



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER MO-1497

Appeal MA-010302-1

City of Mississauga



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BACKGROUND

On June 4, 1997, former Adjudicator Anita Fineberg issued Order M-947, which dealt with 26 appeals stemming from requests made by the same individual to the City of Mississauga (the City) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The City had denied access to 14 of the appellant's requests on the basis that they were frivolous and vexatious, as provided in section 4(1)(b) of the *Act* and section 5.1 of Regulation 823 made under the *Act*. After conducting an inquiry, Adjudicator Fineberg upheld the City's decision with respect to two of these requests. In so doing, she included a provision in Order M-947 that imposed conditions on future requests and appeals from that appellant. Specifically, Provision 3 of her order stated:

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.

To date, no party in Order M-947 has applied to this office to vary the terms of Provision 3 so, in accordance with paragraph (d), the terms continue.

NATURE OF THE APPEAL

The City received a request under the *Act* for access to the following:

A copy of information where reference is made to the Walled Garden in the Cawthra Woods. Safety issues regarding the Walled Garden are the main focus of this request but please list all records that refer to the Walled Garden, including reports, memos, notes by staff and e-mails. Search City records from Sept. 2000 to present.

In order to make this a cost effective search, a list of persons is provided to aid you. Please provide a list of records found. I am open to any suggestions on making this request cost effective.

For this information please be sure to contact [five named City employees, together with their job titles].

The City denied access to the responsive records citing Order Provision 3(c) of Order M-947. The City clarified its decision by stating:

For your information, the provisions of [Order M-947] are being applied because we have reason to believe that you are acting on behalf or under the direction of the individual who is the subject of Order M-947 and who currently has an active request/appeal under [the *Act*].

The requester appealed the City's decision.

I sent a Notice of Inquiry to the City, seeking representations to support its position that the requester in the current appeal is acting on behalf of or under the direction of the appellant in Order M-947, and to provide evidence that this other appellant currently has an active request/appeal under the *Act*. The City submitted representations, which I then shared with the requester. The requester provided representations in response.

ISSUE:

The sole issue in this appeal is whether the requester is acting on behalf of or under the direction of the appellant in Order M-947 (the "original appellant").

DISCUSSION:

The City confirmed that the original appellant has one outstanding request (City reference 00018-2001), and one unresolved appeal with this office (Appeal MA-010057-1).

The City's explains in its representations that during a seven-month period ending in July 2001, it received six separate requests from three different individuals, all relating to Cawthra Bush,

Jefferson Salamander and/or the Walled Garden area of Cawthra Woods. One of these requesters is also the requester in the current appeal. The City explains that these requests were similar in scope and nature to others submitted in the past by the original appellant. The City also attached copies of two requests dealing with similar subject matters that had been forwarded to the City by two other institutions, with personal information concerning the requesters severed.

In responding to all six requests, the City relied on Provision 3(c) of Order M-947. None of these decisions was appealed, including one that was submitted by the requester in the current appeal, who represents a political party.

In August 2001, the City received a seventh request (and second from this particular requester) that led to the current appeal. As set out above, this request also relates to records concerning the Walled Garden area of the Cawthra Woods. The City again applied Provision 3(c) of Order M-947 in denying access, and the requester appealed to this office.

The City submits that the wording and reference to City staff in this request is consistent with the other previous six requests, and also deals with the same subject matter as correspondence from January and May 2001 that was sent by the original appellant to City staff and staff of the Ministry of Natural Resources. A copy of this correspondence was attached to the City's representations.

As far as the employees named in the request are concerned, the City states that they were all approached by City officials and asked whether they had been contacted regarding the subject matter of the request. The only person identified as having contacted these individuals was the original appellant. In the City's view, it is doubtful that the requester in the current appeal, on his own, would have been able to identify the appropriate staff persons by name and job title.

The City sums up its position by stating:

I believe that the requesters [who submitted the seven requests], including [the requester in this appeal] have no awareness of details, such as staff names, positions, etc. Based on the foregoing, it is my opinion that the similarities in the format, wording, tone and content of all the requests, including the one under appeal, is not a coincidence and that [the requester in this appeal] was acting on [the original appellant's] behalf or under his direction.

The requester provided extensive representations in response to the Notice of Inquiry, including an attachment prepared by the original appellant. Some portions deal with issues relating to the relationship between the original appellant and City officials, which are not relevant to this appeal. The representations explain the origin of the relationship between the requester's political party and the original appellant and their areas of shared interest involving environmental matters. A significant part of these representations deals with the requester's view of the role of political parties in our system of democracy and the specific role and approach taken by the requester's party in engaging in political activity. The requester then explains his party's particular interest in matters relating to Cawthra Bush, Jefferson

Salamanders and the Walled Garden area of Cawthra Woods. Before dealing with the specific issues identified in the Notice, the requester submits:

There are a number of elements to this inquiry that are being presented in defence [sic] the right to access. Of greatest importance is the fact that the FOI request that this appeal/inquiry is reviewing has been undertaken by the Leader of [a named political party]. As it is being presented, a political party has special status [sic] in a democratic society, other considerations such as health, safety and issues of interest or concern to the riding/community need to be considered in a different light. Past IPC ruling/Orders have been in regards to the requesters [sic] by individuals, community groups or media, now the IPC must deal with the unique circumstances and social consequences that arise from a political party trying to access government records. Will the poor lose their last champion?

The issues of the IPC becoming the judge that will control what political parties will know is at the heart of this matter. The only exemption or severance that is being claimed in order to deny City records (to those who would use them for the benefit of the riding/community) is guilt by the claim of association by a Canadian City. In the past the IPC was warned that allowing the City of Mississauga to succeed in its efforts to rule [the original appellant] was [sic] frivolous & vexatious FOI requester would create a tool for governments to defeat FOI requests and requesters who were working for the benefit of the community. In fact the Honourable John M. Reid, P.C., Information Commissioner of Canada, has expressed his grave concerns that allowing frivolous & vexatious as a reason to deny records at the Federal level would be "regressive" and would be a severe blow to government accountability. In this case the requester is made to justify the request and prove their [sic] innocence before the government.

Order M-947 was the lowering of the legal bar so that most community groups could be ruled frivolous & vexatious and records denied. Now we see further evidence that the City of Mississauga is using the FOI Act to deny all access to it [sic] records. The record shows that the Mayor of Mississauga has promised to not [sic] to provide the records. The latest use of M-947 by [the City's FOI Co-ordinator] that is of concern is claiming it can be used to deny non-FOI requests for information. M-947 would appear to legalize government censorship and cover up, that not even a political party can override.

I find no merit in any of these submissions. The appellant has mischaracterized the impact of Order M-947. It is extremely narrow in focus, restricting the ability of one individual to exercise his statutory access rights under the *Act* in dealings with one particular institution. The order does not deal with access rights in any generalized way, nor does it impact on the rights of any community group or political party to fully utilize the important access rights provided by the *Act*. After detailed and careful consideration, former Adjudicator Fineberg determined that the original appellant's requests to the City were frivolous and vexatious, and decided to impose restrictions on his future dealings with the City. Unless the City can establish, to my satisfaction, that the requester in this appeal is acting on behalf of or under the direction of the original

appellant, Order M-947 has no relevance whatsoever to any request submitted by him or any other individual, community group or political party.

The requester then goes on to deal with specific aspects of the City's representations. For the most part, the requester's representations are not helpful, and deal primarily with criticisms of the manner in which the City's FOI Co-ordinator dealt with both the original appellant and the request in the current appeal. The requester points out what he considers to be inconsistencies and inaccuracies in the Co-ordinator's statements but, in my view, the representations do not effectively address the rationale put forward by the City for concluding that the appellant is acting on behalf of or under the direction of the original appellant.

Having carefully considered the representations of both parties, I accept the City's position that the request at issue in this appeal was made on behalf of or under the direction of the original appellant. The subject matter of the request relates directly to similar requests submitted by the original appellant; although less verbose than typical requests from the original appellant, it nonetheless is consistent in style, offering a willingness to discuss and explain the request and scope of records; and it identifies specific individuals to be contacted, an approach that is somewhat unique to the original appellant and clearly established as his practice.

There would appear to be no dispute that the original appellant and the requester in this appeal share common interests and have an established relationship. That in itself is insufficient to establish the requirements of Order M-947. However, I find that the City has provided evidence sufficient to establish that the dealings between these two individuals go beyond collaborative efforts to address environmental concerns, and relate specifically to usage of the *Act* and efforts to circumvent the restrictions imposed on the original appellant in Order M-947. The original appellant is an active participant in the current appeal - the requester apparently shared the City's representations with him and sought the original appellant's views in the process of preparing his own submissions. Indeed, in my view, the representations provided by the requester read, to a large measure, as if the original appellant could have composed them. The City has also provided me with copies of correspondence received from the original appellant following the issuance of the Notice of Inquiry to the requester in this appeal, which express views quite similar to those contained in the requester's representations. In my view, the original appellant is the controlling force behind the various similar and related requests identified by the City concerning Cawthra Bush, Jefferson Salamanders and the Walled Garden area of Cawthra Woods, and the request at issue in this appeal should be considered as if it had been submitted directly by the original appellant.

To be clear, this order should not be interpreted as precluding the requester in this appeal, the political party he represents, other political parties or various community organizations concerned with environmental issues generally or specific issues relating to Cawthra Woods, from exercising their legitimate right to request records from the City under the *Act*. The only restriction imposed by Order M-947, and confirmed in this order, is that no individual or organization may do so "on behalf of or under the direction of" the original appellant.

ORDER:

I uphold the City's decision and dismiss the appeal.

Original signed by: _____
Tom Mitchinson
Assistant Commissioner

December 24, 2001 _____