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

ORDER MO-1519

Appeal MA-010057-1

City of Mississauga

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NATURE OF THE APPEAL:

The appellant submitted a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the City of Mississauga (the City) for access to records containing his personal information, including records that the City would or could use to ban him from City property.

The City refused access to the requested information in accordance with section 20.1 of the *Act* stating that in its view, the appellant's request was vexatious as contemplated by section 4(1)(b) of the *Act*.

The appellant appealed this decision.

During mediation of the appeal, the appellant indicated that he believed the Freedom of Information Co-ordinator (the FOIC) is in a conflict of interest in handling both his access request and this appeal. The appellant believed the City Clerk would also be in a conflict of interest position if he were to replace the Co-ordinator on this file. In this regard, the appellant stated that both the Co-ordinator and the Clerk have threatened legal action against him. In support of his position in this regard, the appellant provided this office with several pieces of correspondence relating to matters between him and these two City staff.

The appellant also clarified that he is not interested in accessing records which were provided to him in response to previous access requests.

Further mediation could not be effected and this matter proceeded to inquiry. I decided to seek representations from the City initially, and sent it a Notice of Inquiry setting out the facts and issues at inquiry. The City submitted representations in response. I subsequently sought representations from the appellant, and attached the non-confidential portions of the City's submissions to the copy of the Notice of Inquiry that I sent to him.

Upon receipt of the Notice of Inquiry, the appellant submitted a series of letters to this office, covering a range of topics including: criticism of the process; asking questions or making demands unrelated to the inquiry process; and seeking information relating to previous appeals. After being provided with a deadline for the receipt of representations, the appellant submitted extensive representations in response. From that point on, he has continued to send in bits and pieces of information, comments and other "evidence" which he asks that I add to the submissions he made.

CONCLUSION:

I find the appellant's request to be frivolous and vexatious in the circumstances and dismiss this appeal.

BACKGROUND:

The appellant has a long history of dealings with the City, much of it rife with conflict, with respect to general interaction with City staff and members of Council and in the context of making access requests. In order to put the City's decision, and ultimately my findings in this

order, into perspective, it is necessary to review this history in some detail, insofar as it pertains to access requests under the *Act*.

Past history of requests under the Act

In the past, much of the appellant's contact with the City revolved around issues relating to the Cawthra Woodlot and the Woodlot Management Program. A number of these previous interactions culminated in the issuance of Order M-947 in June 1997, wherein former Adjudicator Anita Fineberg concluded, among other things, that the requests at issue in those appeals were frivolous or vexatious.

Order M-947

In this order, the former Adjudicator found, in part, that the "nature, frequency and practice of submitting numerous duplicative requests" constituted a "pattern of conduct" as that phrase has been interpreted by this office. She acknowledged that the appellant likely had a legitimate interest in the records being requested in those appeals. However, she found that "very shortly after these requests began, the appellant's conduct with respect to the City became 'an abuse of the right of access' …". Further on this point, the former Adjudicator noted that:

> [t]he 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.
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> The appellant's abuse of the freedom of information process has not been limited to the request stage, but also extends to this office [the Commissioner's office]. [emphasis in the original]

In conclusion, former Adjudicator Fineberg dismissed the appeals. In addition, she invoked her authority under section 43(3) of the *Act* to impose conditions on the processing of any future requests made by the appellant. In particular, the former Adjudicator imposed a one transaction limit on the number of requests and/or appeals from the appellant that the City is required to process at any one point in time. The former Adjudicator clarified that the transaction limit refers to each part of a request or an appeal, meaning that a three-part request would be

considered to consist of three transactions. The former Adjudicator also restricted the total number of requests/appeals to be processed in one year to five. This order was to be in effect for one year and the appellant was permitted to seek a variance at the end of that time, failing which these terms were to continue in effect from year to year. The conditions imposed by this order continue in effect from year to year.

Before arriving at her conclusions in this order, the former Adjudicator set out in considerable detail the history of the appellant's interactions with the City as well as the manner in which he behaved during the processing of the various appeals with which she was dealing. Some of her comments are relevant to the current request or otherwise are helpful to place this matter in perspective:

> 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.

The former Adjudicator also considered other matters which she viewed as being relevant to the issue, such as: the appellant's practice of abandoning the request when the fee is not waived; continued requests for records which the City has previously indicated do not exist; decisions that were appealed even though access was granted; and, as is apparent from her comments (above), the appellant's "attitude" towards the City's employees and the freedom of information process.

Another order issued by this office is also relevant to the issues in this appeal.

Order M-716

In this order concerning an appeal filed by the appellant against the City, Assistant Commissioner Tom Mitchinson considered the adequacy of the City's response to the appellant's request. It appears that this issue had been raised in a number of appeals submitted by the appellant at about the same time and the parties agreed to hold these other appeals in abeyance pending the Assistant Commissioner's decision in Order M-716. In concluding that the City had adequately responded to the appellant's request, the Assistant Commissioner described the format of the appellant's request (noting that this request followed a similar format to his other requests):

> In the opening paragraph the requester introduces himself, emphasizes the importance of confidentiality, identifies his preferred method of access, and clarifies that he is primarily interested in working files with handwritten side notes included. This first paragraph closes with the following sentence: "Please include where the file/record (its location in ARIS or IRIS), is held & by who or who looks after the record." These acronyms stand for Active Records Indexing System and Inactive Records Indexing System, the computerized records management systems used by the City for all of its record holdings.
>
> The opening paragraph is followed by an outline of the specific information the requester is seeking. This part of the letter is different for each request.
>
> The letter then goes on to stress the importance of processing the request quickly, identifies the reasons for requesting a fee waiver, and closes by explaining how the requester can be contacted, with particular instructions as to how his phone answering machine should be used.

The basis for the appellant's appeal was that the City had failed to include reference as to where the responsive records were located on the ARIS or IRIS system. In finding that this information did not form a part of the request, Assistant Commissioner Mitchinson stated:

> The parts of the City's records management indexing system which were used to retrieve responsive records and the City employees who are responsible for managing these particular record holdings do not appear on the face of these records and, in my view, the City is not required to create new records which would link these records management codes to the records accessed by the appellant in order to comply with section 19 of the *Act*.
>
> In my view, the information contained in the opening paragraph of this and other similar request letters submitted by the appellant relates to the form in which the appellant would like to receive the records and falls outside the scope of the substantive access request.

Recent history of requests under the *Act*

On December 14, 1999, the appellant submitted a three-part request to the City for records relating to an "event" (an incident involving the appellant) that occurred on October 28, 1999 at the Cawthra Estate (Request 99-000223). In particular, he asked for:

1. the names, employee numbers, their rank as well as any other way to clearly identify the individual City staff members involved in this event;
2. a copy of whatever records they filed or created regarding this event; and
3. a copy of all the City by-laws or policies that apply to persons taking photographs on City property (which he asked to be made available for viewing so that he could select those portions he wished to have copied).

As a preface to this request, the appellant specified the manner in which the City is to respond to his request, the specific location of the records (including information about ARIS and IRIS codes). In this regard, the format of the appellant's request is very similar to that described by the Assistant Commissioner in Order M-716.

The City responded initially on December 15, 1999, and subsequently issued a decision on January 13, 2000, enclosing an index of records on which it identified that eight records exist with respect to part two of the request and indicated that seven of them would be disclosed to the appellant. The index identified that the remaining record was denied pursuant to section 12 (solicitor-client privilege) of the *Act*.

The City also indicated that no records exist relating to part one of the request and provided an explanation for their non-existence. The City indicated further that no records exist relating to part three insofar as private individuals are concerned, noting that records regarding commercial photography are publicly available and can be viewed anytime. The City advised the appellant that it was waiving the fees associated with processing this request.

The appellant did not appeal this decision.

The appellant submitted another similarly worded request on September 15, 2000, this time for an incident involving him on August 16, 2000 at the Cawthra Estate (Request 000161-2000).

The first two parts of this request were virtually identical to those in the previous request, as was the preface. In part three of the request, the appellant asked for records delivered to the City by non-City staff.

The City responded to this request on October 12, 2000, identifying two records responsive to part two of the request. The City granted the appellant partial access to these records with severances made to identifying information relating to staff and participants pursuant to sections 8(1)(e) (endanger life or safety) and 14 (invasion of privacy).

The City indicated further that names and other information about staff (in response to part one of the request) was being denied under section 8(1)(e). Finally, the City noted that no further documents exist. As in its previous access decision, the City waived any fees associated with the processing of this request.

The appellant did not appeal this decision.

On October 23, 2000, the appellant submitted a similarly worded three-part request for records relating to an incident involving him on September 13, 2000 at the Cawthra Community Centre (Request 000181-2000). In part three of this request, the appellant asked for a videotape of the incident.

On November 17, 2000, the City granted partial access to an incident report and three staff reports (with the personal information of staff withheld pursuant to sections 8(1)(e) and 14). Similar to its previous decision, the City stated that access was denied to employee names, employee numbers and employee ranks pursuant to section 8(1)(e). The City indicated further that no other records exist, and in particular, that no videotape exists. Finally, the City indicated that it was waiving the fees associated with processing the request.

The appellant responded to this decision by requesting that the City provide him with a "list" (meaning index) of the records (as it had done in the past), even though only four records were identified and all were disclosed to him (in part). He then "required" the City to pose specific questions to certain identified individuals regarding the videotape.

The City complied with his request for an index and reiterated its decision that the videotape does not exist. The City stated further that it was not able to respond to the appellant's questions and suggested that he contact the director of Recreation and Parks.

The appellant did not appeal this decision.

Approximately a week after the City's final response to the previous request, the appellant submitted another request (on December 5, 2000) to the City. In this similarly formatted request (Request 000219-2000), the appellant requested that the City conduct a search in its Corporate Security Division, for all of his personal information. In making this request, the appellant stated that it was "a request for a reasonable search for his personal information, not one that will present me with an unacceptably large bill for searching".

To be specific, the appellant indicated that he was seeking all records that "refer to me in their care". Moreover, if records were found in more than one file, he expected the number of files and their titles to be noted. He indicated further that the request was to cover any directions regarding how he is to be dealt with. As well, he specified that he was seeking any references to the videotape "that recorded the September 13, 2000 event" (even though the City had indicated twice that this videotape did not exist and that it had provided him with all records relating to the September 13, 2000 incident).

On December 15, 2000, the City wrote to the appellant and explained that its security division does not organize records based on names. As a result, the City noted that it was not possible to retrieve records using his name alone. The City indicated that if the appellant wished to pursue this request, he should forward a more precise description of the types of records which may contain information about him, such as particular incidents, locations, dates, and so on. The City stated that once the appellant provided this information, it would process his request.

A number of written communications were exchanged between the appellant and the City, relating to the City's request for clarification. Essentially, the appellant took issue with the manner in which the City said it maintained its records. As part of his criticism, the appellant parsed the City's December 15 letter, commenting on each sentence and requiring the City to respond to him to explain "what these sentences mean to you". The appellant set out his views regarding how the records should be maintained and stated: "Therefore, I believe you are not being truthful or factual in your letter".

The appellant indicated that he would not change his request, stating, "I direct you to carry out your responsibilities under the *Act*".

In response to this, the City wrote back on January 12, 2001, to advise the appellant that according to the Manager of Security Operations, all Incident Reports are filed by month of occurrence and that there are approximately 700 occurrences filed per month. The City asked the appellant again to provide specific dates of occurrences where he is named since the reports are not filed by name. The City also indicated at this time that fees were expected to apply, depending on the number of months to be searched.

On January 16, 2001, the appellant responded to the City stating that he believed the City was refusing him service. He suggested locations where he believed records might exist based on his review of the types of records the City maintains (as described in its FOI Manual). Many of the comments made by the appellant in this letter were re-iterated in his next access request (the request at issue). In particular, he stated, "please make a point of finding the records regarding the November 16, 2000 event that involved …".

The appellant then "directs" the City to contact him to explain its records system and to clarify his request.

Finally, referring to two of his previous requests (Request 000161-2000 and 000181-2000), the appellant stated:

> In my requests I have specifically asked you provide information regarding the records location and you have failed to do so. This is withholding of service and the Information and Privacy Commission has never specifically ruled that this information is to be denied.

On January 19, 2001, he sent a follow-up letter in which he refers to the January 16 letter and then suggests that City staff be contacted and asked if they have any files/records about him. He indicated that the City should contact him for further directions in this regard. He also asked that the City explain its filing methods to him. He concluded that the FOIC is "unlawfully denying me access" which he believed shows that she is in a conflict of interest.

The appellant then sent another letter to the City on January 23, 2001 in which he stated:

> I have not received a decision letter yet from you regarding this request. If one has been sent then inform me of that fact and send me a copy. I have also not been contacted by you regarding efforts at clarifying my request. I have repeatedly instructed you to do so and you have not. It is necessary for you to do so in order to grant me full access to all the records that I am requesting and to keep costs down. **SO CALL ME!** [emphasis in the original]

The City wrote two letters to the appellant on this same date. In one letter, the City quoted the file number which had been assigned to the final request (000219-2000), and stated:

> This is in response to your request for access to your personal information in the City's Corporate Security Office and further to your letter of January 16, 2001, wherein you identify a particular record dated November 16, 2000.
>
> A search was conducted of the Corporate Security records and no report involving you was found for that date.

In the other letter, the City indicated that it was responding to the appellant's January 19, 2001 letter, this time simply referring back to its January 12 letter.

Finally, on January 29, 2001, the appellant wrote again to the City, indicating that he was abandoning his request:

> Due to the manner in which you have handled my FOI request, withheld service, refused to communicate with me in a meaningful and/or professional fashion and your refusal to discuss my clarifications and/or if it would be used by you for a search for records, I am forced by your actions to terminate my current FOI request 000219-2000. [emphasis in the original]

The current request and appeal

The current request, which the appellant sent to the City was dated (on the first page) January 16, 2001 (but signed and dated on the last page and apparently delivered by the appellant on January

29, 2001). As I noted at the beginning of this order, this request was for access to records containing the appellant's personal information, including records that the City would or could use to ban him from City property. In making this request, the appellant specified that the lowest cost search method best suited to finding all of the records was to be used, but only after speaking to him about the different methods of searching that were possible. He then suggested how/where to search (in general terms).

Referring to his previous requests (99-000223, 000161 and 000181) through which he received records, he indicated that the location of these records/files "is a good place to start", noting that "these kinds of records and any other kinds of records that the City would/could be used to ban me from City property … are the ones I'm seeking" [emphasis in the original]. In other words, the appellant is seeking records in the City's custody that contain "my personal information and report about me and my activities." He specified the departments in which he believes records are likely to be kept. He indicated further that a search should be conducted in the offices of Corporate Security as he believed that it is only logical that this department would have records. He noted that he has been told that the filing system does not permit a search by file content but finds this explanation to be "unbelievable". He also asked that the City conduct a search to specifically find records relating to the November 16, 2000 incident (referred to in his January 16, 2001 letter). He also indicated that the FOIC should contact City staff to see if they have notes/files relating to him. Finally, the appellant requested that the records be grouped by department and that they be identified using the Department Code. In this regard, the appellant stated:

> The City has methods for identifying the location of its files/records and which are noted in the FOI manual, codes for dept., CA.05, etc., so they are ways to provide the record of where the source files are located and I wish that record, as a part of this request.

In concluding this request, the appellant indicated that the City should submit a fee estimate to him before searching.

As I noted above, the City refused access to the requested information in accordance with section 20.1 of the *Act* stating that in its view, the appellant's request was vexatious as contemplated by section 4(1)(b) of the *Act*, and the appellant appealed this decision.

PRELIMINARY MATTERS:

THE APPELLANT'S REPRESENTATIONS

The appellant's submissions raise a number of new issues, including bias with respect to this office (the IPC) generally, and gender bias based on the fact that I am a woman, and the infringement of his rights under the *Canadian Charter of Rights and Freedoms* (the *Charter*). I will address these issues below.

The appellant also submitted a number of documents which he believes support his position on what he considers to be at issue in this appeal. This documentation includes, but is not limited to:

- information relating to the Cawthra Woodlot, much of which is produced by him and/or the organizations to which he belongs which he believes demonstrates how the City has misled the public and/or how the City is "shutting me out of the process";

- information which he claims is "evidence" of a political agenda on the City's part against him, the organizations he is involved in and/or represents and their political activism;

- information pertaining to other access requests he has made to the City as well as to other institutions;

- information which he believes is "evidence" of political interference and/or misuse of the *Act* by the City and/or its FOIC; and

- letters of support for his access request from other members of, or those who support the organizations to which he belongs.

Because of the volume of information provided by the appellant (much of which, as I indicated above, was provided beyond the final date for the receipt of representations), I will simply acknowledge that this documentation has been received and considered by me.

In my view, the vast majority of this documentation supports a conclusion that there are, without question, issues between the appellant and the City, including the FOIC, the Clerk, the Communications Director, the Commissioner of Corporate Services, the City Manager's and City Clerk's offices generally, "City staff", the Mayor and Council generally. While some of this documentation might be interpreted as evidence relating to the issue of conflict of interest with respect to the FOIC, it is equally suggestive that, as a result of the appellant's behaviour, there may be no-one left at the City with whom he does not have a dispute.

It also appears that the inclusion of this "evidence" is intended to demonstrate that the appellant's concerns are serious, as are his requests for information, that he speaks for the public insofar as his political activism is concerned, and that his requests are, therefore, not frivolous or vexatious.

This appeal is not a test of the seriousness of the issues the appellant is involved in. Rather, the issue to be determined is whether the appellant's request is frivolous or vexatious in the circumstances of the current request, bearing in mind the history of the appellant's dealings with the City. In my view, the documentary evidence submitted by the appellant does not pertain to the matter before me. On this basis, I find that the majority of it is not relevant to the specific issues on appeal.

Even if I were to conclude that some of this "evidence" is relevant to his allegations that the FOIC and the Clerk are in a conflict of interest, given my decision below, it is not necessary for me to discuss the documents submitted by the appellant further.

BIAS

The appellant suggests that he is not able to receive a fair adjudication of the issues from the IPC as this office is biased in favour of government institutions, and in particular, the City. He believes further that the IPC is biased against the poor. In addition, he claims that, because I am a woman, I am unable to impartially address the issues concerning him.

With respect to the IPC, the appellant submits that this office is corrupt and has perverted the *Act* into a form of legalized government censorship. He argues that the IPC supports, justifies and perpetuates institutional abuses of the public. The appellant believes that the IPC has turned government accountability into a "dictatorial weapon against all who would oppose the government". As a result, the appellant states:

> In the [City's] case, I have seen a Frivolous and Vexatious ruling used across the board by most City staff as their reason for denying a community leader, me, service.

The appellant submits that because of the previous IPC rulings against him, this office (and implicitly the adjudicator deciding this appeal) cannot "make a complete new ruling (*sic*) against me".

The appellant submits the following as "evidence" in support of a finding of IPC bias:

- the IPC allowed the City's claim to go ahead to adjudication;
- the IPC allowed the City to control the process (presumably because it "permitted" the City to claim that the request is frivolous or vexatious);
- the IPC ended mediation against his wishes;
- the IPC has taken and/or accepted "evidence" from the City which he believes to be false;
- the IPC withheld part of the City's representations (pursuant to the sharing of representations procedures);
- the IPC is restricting this appeal to "frivolous or vexatious" and not looking at what was requested; and
- the IPC has structured the appeal and inquiry to reinforce the City's "self-serving position that I am a trouble-maker".

On a more general level, the appellant objects to the IPC procedures for the receipt and sharing of representations, which he appears to claim is evidence of bias against him.

The appellant states further that the IPC has ruled against him in the past because "it knew I was too poor to fight back".

As far as his allegations of gender bias are concerned, the basis for his claim is most succinctly put in a letter the appellant wrote to the Commissioner on September 12, 2001:

> In my Sept. 9/01 representation and now I do ask that, **the IPC Commissioner hand this Inquiry over to a man**, some like [a male former adjudicator].

> I do have reason to believe there are gender prejudices affecting the IPC's decision making. I feel the need to go on the record and say that because this Inquiry involves accusations of abuse, threatening behaviour towards women and inappropriate behaviour around children. And Order M-947 which was done by a women and it is totally out to lunch in the statements made, reasoning used and important evidence ignored. I am not comfortable with a woman handling this Inquiry.
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> …
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> Given the nature of the statements being made by the City design to motive (*sic*) women to come to the aid of other women against the big bad man who is going after old women and children and the outrageous conduct of Anita Fineberg, I have serious concerns about prejudice (*sic*) decision making by women in the IPC. [emphasis in the original]

The rules of natural justice and procedural fairness emphasize the right to an unbiased adjudication in administrative decision-making. Allegations of bias on the part of the tribunal or a particular adjudicator are, therefore, very serious, and, as a consequence, should not be made lightly (Robert F. Reid & Hillel David, *Administrative Law and Practice* (2nd ed.), (Butterworth's: Toronto, 1978), at page 260).

It appears well settled in law that it is not necessary to provide proof of "actual bias". Rather, the test most commonly applied by the courts is whether there exists a "reasonable apprehension of bias" (David Phillip Jones & Anne S. de Villars, *Principles of Administrative Law* (2nd. ed.), (Carswell: Toronto, 1994) at pp. 361 – 363).

Speaking for the majority in *Baker* v. *Canada (Minister of Citizenship and Immigration)* (1999), 174 D.L.R. (4th) 193 (S.C.C.) on this issue, L'Heureux-Dube J. stated:

> The test for reasonable apprehension of bias was set out by de Grandpre J., writing in dissent, in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369 at p. 394, 68 D.L.R. (3d) 716:
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> > … the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information … that test is "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."

Commenting on this issue in *Administrative Law in Canada* (3rd. ed.), (Butterworth's, 2001)), at page 106, author Sara Blake noted:

> There is a presumption that a tribunal member will act fairly and impartially, in the absence of evidence to the contrary. The onus of demonstrating bias lies on the person who alleges it … Mere suspicion is not enough …

Taking this one step further, in my view, the onus is on the appellant (in this case) to provide a credible basis for the allegation.

Insofar as the appellant's allegations against the IPC are concerned, they relate primarily to the nature of the governing legislation and the role and operation of the IPC as contemplated by that legislation. Otherwise, they simply reflect his disagreement with the manner in which this office has dealt with him in the past and the decisions that have been made in his appeals.

In my view, the appellant's arguments are based on his unreasonable expectations with respect to the *Act* and its processes. Disagreement with the processes and decisions of tribunals alone is not a sufficient basis for a finding that the tribunal is biased against a particular group or individual party. Absent any cogent evidence which might support his claim, I find that none of his arguments form a basis for a finding of a reasonable apprehension of bias on the part of the IPC, nor would any reasonable person so conclude.

With respect to the issue of gender bias, the appellant alleges that I am incapable of impartially adjudicating the issues in this appeal simply because I am a woman and because Order M-947 was decided by a woman. The basis for this argument appears to be that his disputes often (and particularly in this case) involve women and/or children, although the Clerk of the City, against whom the appellant has also alleged a conflict of interest, is a man.

Other than making a bald assertion, the appellant has provided no credible evidence of or basis for concluding that there exists a reasonable apprehension of gender bias (or bias against the poor for that matter) at this office generally, or in respect of my decision-making. Accordingly, I do not accept this allegation.

One final point on this issue merits comment, however. The appellant claims that since former Adjudicator Fineberg's finding that he and his requests were frivolous and vexatious, the City has, essentially, used this decision as a basis for denying him service. This assertion is untenable in light of the degree of "service" the appellant has received (as described above) with respect to all of the issues in this appeal (stemming back to, at a minimum, his December 14, 1999 request).

THE *CHARTER*

The appellant believes his *Charter* rights have been infringed as a result of the decision in Order M-947 and, more generally, because he has been denied access to the City's records. Although it is not entirely clear, it appears that he is arguing that the application of the frivolous and vexatious provisions of the *Act* is a violation of his *Charter* rights.

The basis for his claim is the importance of access to government information in supporting democracy in general and *Charter* rights in particular.

I agree that access to government information is fundamental to the exercise of democratic rights. The creation of this legislation reflects the importance of the principles of government accountability and the effective participation of the public in government decision-making. Nevertheless, as indicated in *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.) at p. 204, "… it is not possible to proclaim that s. 2(b) [freedom of the press] entails a general constitutional right of access to all information under the control of government …". Similarly, I am not persuaded that there is any *Charter*-based entitlement to submit frivolous or vexatious requests under the *Act*. Although the appellant has made extensive representations on this issue, I find that he has failed to demonstrate that the application of the provision in section 4(1)(b) of the *Act* constitutes a violation of his *Charter* rights.

DISCUSSION:

FRIVOLOUS OR VEXATIOUS

The provisions that I must consider to determine whether the appellant's request is frivolous or vexatious are in sections 4(1)(b) and 20.1(1) of the *Act* and section 5.1 of Regulation 823 made under the *Act*.

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 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).

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 Regulation 823 provide some guidelines for determining whether a request is frivolous or 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, Assistant Commissioner 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*", and that this power should not be exercised lightly.

The City's position

In addressing its onus in this case, the City has submitted background information relating to the previous requests submitted by the appellant (as described under the heading "Recent history of requests").

The appellant's position

The appellant reiterates his objection to the IPC proceeding with this inquiry on the basis of the City's claim. He also submits that the City has not met its onus in establishing that his request is frivolous or vexatious.

His representations suggest that he is at a disadvantage both in requesting information under the *Act* and in responding to the issues at inquiry because he is neither a lawyer nor skilled in Freedom of Information matters. His representations appear to imply that he is unsure of what is required in this process and that the City has been less than helpful in assisting him.

His representations overall suggest that he is frustrated with the City's "attitude" toward him and its attempts to obstruct his pursuit of information. In response to the Notice of Inquiry and the City's representations, the appellant concludes:

> [The FOIC] was abusing the FOI process by endlessly delaying granting access while seeking clarifications to my request, which also meant she could avoid writing a decision letter. Before I ended my FOI request I consulted others and discovered the facts. As the IPC has (wrongfully), placed limits on my FOI requests, such that I can't make requests while one is being appealed it is only reasonable to appeal only FOI requests that completely express the request and will grant access to all City records. The IPC has been made aware that the City was a hostile institution before it made its F&V ruling and this is the abuses of the IPC's F&V ruling, it has become a weapon. Again this is only happening as [the FOIC] refuses reasonable service and it is clear my request for personal information will go to appeal. These letters show that it is the City that is the bully in this case, the abuser of the process and that I am the victim.

Section 5.1(a)

Pattern of Conduct that Amounts to an Abuse of the Right of Access or would interfere with the operations of the institution

To determine whether the criteria outlined in section 5.1(a) are established, I must first determine whether the appellant's filing of the current request, by itself or in conjunction with his previous request, forms part of a "pattern of conduct". If I find that it does, then I must determine (1) whether this pattern amounts to an abuse of the right of access, or (2) whether this pattern would interfere with the operations of the City.

In Order M-850, 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. Further, in Order P-1534, he determined that a distinction must be made between formal requests for access **under the *Act*** and informal contact between a member of the public and an institution outside the formal context of the *Act*. I agree with these approaches and adopt them for the purposes of this appeal.

In Order M-947, former Adjudicator Fineberg considered whether the appellant's 14 requests submitted to the institution over an 11-month period constituted a "pattern of conduct". In that case, the appellant had submitted numerous previous requests. In determining that the City had established a pattern of conduct in the circumstances of that appeal, the former Adjudicator noted that "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" (emphasis in the original). She concluded, however, that:

> 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.

Although past behaviour, or a previous finding that the appellant's conduct constituted a "pattern of conduct" are not determinative in establishing that the circumstances surrounding the current request should be similarly characterized, they are relevant in assessing this issue. In particular, in another case, I might be disinclined to find that two similarly worded, or overlapping requests would be sufficient to establish a "pattern of conduct" (see, for example, Order MO-1488). Where, however, an appellant has clearly demonstrated a "pattern of conduct" in the past, and the circumstances of a current request parallel that pattern, I am inclined to interpret them as a resurgence of that previous "pattern of conduct", if not a continuation of it.

Taken alone, or even grouped together, the appellant's first three requests (beginning in December, 1999) do not constitute such a pattern. However, in submitting his December 5, 2000 request, the appellant embarked upon a return to his previous conduct in his manner of requesting information from the City, not only by revisiting previously requested information but also in the manner in which he pursued his request. By unilaterally abandoning the December 5, 2000 request and essentially resubmitting it on the same date, the appellant has, in my view, engaged in a "pattern of conduct" as that term has been defined by this office.

Abuse of the right of access

The meaning of "abuse of the right of access" was also discussed by Assistant Commissioner Mitchinson in Order M-850. He commented on this phrase as follows:

> In determining what constitutes "an abuse of the right of access", I feel that the criteria established by Commissioner Tom Wright in Order M-618 [decided before the "frivolous or vexatious" amendments were added to the *Act* by the *Savings and Restructuring Act*, 1996] are a valuable starting point. Commissioner Wright found that the appellant in that case (who is not the same person as the appellant in this case) was abusing processes established under the *Act*.
>
> The Commissioner described in detail the factual basis for the finding that the appellant had engaged in a course of conduct which constituted an abuse of process. The Commissioner found that an excessive volume of requests and appeals, combined with four other factors, justified a conclusion that the appellant in that case had abused the access process. The four other factors were:
>
> 1. the varied nature and broad scope of the requests;
>
> 2. the appearance that they were submitted for their "nuisance" value;
>
> 3. increased requests and appeals following the initiation of court proceedings by the institution;
>
> 4. the requester's working in concert with another requester whose publicly stated aim is to harass government and to break or burden the system.
>
> Another source of assistance for interpreting the words "abuse of the right of access" is the case law dealing with the term "abuse of process".
> ...
>
> To summarize, the abuse of process cases provide several examples of the meaning of "abuse" in the legal context, including:
>
> - proceedings instituted without any reasonable ground;
>
> - proceedings whose purpose is not legitimate, but is rather designed to harass, or to accomplish some other objective unrelated to the process being used;
>
> - situations where a process is used more than once, for the purpose of revisiting an issue which has been previously addressed.

> In my view, although this is not intended to be an exhaustive list, these are examples of the type of conduct which would amount to "an abuse of the right of access" for the purposes of section 5.1(a).

In Order M-864, Assistant Commissioner Irwin Glasberg summarized the interpretations of "abuse of the right of access" in Orders M-618 and M-850 as follows:

> Following my review of these two orders, and taking into account the wording of section 5.1(a) of the regulations, I believe that there are a number of factors that are relevant in deciding whether a pattern of conduct amounts to an abuse of the right of access. Some of these considerations are listed below:
>
> (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 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 is to harass government or to break or burden the system?)
>
> While this list is not intended to be exhaustive, these factors represent the type of considerations which could define "an abuse of the right of access" for the purposes of section 5.1(a). I would also reiterate the view, originally expressed by Commissioner Wright in Order M-618, that a high volume of requests alone would not necessarily amount to an abuse of process.

Previous orders of this office have found that the abuse of the right of access described by section 5.1(a) refers only to the access process **under the *Act***, and is not intended to include proceedings in other forums (Orders M-906, M-1066, M-1071 and P-1534).

I adopt the analyses put forward by these orders for the purposes of the present appeal.

Commenting on the "legitimacy" of the appellant's purpose in making access requests, former Adjudicator Fineberg found in Order M-947, that the appellant's purpose changed in focus over time, thus becoming 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 has 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.

As I indicated above, the appellant clearly has issues with the City. In my view, his actions and behaviour in the manner in which he approaches the freedom of information process indicate an intention to use this process to further his dispute with the City.

Similar to the conclusions reached by former Adjudicator Fineberg in Order M-947, I find that the appellant has not made any effort to work constructively with the City to resolve his requests. In particular, although I do not doubt that the appellant has an interest in the records being requested, in submitting his December 5, 2000 request, he began what can only be characterized as an escalation of the "uncooperative and harassing manner" he exhibited previously. The series of letters exchanged between him and the City demonstrates his refusal to work constructively with the City to resolve his request. Not only did he attempt to bait and badger the FOIC, his correspondence reflected the contempt he had previously shown towards City staff and the freedom of information process generally.

While the City has made genuine efforts to accommodate the appellant, he has responded through directives, uncompromising demands, criticism and belligerence. This behaviour was demonstrated not only towards the City, but throughout the inquiry process.

Given the appellant's experience with the *Act* and this office, I do not accept his suggestion that his behaviour is a result of confusion or inexperience with the *Act*. Although I accept that he is frustrated, in my view, it is more likely a result of his own unreasonable expectations and the thwarting of his attempts to control the process.

Based on the documentary and other evidence described above, I am convinced that the confrontational approaches he takes with respect to his requests and appeals is by design. In contrast to working constructively in pursuit of his objectives, the appellant seeks to control the processes for responding to and resolving freedom of information matters, and he demands

almost unlimited attention of any party who approaches him or whom he deems it necessary to contact, be it City representative or a representative of the IPC.

Taken as a whole, I find that the evidence supports a conclusion that the appellant's request is part of a pattern of conduct that amounts to an abuse of the right of access, and that is my finding.

The question remains, how should this abuse of the processes of the *Act* be remedied? It is abundantly clear that the appellant has not learned from his previous experience. In my view, it is questionable whether he will amend his behaviour in the future. In a recent decision, for example, Assistant Commissioner Mitchinson dealt with the length to which this appellant is prepared to go to circumvent the restrictions imposed on him in Order M-947 (Order MO-1497). The simple answer might be to prohibit the appellant from using the processes of the *Act*. However, at this point in time, a prohibition against the appellant's exercise of his statutory rights for all time would be too extreme. Nevertheless, I think it appropriate to impose serious restrictions on the means by which the appellant exercises these rights.

As a result of Order M-947, the City is only required to process one transaction at a time (which includes both requests and appeals) and a total of five transactions in any year. I find this to be a reasonable limit on the appellant's right of access and, therefore, will not vary the conditions imposed by former Adjudicator Fineberg.

In addition, pursuant to section 43(3) of the *Act*, in the order provisions below, I will impose conditions on the manner in which the appellant may interact with the City with respect to his access requests and appeals of the City's decisions.

CONCLUSION:

As I noted above, the appellant believes that both the FOIC and the Clerk are in a conflict of interest in dealing with his access requests and appeals because they have threatened legal action against him. This matter arose in relation to certain public statements he had made about them.

I have decided, for reasons outlined below, that I need not address this issue in this order.

Section 39(1) of the *Act* provides that a person who makes a request for information under the *Act* may appeal any decision of a head to the Commissioner. Pursuant to section 20.1(1)(c), this includes a decision by the head that the request is frivolous or vexatious.

Previous orders of this office have determined that the Commissioner or her delegate has the inherent power to review all matters pertaining to the decision of a head (see, for example, Orders M-315, M-449, M-1044, P-158, P-540 and P-1115). The basis for this conclusion is succinctly stated by Adjudicator Donald Hale in Order P-1115 (in the context of determining questions of bias):

> Inherent in the powers granted to the Commissioner, as well as his delegates, is the power to determine questions of bias. The Commissioner's office, in its

> capacity as an administrative tribunal with certain legislative functions, is required to ensure that the rules of natural justice govern the access to information regime in Ontario. As such, I find that I am acting within my jurisdiction in reviewing and making a determination as to an allegation of bias on the part of a decision maker under the *Act*.

Accordingly, I am satisfied that I have the power to consider the issue of an alleged conflict of interest at the request stage. In the circumstances of this case, however, I have concluded that it is not necessary or appropriate for me to do so because the Commissioner's power to supervise the access process provides a suitable remedy.

This supervisory role over the processes and application of the *Act* generally has been canvassed in previous orders of this office (Orders 164, 207, P-345, P-373, P-537, P-658, P-1200, P-1575, M-618, M-849, MO-1053 and MO-1353-I, for example). In Order M-618, former Commissioner Tom Wright considered his jurisdiction to entertain a claim that the appellant's request in that case was frivolous or vexatious in the absence of legislative enactment. Order M-618 was decided prior to the amendment to the *Act*, which resulted in the inclusion of sections 4(1) and 20.1, but his comments continue to have relevance to the Commissioner's supervisory role generally. He stated:

> 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.
>
> I have been referred to ample and persuasive legal authority for the proposition that, as an administrative tribunal exercising quasi-judicial functions, the Commissioner is "master of his own process". On this basis I believe that I have the necessary authority to control what I identify as abuse of that process which would frustrate the intent of the Legislature in creating both a freedom of information regime and an office for its administration.

Speaking to the question of whether his jurisdiction to control his own processes extends to an ability to supervise the processes of institutions faced with abuse of process at the request stage, former Commissioner Wright concluded:

> 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 [the appellant's] abuse by perpetuating meaningless exercises in the expenditure of government resources merely to

> satisfy [the appellant'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.

I agree fully with these conclusions and find that they are particularly germane where parties are in conflict. It is predictable that a claim that a request is frivolous or vexatious will more likely occur where relations between a requester and institution are strained or otherwise problematic. The inherent supervisory function of the IPC in these cases ensures that appropriate considerations (in respect of the behaviour of both parties) are taken into account in deciding whether to uphold such a claim (see, for example, Order MO-1488).

In exercising this inherent supervisory role over the processes of this office and institutions alike, I have independently reviewed the circumstances surrounding this appeal, as described above, based on the documentary evidence alone. In particular, I decided that it was not necessary to consider any argument made by the City on the question of whether the appellant's request was frivolous or vexatious.

As discussed above, I have reviewed the circumstances under which the appellant submitted his request, his behaviour throughout both the request and appeal stages and his past behaviour in dealings with the City. Based on my own assessment of these circumstances, I have concluded that his request is frivolous or vexatious. In my view, the appellant's actions in the manner in which he has and is approaching the freedom of information processes constitutes a clear abuse of the right of access. I find that to permit him to continue his pattern of harassment and belligerence would so offend public policy that I will, pursuant to the Commissioner's inherent supervisory authority under the *Act*, remedy this abuse, regardless of anything that may have occurred at the request stage. Because of my ultimate findings with respect to the primary issue, I have decided that it is not necessary to address the appellant's claim that the FOIC and Clerk are in a conflict of interest.

Finally, it is noteworthy in the overall context of this appeal that any conflict arising between the appellant and either of these other parties was generated by the appellant's behaviour towards them and towards City staff and council members generally. There may well come a time, if it has not already arrived, that there will be nobody at the City who the appellant believes would be capable of dealing with him.

ORDER:

1. I uphold the City's decision that the appellant's request is frivolous or vexatious.

2. I confirm the conditions imposed by former Adjudicator Anita Fineberg in Order M-947.

3. I impose the following additional conditions on the manner in which the appellant's requests are to be processed.

- the appellant is to specify the exact information or records he is seeking, if possible, the location in which he expects the requested records to be found, and any other information he believes may assist in locating responsive records;

- the appellant is not to otherwise contact the City (verbally or in writing) with respect to the processing of a particular access request and/or appeal, except and unless the City contacts him first for clarification of his request;

- the City is not required to respond to any communications from the appellant unless it is in response to a properly filed access request (in accordance with the terms of Order M-947) or it is in direct response to a request by the FOIC for clarification from him;

- if the appellant does not respond to a request by the City for clarification by providing the clarification requested within a reasonable time frame as specified by the City, the City may close his file as being abandoned. In this case, the City is to send the appellant a letter stating that the file has been closed.

- the appellant may appeal the City's decision to close the file to the IPC;

- the appellant may appeal any other decision of the head to this office.

4. The appellant and/or the City may apply to this office at any time after one year has expired from the date of this Order, to seek to vary the terms of paragraphs 2 and 3, failing which the terms shall continue in effect indefinitely.

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

February 28, 2002

Laurel Cropley
Adjudicator

Date