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

ORDER MO-1921

Appeal MA-040355-1

Town of LaSalle Police Services Board

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NATURE OF THE APPEAL:

The Town of LaSalle Police Services Board (the Police) received a request pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following:

> I hereby request any/all information concerning the following:
>
> 1) Has any staff, their agents, subordinates, affiliates, employees or accessories of "LaSalle Police Services" entered into my premises or property, entered onto my premises or property or apprehended any of my property either with or without any sort of search warrant or any other kind of court order?

The Police issued a decision stating that they declined to process the request on the basis that it is frivolous and vexatious within the meaning of sections 4(1)(b) and 20.1(1)(a) of the *Act*.

The requester, now the appellant, appealed this decision. Mediation of the appeal was not possible, and the file was moved to the adjudication stage of the appeals process. I sought and received representations from the Police, initially. The non-confidential portions of the Police representations were shared with the appellant, who also provided me with submissions.

DISCUSSION:

IS THE REQUEST FRIVOLOUS AND VEXATIOUS?

General principles

The provisions to be considered in determining whether a request is frivolous or vexatious are 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 Police take the position that the present request, taken together with the appellant's previous requests and subsequent appeals, is part of a pattern of conduct that amounts to an abuse of the right of access on the part of the appellant, within the meaning of section 5(1)(a).

The representations of the parties

The Police have provided me with a chronology that describes in detail its contacts with the appellant, beginning in 2003 when he made 14 requests (resulting in eight appeals to this office), followed by 18 requests in 2004 (and four appeals). In addition, the Police indicate that its Records Management System indicated that it received some 61 telephone calls and 15 emails from the appellant in 2003. However, the Police state that this represents only a fraction of the actual calls and messages received as many were not logged into the system. In addition, a total of 116 telephone calls were made from the appellant to the Police during that part of the year 2004 when a log of such calls was kept. Five additional requests were received thus far in 2005 relating to information already provided to the appellant and the Police refused to process them on the basis that the requests were frivolous and vexatious in nature. The appellant has appealed at lease two of those decisions to this office. In addition, the Police indicate that there have been a large number of "informal contacts" between the appellant and members of the Police Service, as well as the Police Services Board, the Mayor, Deputy Mayor and members of the Town Council in the form of telephone calls, FAX, email and regular mail since 2003.

The Police go on to state:

> The apparent purpose of [the appellant's] requests changed their focus from somewhat reasonable or legitimate grounds to one, which may be characterized as seeking to accomplish some objective unrelated to the access process. [His] behaviour can only be characterized as an escalation of the 'uncooperative and harassing manner' he has exhibited. While the LaSalle Police Service has made genuine efforts to accommodate [the appellant] in the past, [he] responded through directives, uncompromising demands, criticism and belligerence.

The Police also describe the appellant's approach to the access process as "confrontational" and "not legitimate, but rather designed to harass or accomplish some other objective unrelated to the process being used". It also points out that the appellant uses the access process in order to revisit issues previously addressed by the Police in other access decisions and in the appeals of those decisions. In support of this contention, the Police have provided me with copies of all of the appellant's requests and the corresponding decision letters that have been issued in response

to them. In each case, the requests deal with records created as a result of an incident arising out of a visit by the appellant to a particular place of business. The records sought deal with the Police investigation of that incident, the manner in which the Police processed the many subsequent requests that followed under the *Act* and the appellant's requests for additional information relating to that incident outside a formal one made under the *Act*. Furthermore, in Order MO-1709 I disposed of three appeals of decisions by the Police to deny access to some portions of the records relating to this original incident and ordered the disclosure of a videotape to the appellant.

The Police further indicate that the appellant has advised that he is pursuing access to the information requested in order to compile evidence in support of his contention that there has been wrongdoing of some sort by the Police. The Police state that the appellant has refused to meet with members of the Police Service or its Police Services Board to discuss his concerns despite many invitations to do so.

The appellant maintains that he requires access to the information sought in his requests in order to bring to light the "criminal activities and misconduct" of members of the Police and to assist the local Crown Attorney and Royal Canadian Mounted Police in pursuing the evidence needed to bring those who are breaking the law within the LaSalle Police Service to justice. The appellant goes on to express his personal views about certain identified individual police officers and recounts specific incidents that have taken place over the past two years involving these individuals and other members of the Police Service. The appellant attached to his representations an assortment of correspondence setting out his complaints to the Ontario Civilian Commission on Police Services (OCCPS) about the treatment afforded him by the Police in relation to his requests under the *Act* and other matters.

Definition of a Pattern of Conduct and an Abuse of the Access Process

In Order M-850, former Assistant Commissioner Mitchinson comprehensively reviewed both the standard and legal dictionaries to assist him in defining the phrase "pattern of conduct". He arrived at the following conclusion in defining that term:

> The *Concise Oxford Dictionary* (8th ed.) offers the following definitions:
>
> **pattern:** a regular or logical form, order or arrangement of parts (behaviour pattern, the pattern of one's daily life)
>
> **conduct:** behaviour, esp. in its moral aspect. ... the action or manner of directing or managing (business, war, etc.)
>
> Consolidating these two definitions, a "pattern of conduct" means a regular form of behaviour.

The same dictionary defines "regular" as:

acting or done or recurring uniformly or calculably in time or manner; habitual, constant, orderly

No legal dictionary I consulted offered a definition of "pattern of conduct". However, *Black's Law Dictionary* (6th ed.) has a definition of "pattern of racketeering activity". This definition, which derives from several American cases, reads, in part, as follows:

> As used in the racketeering statute ..., a "pattern of racketeering activity" includes two or more related criminal acts that amount to, or threaten the likelihood of, continued criminal activity. ... A combination of factors, such as the number of unlawful acts, the time over which the acts were committed, the similarity of the acts, the number of victims, the number of perpetrators, and the character of the unlawful activity can be considered in determining whether a pattern existed.

Taking all of these definitions into consideration, in my view, a "pattern of conduct" requires recurring incidents of related or similar requests on the part of the requester (or with which the requester is connected in some material way). As the definitions of both "pattern of racketeering activity" and "regular" would suggest, the time over which the behaviour is committed is also a factor.

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 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.

Assistant Commissioner Mitchinson then concluded his discussion and review of the law applicable to "abuse of process" as follows:

> 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).

I adopt the reasoning of the former Assistant Commissioner in Order M-850 for the purposes of the present appeal.

Findings

It is clear from the material provided to me by the Police that the appellant has submitted a substantial number of very similar requests over the past several years. These requests deal with records created as a result of an incident involving the appellant and the subsequent Police investigation. Since that time, the appellant has initiated a litany of requests, followed in some cases by appeals to this office, which resulted in his obtaining access or being denied access to the same records time and time again.

In Order MO-1519, Adjudicator Laurel Cropley was faced with a similar case involving an individual who had made multiple requests for the same information and had behaved in a belligerent and uncooperative manner throughout the processing of his requests by a municipal institution:

> 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.

In Order PO-1872, I addressed a similar situation involving requests made under the provincial equivalent to the *Act* in the following manner:

> I have reviewed the summary of the appellant's requests which was provided to me by the Ministry along with its representations. In my view, submitting a large number of very similar requests for very similar information since July 1998 represents "recurring incidents of related or similar requests on the part of the requester", as described by Assistant Commissioner Mitchinson in Order M-850.
>
> Although the number of requests which exactly repeat the wording of an earlier request is small, it is clear that the requests all focus on the same basic subject or theme, and I am satisfied that there is a significant overlap between the subjects of many of them. Bearing this in mind, I have concluded that the number of requests submitted between July 1998 and April 2000 is excessive.
>
> I also find that the repeated requests for similar information indicate that the appellant is seeking to use the access procedures available to him under the *Act* for the purpose of obtaining access to records which have already been made available to him or which have been denied under one of the exemptions contained in the *Act*. Despite being advised by the Ministry of his right to appeal its decisions to the Commissioner's office, the appellant has chosen not to do so, with the exception of two requests. In my view, the continued use of the *Act* by the appellant to attempt to obtain access to the same information again and again also represents a "pattern of conduct" within the meaning of section 5.1(a) of Regulation 460.
>
> I must now decide whether this pattern of conduct "amounts to an abuse of the right of access". In this case, the evidence, particularly in relation to the volume of requests, and the recurring and/or continuing pattern of the requests, is in my view sufficient to demonstrate that the requests represent an abuse of the access process within the meaning of section 5.1(a) of the Regulation. I also find that the appellant has clearly made use of the access provisions of the *Act* more than once, for the purpose of revisiting an issue which has been previously addressed by the Ministry through its decisions on his earlier requests for the identical information. This activity is another of the examples from the abuse of process cases in a legal context which are cited in Order M-850. I find that this revisiting of previously-resolved issues also represents a pattern of conduct that amounts to an abuse of the right of access as contemplated by section 10(1)(b) of the *Act* and section 5.1(a) of Regulation 460.
>
> In the circumstances of this appeal, therefore, I find that the Ministry has demonstrated that the appellant's pattern of conduct, which includes the requests

> at issue in this appeal, is an abuse of the right of access. For this reason, I find that the requests at issue in this appeal are frivolous or vexatious.

In the present appeal, the Police have demonstrated to me that over a 24 month period in 2003 and 2004, the appellant initiated some 33 requests under the *Act* that resulted in 13 appeals to this office. In the first six weeks of 2005, the appellant submitted an additional five requests to the Police. The Police add that it began to keep a telephone log of its contacts with the appellant in 2004 when some 116 calls were received from him. In addition, the Police have provided me with evidence that the appellant has had contact by email, telephone and regular mail with uniformed members of the Police, members of the Police Services Board, the Mayor, Deputy Mayor and Town Council on many, many occasions over the past two and a half years.

In my view, the evidence tendered by the Police demonstrate clearly and unequivocally a pattern of conduct that amounts to an abuse of the right of access within the meaning of section 5(1)(a). The appellant has single-mindedly pursued a campaign of unwarranted contact and requests under the *Act* seeking access to the same information over and over again. Such information was either found to be exempt in my earlier decision in Order MO-1709 or has been provided to the appellant on numerous occasions by the Police. I have no difficulty in finding first that the appellant has embarked on a pattern of conduct consisting of making requests to the Police for the identical or very similar information and then following up those requests with a flood of telephone messages, emails and correspondence addressed to any and all who have any connection whatsoever to the Police.

In my view, this pattern of conduct amounts to an abuse of the right of access within the meaning of section 5(1)(a) of Regulation 823 and section 4(1)(b). The fact that the requests are numerous, have been made within a relatively short period of time and all relate to essentially the same subject matter are indicative of the pattern of conduct that lead to a finding of an abuse of the right of access.

Conclusion and Remedy

As a result of my finding that the appellant has entered into a pattern of conduct that amounts to an abuse of process, I conclude that the current request is frivolous and vexatious. Because there are similar requests and appeals outstanding from the appellant involving the Police, it will be necessary to impose certain restrictions on the appellant's right to make requests under the *Act* and appeal the decisions of the Police where he feels it necessary to do so.

In several recent decisions, the Commissioner's office has determined that it was necessary to impose certain restrictions on a requester who was found to have submitted requests that were frivolous and vexatious to two separate municipal institutions. In Orders MO-1810 and MO-1841, the following determination was made respecting the imposition of certain conditions restricting the right to make access requests under the *Act*:

> In the circumstances, I have decided that the appropriate remedy is to uphold the [institution's] decision that the appellant does not have a right of access to the information he requested in this appeal.

> In addition, in order to deal with the broader issues of the appellant's conduct, I have decided to limit the number of his active access to information matters with the [institution] to one at any given time. The decision to limit the appellant's active matters to one at a time does not preclude a finding, where appropriate, that any current or future request is frivolous or vexatious. The appellant may apply to this office for an order varying the terms of this order after one year has passed from the date of this order.

In the present appeal, it is my view that this is similarly an appropriate situation to limit the appellant's active access to information matters with the Police to one at a time. In this way, the appellant's ability to make legitimate requests to the Police is not unduly impeded.

ORDER:

1. I uphold the Police decision under section 4(1)(b) of the *Act* that the appellant does not have a right of access to the records he requested because the request is frivolous or vexatious, and I dismiss this appeal. However, the appellant may choose to re-activate this request in accordance with the terms of my order below.

2. I impose the following conditions on the processing of any requests and appeals from the appellant with respect to the Police 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-transaction limit on the number of requests and/or appeals under the *Act* that may proceed at any given point in time, including any requests or appeals that are outstanding as of the date of this order.

   (b) Subject to the one-transaction limit described in provision 2(a) above, if the appellant wishes any of his requests and/or appeals that exist at any given time to proceed to completion, the appellant shall notify both this office and the Police and advice as to which matter he wishes to proceed.

   (c) If the appellant fails to pursue any of his appeals that are with this office on the date of this order within two years of the date of this order, this office may declare those appeals to have been abandoned.

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

4. At the conclusion of one year from the date of this order, the appellant, the Police and/or any person or organization affected by this order, may apply to this office to seek to vary the terms of provision 2 of this order, failing which its terms shall continue in effect until such time as a variance is sought and ordered.

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.

Original signed by: April 22, 2005
Donald Hale
Adjudicator