE OF THE RIGHT OF ACCESS - SECTION 5.1(A)

The Evidence

I will begin my analysis by reviewing the history of the interaction between the appellant and the City. A useful starting point is the decision of the City dated October 10, 1996 in which it advised the appellant that it was claiming that his 14 requests were frivolous or vexatious, on the basis of the following:

(i) the volume of requests you have filed with the City primarily dealing with the same subject matter;

(ii) the number of requests you have appealed to the Information and Privacy Commissioner even though access was granted. Out of 37 requests, you have appealed 31;

(iii) your practice of abandoning the request when the fee has not been waived and/or the fee has been upheld by the Information and Privacy Commissioner;

(iv) the number of duplicate requests filed by you, including duplicates of those where the Privacy Commissioner has issued orders on fees;

(v) splitting of bulk requests into smaller requests in order to avoid payment of fees;

(vi) your continued requests for records which do not exist where you have already been informed that they do not exist;

(vii) the fact that you are conspiring with another individual who is making identical requests to yours.

I will summarize the evidence the City has presented in support of each of these statements. As part of its representations, the City has provided me with an affidavit of its Freedom of Information and Privacy Co-ordinator (the Co-ordinator) who has outlined these matters. In addition, the City has created a number of charts which track the appellant's involvement and use of the Act. The charts may be described as follows:

(1) Requests which are the subject of this appeal: This chart sets out the City's file number, the related appeal number, the date of the request, the nature of the request and a comments section which indicates which requests are duplicates of previous requests.

(2) Documents which were not provided to the appellant as they do not exist: This chart sets out the City's file number, the related appeal number, the number and date of the order, and the date and nature of the request. Included in this category are Orders M-463, M-442, M-659, M-638 and M-716.

(3) Documents previously provided to the appellant: This chart includes the City's file number, as well as the nature and date of the request. The appellant did not appeal these decisions as the records were provided to him.

(4) Requests for information for which the appellant has refused to pay: This chart includes the City's file number, the related appeal number, the number and date of the order as well as the date and nature of the request. Order M-509, a decision of this office upholding the City's calculation of a fee estimate and its decision not to waive the fee, is included in this list.

I will analyse the aforementioned information on the basis of the reasons set out in the City's decision letter.

(i) The volume of requests filed with the City dealing primarily with the same subject matter/splitting of bulk requests into smaller ones to avoid payment of fees/ duplicate requests

In the ten-month period of March to December 1994, the appellant filed a total of 15 requests with the City, constituting 33% of all requests received by the City pursuant to the Act. The vast majority of the requests related to information concerning the Cawthra Woodlot and the Woodlot Management Program. Another large group of requests seek access to information concerning the manner in which various City employees, and in particular, staff in the Freedom of Information office, are to "deal" with the appellant and his requests under the Act. Two parts of

one of the requests sought access to the wages and expenses of the Mayor and councillors, and the City's deficit.

Although the City opened only 15 files to respond to these requests, many of the requests consisted of several parts. For example, the April 28 request contained six parts, the May 2 request, five parts, the June 3 request, seven parts, the June 20 request, 31 parts and the June 24, 1994 request, 10 parts.

In 1995, the appellant filed an additional 18 requests under the Act, comprising 58% of the City's requests in that year. Once again, the information requested concerns the Cawthra Woodlot and the Woodlot Management program, as well as information concerning the manner in which City employees are to respond to the appellant's requests under the Act and the costs the City has incurred in responding. Each of the February 10 and November 10, 1995 requests consisted of 14 parts, although, as per its practice in 1994, the City only opened and counted one request file for each of the requests filed on these dates.

The appellant filed five requests under the Act in 1996. The City identified all 10 parts comprising the August 7 request as being duplicates of previous requests. The information sought in these 1996 requests again dealt with the Cawthra Woodlot, the manner in which the City was to interact with the appellant and the City's Active Record Indexing System (ARIS) and Inactive Record Indexing System (IRIS) records management systems which were previously the subject of Order M-870.

In addition, in the City's chart setting out the requests that are the subject of this appeal, 23 parts of the requests are duplicates of requests previously submitted by the appellant to the City.

(ii) Conspiring with another individual who is making identical requests

In her affidavit, the Co-ordinator alleges that in 1996, the appellant began having other individuals submit requests to the City on his behalf. The Co-ordinator points out that, in the past, the appellant's requests and some of his other correspondence contained characteristic paragraphs and sentences at the beginning and end of the documents.

In the month of October 1996, the Co-ordinator states that the City received seven requests signed by six different individuals. Four of the seven requests begin with the identical paragraph as that used by the appellant in his requests. Two of the remaining requests were handwritten and, while they contained the same information, they were written in block letters and did not follow the form of the other four letters. The last request was typewritten and contained a variation of the introductory paragraph.

As indicated, the appellant regularly concludes his requests for information with a standard paragraph. Five of the seven requests submitted to the City in October 1996 contained a truncated version of this paragraph. The other two requests contained variations of this conclusion.

In her affidavit, the Co-ordinator states that she was advised by her secretary that three of the above-described requests were hand-delivered by the appellant on October 22. All seven of the

requests seek access to ARIS, which, as noted, has been the subject of a number of requests submitted by the appellant. The October 1996 requests with the names of the requesters and their phone numbers removed, are attached as exhibits to the Co-ordinator's affidavit in this inquiry.

(iii) Practice of abandoning the request when the fee is not waived or where the Commissioner has upheld the City's decision not to waive the fee

In this regard, the City states that four of the current appeals involve situations in which the appellant initially refused to pay the fee charged and applied for a fee waiver. The appellant has appealed the City's refusal to waive the fee. The City's position has been upheld on appeal (see, for example Order M-509). The appellant has then submitted another request to the City for the same information. The City acknowledges that the appellant has recently paid the fees that were outstanding in respect of one of the requests that is the subject of these appeals. However, the Co-ordinator advises that the appellant has refused to accept some of the records the City identified as responsive to this request and now seeks a partial return of the fees paid.

(iv) Continued requests for records which the City has previously indicated do not exist

The City cites the appellant's practice of filing appeals of decisions in which the City maintains that it has provided him with the requested records or in which the appellant has previously unsuccessfully appealed decisions in which the City has claimed that no records exist, as another example of his frivolous or vexatious requests.

This chart contains seven files which the City opened in which it issued a decision claiming that responsive records did not exist. The appellant appealed all of these decisions resulting in orders from this office. With the exception of one order, Order M-442, all of the decisions of this office upheld the City's claim that records did not exist. However, as noted, the appellant subsequently requested the same information from the City.

(v) Decisions that were appealed even though access was granted

The City has not prepared a chart on these appeals. However, my review of the appeal files at issue indicates that these appeals are the ones that fall into category (4) described at the beginning of this order. That is, they deal with those requests involving the Cawthra Woodlot in which the City has granted access to the records which were the subject matter of the request. The appellant has appealed what he alleges to be the City's failure to adequately respond to the requests because they have not included a reference as to where the responsive records were located on the ARIS or IRIS system. This issue was previously the subject of Order M-716 in which former Assistant Commissioner Tom Mitchinson dismissed the appellant's appeal on the basis that the City had responded to the request in accordance with its statutory requirements.

(vi) Other Considerations

Finally, although this was not set out in its October 10, 1996 decision letter, the City submits that I may take into consideration the appellant's "attitude" towards its employees and the Freedom of Information process in determining whether his requests are "frivolous or vexatious". The

City has explained that, despite its efforts to clarify requests with the appellant, and work out some reasonable measures with respect to the processing of his requests, the appellant has refused to cooperate.

As an example, the City states that, from time to time, it has attempted to employ alternative mechanisms outside of the Act, in order to facilitate a more efficient and effective response to some of the appellant's requests. It states that the appellant's repeated requests for information made this process unworkable. The City has provided me with a copy of a report from one of its staff members indicating that in the course of eight meetings with the appellant between January 11 and March 13, 1996, she spent 21 hours of time responding to the appellant's requests through this mechanism.

The City also submits that, during the course of his efforts to pursue requests for information, the appellant has made "serious and unfounded allegations" against City staff in correspondence to a City Councillor, the City's legal counsel and the City Clerk and Deputy. In this correspondence, attached as exhibits to the Co-ordinator's affidavit, the appellant refers repeatedly to the fact that he is not receiving the service which the City should provide to him in addressing his requests under the Act. Based on this, the Co-ordinator states that it is her belief that the appellant's intent in pursuing his requests and appeals is not to obtain information from the City but to harass City staff and Council and "to employ the F.O.I. process as a means to facilitate libellous and irresponsible allegations regarding the City, its elected officials and staff".

On the basis of the evidence outlined above, I must determine whether the City's submissions meet the criteria outlined in section 5.1(a) of the Regulation. The City's primary argument is that (1) the appellant's filing of requests forms part of a "pattern of conduct" and, that (2) this pattern amounts to "an abuse of the right of access".

Discussion

The requirements of section 5.1(a) of the Regulation would be met if the City establishes reasonable grounds for concluding that the requests are 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.

In Order M-850, former Assistant Commissioner Mitchinson defined the term "pattern of conduct". He stated that, for such a pattern to exist, one must find "recurring incidents of related or similar requests on the part of the requester (or with which the requester is connected in some material way)". He also pointed out that, in determining whether a pattern of conduct has been established, the time over which the behaviour occurs is a relevant consideration. I agree with this approach and adopt it for the purposes of my order.

In the same order, the former Assistant Commissioner then commented on the meaning to be accorded to the phrase "abuse of the access process". He then went on to list a number of criteria for defining this phrase, which were originally described by Commissioner Tom Wright in Order M-618.

In Order M-864, former Assistant Commissioner Irwin Glasberg, reviewed Orders M-618 and M-850 and the language of section 5.1(a) of the Regulations. He formulated a list of factors that

he believed to be relevant in deciding whether a pattern of conduct amounts to an abuse of the right of access. Former Assistant Commissioner Glasberg listed the following considerations:

(1) The actual number of requests filed: are they considered excessive by reasonable standards?

(2) The nature and scope of the requests: for example, are they excessively broad and varied in scope or unusually detailed? Alternatively, are the requests repetitive in character or are they used to revisit an issue which has previously been addressed?

(3) The purpose of the requests: for example (a) have they been submitted for their "nuisance" value, (b) are they made without reasonable or legitimate grounds, and/or (c) are they intended to accomplish some objective unrelated to the access process?

(4) The sequencing of the requests: do the volume of requests or appeals increase following the initiation of court proceedings by the institution or the occurrence of some other related event?

(5) The intent of the requester: is the requester's aim to harass government or to break or burden the system?

The former Assistant Commissioner commented that the list was not intended to be exhaustive and also reiterated the view expressed by Commissioner Wright in Order M-618, that a high volume of requests alone would not necessarily amount to an abuse of process.

In Order M-850, former Assistant Commissioner Mitchinson reviewed the case law dealing with the term "abuse of process" to assist in the interpretation of the words "abuse of the right of access" in section 5.1(a) of the Regulation. One of the cases he referred to was that of Foy v. Foy (No. 2) (1979), 26 O.R. (2d) 220, 102 D.L.R. (3d) 342 (C.A.).

It its submissions, the City also refers to this case and notes that it was cited, with approval, in the later case of Re Lang Michener et al. and Fabian et al. (1987), 59 O.R. (2d) 353. There is some overlap between the grounds cited above and the conclusions in this case. However, the City submits, and I agree, that in the Lang Michener decision, the court expanded on the grounds cited above. Having considered the Foy case and the cases of Re Kitchener-Waterloo Record Ltd. and Weber (1986), 53 O.R. (2d) 687 (Ont. S.C.) and Re Law Society of Upper Canada and Zikov (1984), 47 C.P.C. 42 (Ont. S.C.), the Court in Lang Michener indicated that the following principles may be extracted from the cases dealing with "frivolous and vexatious" actions:

(1) the bringing of one or more actions to determine an issue which has already been determined by a court of competent jurisdiction constitutes a vexatious proceeding;

(2) where it is obvious that an action cannot succeed, or if the action would lead to no possible good, or if no reasonable person can reasonably expect to obtain relief, the action is vexatious;

(3) vexatious actions include those brought for an improper purpose, including the harassment and oppression of other parties by multifarious proceedings brought for purposes other than the assessment of legitimate rights;

(4) it is a general characteristic of vexatious proceedings that grounds and issues raised tend to be rolled forward into subsequent actions and repeated and supplemented, often with actions against the lawyers who have acted for or against the litigant in earlier proceedings;

(5) in determining whether proceedings are vexatious, the court must look at the whole history of the matter and not just whether there was originally a good cause of action;

(6) the failure of the person instituting the proceedings to pay the costs of unsuccessful proceedings is one factor to be considered in determining whether proceedings are vexatious; and

(6) the respondent's conduct in persistently taking unsuccessful appeals from judicial decisions can be considered vexatious in the conduct of legal proceedings.

The City maintains that a number of the above-cited principles are applicable to the current appeals. In my view, the above factors represent additional considerations which could define "an abuse of the right of access" for the purposes of section 5.1(a). However, as the City itself notes, what constitutes "reasonable grounds" for a head's opinion in any one case requires an examination of the specific facts before him or her. It is important to emphasize that no one factor in and of itself will necessarily lead to a finding of frivolous or vexatious.

In considering the contention of the City that these fourteen requests are part of a pattern of conduct which amounts to an abuse of the right of access, I have examined the relationship between **these requests** and those previously submitted. The fact that previous requests may overlap with each other will not, on its own, establish that **these requests** are part of such a pattern.

I have carefully reviewed the contents of the fourteen requests and their multiple parts that form the subject matter of these appeals. As indicated previously, these requests span the time from September 25, 1995 to August 7, 1996. What is most striking about the pattern of these requests is that the City has identified each of the ten parts comprising the August 7 request alone as being duplicates of previous requests. In addition, two parts of the November 10, 1995 request duplicate previous requests, and two are duplicated within this one request. Because of the duplication in the August 7 request, I have concluded that, by themselves, these fourteen requests constitute "recurring incidents of related or similar requests" and, hence, a pattern of conduct for the purposes of section 5.1(a) of the Regulation.

I will now consider the relationship of these requests to those previously filed with the City between March 8, 1994 and September 25, 1995. In this regard, I note that six parts of the June 24, 1994 request are duplicates of one or more previous requests. In addition, these prior "requests" are comprised of multiple parts as are the later ones. For example, the April 28, 1994 request comprised six parts, the May 2 request, four parts, the June 3, 1994 request, seven parts

and the June 20 request, 31 parts. In my view, the nature, frequency and practice of submitting numerous duplicative requests, in many cases containing multiple parts, is part of the same "pattern of conduct" exhibited by the appellant in his requests which are the subject of those fourteen appeals from the City's decision of October 10, 1996 (the category (3) appeals).

The same may be said of the requests that resulted in categories (1), (2), (4) and (5) of these appeals in that the reason the City did not open a file or issue a decision letter with respect to these requests was because the appellant had previously submitted a request to the City for access to the same information. These requests had been resolved or were being appealed to this office by the appellant.

I note, however, that the practice of submitting requests containing multiple parts allegedly to avoid paying fees, is not, in and of itself a sufficient factor on which to conclude that a request forms part of a "pattern of conduct". Any issues regarding the fees which are assessed for such requests may, of course, be reviewed by the Commissioner's office and a determination made as to how the parts should be "counted" for the purpose of assessing fees (see for example, Order P-1267).

The question remains as to whether the seven requests filed by another individual in the month of October 1996 form part of this pattern of conduct. I have carefully reviewed the affidavit evidence of the Co-ordinator, as well as the supporting exhibits on this point. I agree that there are similarities between these requests and those previously filed by the appellant - the language of the opening and closing paragraphs, as well as the subject matter of these requests. I have also taken into account the fact that the Co-ordinator's secretary has claimed that three of the requests were hand-delivered by the appellant on October 22, 1996.

The appellant has never acknowledged that he was acting in concert with another individual, nor commented on the City's assertion on this matter, despite the fact that this was set out in the October 10, 1996 decision letter as one of the grounds on which the City concluded that the requests were frivolous or vexatious. Had the appellant attended for oral representations, I would have explored this matter with him.

Nonetheless, I am reluctant to conclude, on the balance of probabilities that the seven requests filed with the City in October were, in fact, submitted by the appellant or another individual or individuals with whom he was acting in concert. The evidence in these cases is unlike that before the Commissioner in Order M-618 in which both Riley and Baptista had publicly acknowledged their relationship in seeking access to information under the Act and the Commissioner found that they were "acting in concert".

Despite this conclusion with respect to these seven requests, I find that, based on the requests which the appellant has collectively filed with the City, there are reasonable grounds for the City to have concluded that the appellant has demonstrated a pattern of conduct under section 5.1(a) of the Regulation.

I must now determine whether this pattern of conduct amounts to an abuse of the right of access under the legislation, as submitted by the City.

The appellant's position is that he is legitimately seeking access to information for the benefit of the public. For example, he states that some of the information he requested was to enable him to investigate the 1994 municipal election where "there was reason to believe that the City was not following the Municipal Elections Act". As noted, the majority of the requests deal with the Cawthra Woodlot. The appellant maintains that he is using this information to fight for the environment. He notes that he has made efforts at public education and provided information to newspapers for articles and that ratepayers groups support his goals, but, as noted below, he has provided no evidence confirming these activities.

Furthermore, it is the appellant's position that he has not abused the right of access under the Act. Rather, in his submission, it is the City that is "abusing" the legislation. He submits that he has filed multiple requests because the City will not respond to him and has treated him differently from other requesters. He states that the City is charging him fees to prevent certain individuals, including him, and/or other groups from accessing certain documents. He says that there is nothing wrong with abandoning requests because he cannot pay for them. In addition, he states that, as far as proceeding with his requests for records that the City has previously stated do not exist, he asserts that "perhaps" he pursues these matters because he has evidence indicating that the records do in fact exist. I note that the appellant has not made this argument in respect of these types of appeals, nor provided any evidence to support this assertion. Finally, the appellant suggests that it is up to the City to ascribe a motive to his actions to support their characterization of his requests as an abuse of the right of access.
In my view, when the appellant initially began requesting information from the City, particularly concerning the Cawthra Woodlot and the Woodlot Management Program, he could very well have been said to have had a legitimate interest in the records being requested. I would note however, that, despite the fact that he has suggested that there is a public interest element to his requests, he has never provided any evidence of the legitimate uses to which he has put the information to which he has received access. Nor his he provided any evidence of the community and/or environmental groups which he maintains are interested in the information he receives. It is my view that very shortly after these requests began, the appellant's conduct with respect to the City became "an abuse of the right of access" for the following reasons.

The apparent purpose of the requests changed their focus from reasonable or legitimate grounds to one which may be characterized as seeking to accomplish some objective unrelated to the access process. For example, the requester became focused on seeking information related to how the City dealt with his requests and the amount of time and money the City had spent dealing with him. Because the appellant did not feel he was receiving the "service" from the City's Freedom of Information branch to which he felt he was entitled, he began using the Act and the freedom of information process as a means to express his personal attacks on the personnel involved in the process. To this end, his requests became a "springboard" for launching attacks on City council members and the City legal department.

Although the appellant now explains why he pursued requests where the City had previously indicated that no responsive records existed, I find that this explanation comes rather late in the day and lacks credibility. As I have noted, at no time during the request and appeals process involving these issues did the appellant raise this point. I can think of no other explanation, nor has the appellant offered a credible one, as to why he would pursue these particular cases unless

it was for their "nuisance" value or to harass the City. Neither of these objectives support the use of the process for a legitimate purpose.

The same holds true with respect to those appeals involving fees. Under the Act, the appellant is entitled to dispute the amount of fees charged for access to information, as well as appealing the City's decision not to waive the fee. If, as in the case of Order M-509, the City's position is upheld, again the appellant has the right to decline to pay the fees. However, in my view, these legitimate positions under the Act become an abuse of the right of access when access is requested to the same records a second time.

In addition, the appellant has repeatedly appealed decisions of the City in which he was provided access to the records to which he was seeking access. An example of this conduct relates to the ARIS/IRIS appeals in which the issue was addressed by Order M-716. The appellant continued to pursue appeals in which the same matter considered in that order was the only issue in dispute. Again, I can think of no legitimate purpose, nor has the appellant offered one, for this exercise.

In my view, taking the evidence as a whole, the City has provided me with sufficient evidence to establish that there are reasonable grounds for the City to consider the appellant's requests as part of a pattern of conduct that amounts to an abuse of the right of access.

It will be recalled that the City's decision of October 10, 1996 claiming that the fourteen requests were frivolous or vexatious, relates to requests submitted by the appellant during the period of September 29, 1995 to August 7, 1996. The provisions of the Act relating to "frivolous or vexatious" requests came into force on January 30, 1996. Only two requests, both dated August 7, 1996, were filed after the amendments to the Act. It is legitimate and necessary to consider all of the evidence related to the appellant's requests and appeals, regardless of when they were filed, to determine if either of these requests is part of a pattern of conduct that amounts to an abuse of the right of access. However, a finding that a request is frivolous or vexatious can only be made with respect to requests filed after the amendments. Accordingly, I uphold the City's decisions to refuse to process the appellant's requests of August 7, 1996 as being frivolous or vexatious.

Because of this finding, it is not necessary for me to consider whether these two requests are frivolous or vexatious on the basis that they would interfere with the operations of the institution (the second phrase in section 5.1(a) of the Regulation), or whether section 5.1(b) may be applicable.

I will now examine whether the remaining requests constitute an abuse of the access process.

ABUSE OF THE ACCESS PROCESS:

As noted, in its decision letter of December 14, 1995, the City responded to six of the appellant's requests by advising him that it considered these requests to be "an abuse of process". This letter was issued shortly after Commissioner Wright's decision in Order M-618, dated October 18, 1995 and prior to the legislative amendments incorporating the "frivolous and vexatious" provisions.

The City's submissions on this point make extensive references to the findings in Order M-618, and indicate considerable overlap in the facts put forward in substantiating this claim and those in support of a frivolous and vexatious finding as I have set out above.

It is the City's position that, despite the amendments to the Act, the Commissioner retains the authority described in Order M-618 to find that a **requester** has abused the process. The City also contends that there are certain cases, this being one of them, in which a finding that a **request** or requests are frivolous and vexatious can also support a finding that a **requester** has abused the access process. Therefore, the City maintains that I may fashion a remedy like that utilized in Order M-618 to limit the appellant's requests and appeals in the future. I also note that sections 43(1) and (3) of the Act give the Commissioner explicit authority to make an order "disposing of the issues raised by the appeal" which "may contain any conditions the Commissioner considers appropriate".

In finding that he had the authority to not only deal with issues of the abuse of the appeals process but also the ability to supervise the process of institutions faced with abuse of process at the request stage, the Commissioner, in Order M-618, made a number of comments which are relevant to the issues in these appeals.

He stated that:

> It is common ground between the parties, and I agree, that the Act does not expressly empower me to relieve an institution from its obligation to respond to requests on the basis that they are "frivolous", "vexatious", an "abuse of the right of access" or "abuse of process". However, I believe that it is important to keep in mind the distinction between the existence of the statutory **right** at issue in this inquiry and the **means** available for seeking to realize that right. The former gives any member of the public the right to call on institutions for information not exempt from the disclosure requirements of the Act. The latter engages the processes of the institution when a request is made for access to records, and it engages the Commissioner's processes when a requester appeals "any decision of a head under this Act to the Commissioner".
> ...
>
> The Legislature created the Office of the Information and Privacy Commissioner to administer the Act in ways that facilitate the purposes of the legislation. This mandate cannot require the Commissioner to act unreasonably in administering his own processes, or in supervising the processes of institutions. The Legislature must have intended that the Commissioner have the necessary authority to control his own processes, and to supervise the processes of institutions under the Act, so as to minimize or eliminate the potential for abuse.

The Commissioner then went on to find, on the basis of what he characterized as "ample and persuasive legal authority" that, as an administrative tribunal exercising quasi-judicial functions, he was "master of his own process". With respect to whether he could remedy abuse at the request stage before institutions, he stated:

> If I were to accept [the appellant's] submission that I am powerless to remedy the abuse which I have identified, and that I must mechanically require institutions and my office to be the subjects of that abuse, I would not be fulfilling the objectives of the legislation, but frustrating them. Notwithstanding the absence of express powers vested in the Commissioner for dealing with abuse of process, I am not prepared to serve as agent for Riley's abuse by perpetuating meaningless exercises in the expenditure of government funds merely to satisfy Rileys's curiosity, or to permit him to test the system or render it dysfunctional. This would offend public policy and bring the administration of Ontario's freedom of information legislation into disrepute.

In my view, all of these comments are equally applicable in this appeal. The Legislature, by enacting the frivolous and vexatious amendments cannot be assumed to have abrogated the Commissioner's powers to address abuses of his own process. As noted in the cases cited in Order M-618, this authority comes from the common law. Nor is it reasonable that, having made a finding that a number of requests were frivolous or vexatious within the meaning of the phrase "abuse of the right of access" in section 5.1(a) of the Regulation, the Commissioner should be "powerless" to address the situation in a constructive and prospective manner in an effort to avoid abuse in the future.

I accept the City's submission that the statutory amendments of the Savings and Restructuring Act, 1996 do not abrogate the Commissioner's authority to find that a requester is engaged in a pattern of the abuse of process. Further, I accept the City's position that, in certain cases, a finding that a request is frivolous or vexatious also supports a finding that a requester is engaged in a pattern of abuse of process which could result in the remedy of controlled access in the future. The similarity of the factors to be considered in making a finding of frivolous or vexatious under section 5.1(a) of the Regulation, and the considerations outlined in Order M-618 by the Commissioner which substantiate a finding of abuse of process make this manifest.

In my view, such a case exists where not only the **requests** at issue are frivolous or vexatious within the meaning of section 5.1, but where, as in the case of Order M-618, the factors may be considered to "establish a pattern of abuse of process, through the excessive use of that process by [an] individual **requester**, for purposes unrelated to a genuine or bona fide wish to secure the information requested".

As I have noted, the appellant has provided no evidence to substantiate his involvement in environmental or public interest groups or to verify his claim of using the requested information for publication. It is in this context that the City's evidence on the manner in which the appellant has used the access process is relevant.

Previous orders of this office have determined that both a requester and an institution have certain obligations with respect to access requests under the Act. For example, when an individual makes a request under section 17(1) of the Act, section 17(1)(b) requires that he or she must provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record. Conversely, an institution's obligations are set out in section 17(2) as requiring an institution to assist a requester in reformulating the request if necessary.

Another example of the co-operative effort required between an institution and a requester is found in the fee waiver provisions in section 45(4) of the Act. Previous orders of this office have set out a number of factors to be considered to determine whether a denial of a fee waiver is "fair and equitable". These factors are:

(1) the manner in which the institution attempted to respond to the appellant's request;

(2) whether the institution worked with the appellant to narrow and/or clarify the request;

(3) whether the institution provided any documentation to the appellant free of charge;

(4) whether the appellant worked constructively with the institution to narrow the scope of the request;

(5) whether the request involves a large number of records;

(6) whether or not the appellant has advanced a compromise solution which would reduce costs.

[Order P-790]

In my view, these sections of the Act and the Commissioner's orders support the proposition that the rights afforded the public to access under the Act are accompanied by concomitant responsibilities on the part of requesters. One of these responsibilities is working in tandem with the institution to further the purposes of the Act. In rare cases, actions on the part of an appellant which frustrate this approach can be said to be an abuse of this process.

In this case, the actions of the appellant in dealing with the City's staff, both in its Freedom of Information office and elsewhere, have not exhibited any attempt to work constructively with the City to resolve his requests, and, in fact, demonstrate the opposite. Despite the City's attempts to accommodate the appellant, both within and outside the formal processes of the Act, he has responded in an uncooperative and harassing manner to those who have attempted to assist him. In my opinion, this type of conduct on the part of the appellant is relevant to a finding that not only are certain **requests** frivolous or vexatious, but also that the **requester** is abusing the freedom of information processes, and I so find.

The appellant's abuse of the freedom of information process has not been limited to the request stage, but also extends to this office. Presently, the appellant has 26 active appeals, all of which are the subject of this order. Since June 1994, he has filed 61 appeals, the majority of which are from decisions of the City. In the spring of 1995, he had five "banked appeals", appeals in excess of the 15 active appeal limit established by this office. To the extent that the City has been requested to expend considerable time and resources processing abusive requests, so also has this office in processing appeals arising out of these requests.

I must now decide what is the appropriate remedy in this case. The City suggests that I look to the conditions imposed by the Commissioner in Order M-618, pursuant to his authority under section 43(3) of the Act, for guidance in this case. The City emphasizes that, unlike the situation

in Order M-618, it has been the only institution that has been the subject of the appellant's requests for information. In addition, the City emphasizes the fact that "one request" may, as I have noted, incorporate multiple parts. Therefore, in structuring a controlled access scheme, the City requests that I keep in mind these concerns.

Although I have no information on the total number of requests the appellant has made to other institutions under the municipal and provincial Acts, the appellant has filed appeals from the decisions of two other municipal institutions and three provincial institutions. I also have no information on any current requests the appellant may have filed with institutions other than the City.

The City has advised me that the last request the appellant filed with it in his name is dated August 7, 1996. Apart from the appeals which are the subject of this order, the appellant has one outstanding "banked" appeal with this office.

I must first determine the appropriate remedy to apply to the requests and appeals which are the subject of this order. Based on the evidence I have considered in finding that the appellant is abusing the freedom of information process, it is my view that a system of controlled access is an inappropriate remedy in these cases. As I have described in detail, the issues raised in these files have been previously canvassed by the City and/or this office and, in my view, it would perpetuate the abuse if the appellant were permitted to pursue each of these requests and appeals even on a controlled basis. For this reason, I have decided to invoke my authority under section 43(1) of the Act to dismiss these appeals, upholding the City's decisions to refuse to process these requests.

I have also decided that it is appropriate to invoke my authority under section 43(3) of the Act to impose conditions on processing any requests from the appellant in the future. If I did not do so, I believe there is a strong likelihood that the appellant will again abuse the process and/or engage in a pattern of conduct which amounts to abuse of the right of access and the City and this office will again be required to expend considerable time and resources dealing with this matter.

ORDER:

1. I uphold the City's decisions in Appeals M-9600398 and M-9600399 on the basis that the requests dated August 7, 1996 were frivolous or vexatious.

2. I dismiss Appeals M-9500118, M-9500778, M-9500056, M-9500183, M-9500187, M-9600386 to M-9600397 and M-9600400 to M-9600403.

3. I impose the following conditions on processing any requests and appeals from the appellant now and for a specified time in the future:

   (a) For a period of one year following the date of this order, I am imposing a one (1) transaction limit on the number of requests and/or appeals that the City is required under the Act to process at any one point in time. For greater certainty, this transaction limit refers to each part of a request or an appeal which is to be

considered as one (1) transaction. In addition, the City is only required to process a maximum of five (5) requests and/or appeals in any one year.

(b) Within two weeks of the date of this order, the appellant may advise this office if he wishes to proceed with his one outstanding "banked" appeal, in accordance with the limits set out in clause (a).

(c) The terms of this order will apply to any requests and appeals made by the appellant or by any individual, person, organization or entity found to be acting on his behalf or under his direction.

(d) At the conclusion of one year from the date of this order, the appellant, and/or the City or any person affected by this order, may apply to this office to seek to vary the terms of paragraph 3 of this order, failing which its terms shall continue in effect from year to year.

5. For greater clarity, the one year period expires on June 4, 1998.

6. This office remains seized of this matter for whatever period is necessary to ensure implementation of, and compliance with the terms of this order

Original signed by: June 4, 1997
Anita Fineberg
Inquiry Officer