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

ORDER MO-2111

Appeals MA-050171-2 and MA-050175-2

Corporation of the City of Brantford

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NATURE OF THE APPEALS:

BACKGROUND

The First Request

The Corporation of the City of Brantford (the City) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records, containing the following information:

> (1)Where did the OW Case Worker [an affected person] get the names of the [an affected company] and [an affected company]? (In her correspondence to me, dated February 2003, she specifically gave me the names of the 2 storage sites where my mother, [an affected person's] furniture and personal belongings are stored…)
>
> The question is where did she get the names and locations of those two storage sites?
>
> …
>
> (2)Where did [an affected person] get Permission from the Bank from? She stated on or about July 2002, that we should be living in that house and we didn't get, Permission from the bank where did she get Permission from? From Whom?

In response, the City refused to process the request for access to the records on the basis that it was frivolous or vexatious as contemplated by section 4(1)(b) of the *Act* and section 5.1 of Regulation 823 made under the *Act*.

The requester, now the appellant, appealed that decision and this office opened Appeal Number MA-050171-2. No issues were resolved through mediation and the file moved to the inquiry stage of the appeal process. I was assigned to conduct the inquiry.

The Second Request

The City received another request from the same appellant under the *Act* for access to a copy of the following record:

> A copy of the Affidavit of Service for [an affected party], City of Brantford notice of motion which was brought and the files for the purposes of dismissing [an affecter person's] statement of claim against [a named bank] and the City of Brantford on or about February 2004. I am requesting a copy of the Affidavit of Service for this February 204 Notice of Motion returnable in Brantford?

In response to this request, the City similarly refused to process the access request to the records on the basis that it was frivolous or vexatious.

The appellant also appealed that decision and this office opened Appeal Number MA-050175-2. During the mediation process the Mediator contacted the City and asked if the City would revisit its decision concerning access to the record. The City agreed to conduct a search for the record. After contacting the law firm retained by the City in relation to this matter, it was able to locate a record and provided the appellant with a copy.

Upon receiving the record, the appellant advised that she believes that additional records should exist. The City responded that no additional records exist beyond the record it provided to the appellant.

No further issues were resolved through mediation and the file moved to the inquiry stage of the appeal process. I was also assigned to conduct this inquiry. The issue to be decided under this appeal is whether the City has conducted a reasonable search for the records as is required by section 17 of the *Act*.

Because the appeals before me involve the same appellant and institution, I decided to deal with both in one Notice of Inquiry. I sought and received the representations of the City, initially. I then sent a Notice of Inquiry to the appellant, in each appeal, along with the non-confidential portions of the City's representations. The appellant provided representations in response to the Notices.

Due to the similarity of the representations and of the issues in the two appeals, I have decided to dispose of both appeals in a single order.

DISCUSSION:

REASONABLE SEARCH

In appeals involving a claim that further responsive records exist, as is the case in this appeal, the issue to be decided is whether the City has conducted a reasonable search for the records as required by section 17 of the *Act*. If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the City's decision. If I am not satisfied, I may require further searches.

Where a requester provides sufficient detail about the records that she is seeking and the City indicates that further records do not exist, it is my responsibility to ensure that the City has made a reasonable search to identify any records that are responsive to the request. The *Act* does not require the City to prove with absolute certainty that further records do not exist. However, in order to properly discharge its obligations under the *Act*, the City must provide me with sufficient evidence to show that it has made a *reasonable* effort to identify and locate records responsive to the request.

Although the appellant will rarely be in a position to indicate precisely which records have not been identified in the City's response to a request, the appellant must, nevertheless, provide a reasonable basis for concluding that such records exist.

The appellant has not provided any basis, reasonable or otherwise, for concluding that additional records exist. The appellant offered no explanation as to why other records ought to exist when the one record she sought was disclosed to her.

I accept the City's explanation that it has satisfactorily fulfilled the request of the appellant in providing a copy of the record she requested. I also take note of the City's uncontested representations that it provided access to the appellant, even though "…the appellant … failed to submit the required requester's fee…", and that "…the City secured a copy of the Affidavit … and forwarded it to the appellant." Accordingly, I am satisfied that the City has demonstrated that it properly discharged its obligations under the *Act*, by providing the record that the appellant requested and I dismiss the appeal in Appeal Number MA-050175-2.

IS THE REQUEST FOR ACCESS IN APPEAL MA-050171-2 FRIVOLOUS OR VEXATIOUS?

Under section 4(1)(b) of the *Act*, every person has a right of access to a record or part of a record in the custody and control of an institution unless the head of an institution if of the opinion that on reasonable grounds that the request for access is frivolous or vexatious.

Section 5.1 of Regulation 823 under the *Act* elaborates on the meaning of the terms "frivolous" and "vexatious":

> A head of an institution that receives a request for access to a record or personal information shall conclude that the request is frivolous or vexatious if,
>
> (a) the head is of the opinion on reasonable grounds that the request is part of a pattern of conduct that amounts to an abuse of the right of access or would interfere with the operations of the institution; or
>
> (b) the head is of the opinion on reasonable grounds that the request is made in bad faith or for a purpose other than to obtain access.

Section 4(1)(b) provides institutions with a summary mechanism to deal with frivolous or vexatious requests. This discretionary power can have serious implications on the ability of a requester to obtain information under the *Act*, and therefore it should not be exercised lightly [Order M-850].

An institution has the burden of proof to substantiate its decision to declare a request to be frivolous or vexatious [Order M-850].

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 Mitchinson in Order M-850 for the purposes of the present appeal.

The following factors may be relevant in determining whether a pattern of conduct amounts to an "abuse of the right of access":

- *Number of requests*

  Is the number excessive by reasonable standards?

In the circumstances of this appeal, based on my review of the evidence, I find that the number of requests submitted to the City by the appellant are excessive by any reasonable standard. In its representations, the City states that "… the appellant has submitted a total of 27 requests … which has placed a significant burden on municipal staff…". [the City's emphasis]

I am satisfied that the appellant has received access to all records responsive to her requests. It is clear that the City has communicated this to the appellant. In my view, her continuing requests for the same information are excessive.

- *Nature and scope of the requests*

  Are they excessively broad and varied in scope or unusually detailed? Are they identical to or similar to previous requests?

In the present appeal, based on my review of the evidence, I find that the nature and scope of the appellant's requests are excessively broad and identical to her previous requests. The appellant's representations are not cogent or helpful. Her representations mirror her access requests and, in reading them, it is difficult to imagine how the City could respond further to her requests. Moreover, her requests do not appear to have access as the primary objective, and I will now turn to this factor.

- *Purpose of the requests*

  Are the requests intended to accomplish some objective other than to gain access? For example, are they made for "nuisance" value, or is the requester's aim to harass government or to break or burden the system?

Based on my review of the evidence, I find that the purpose of the appellant's request is intended to accomplish some objective other than access. In the non-confidential portions of its representations, the City states that "[t]he requests relate to the loss of the appellant's home and are peppered with commentary and accusations focusing on staff. The City is of the opinion that the appellant's requests follow a personal agenda to fix blame for the loss of the appellant's home, a matter that was under the legal authority of another institution."

In my view, the appellant's behaviour demonstrates a lack of regard for the access process and intent to unduly burden the City. My findings are supported by the findings of Adjudicator Laurel Cropley in Order MO-1519, where she 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. Adjudicator Cropley stated:

> 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…

In the present appeal, I 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 City through its decisions on her 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 4(1)(b) of the *Act* and section 5.1(a) of Regulation 460.

Other factors, particular to the case under consideration, can also be relevant in deciding whether a pattern of conduct amounts to an abuse of the right of access [Order MO-1782]. In my view, the tone and substance of the appellant's representations themselves supports my finding that there are reasonable grounds to conclude that the request is part of a pattern of conduct that amounts to an abuse of the right of access. The appellant's representations are rambling and aggressive and contain repeated allegations of misconduct directed toward the City, and have little to do with her access requests.

In the circumstances of this appeal, therefore, I find that the City 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 which gave rise to Appeal Number MA-050172-1 is frivolous or vexatious within the meaning of section 4(1)(b).

Conclusion and Remedy

Where a request is found to be frivolous or vexatious, this office will uphold the institution's decision. In addition, this office may impose conditions such as limiting the number of active

requests and appeals the appellant may have in relation to the particular institution [Order MO-1782 and MO-1921].

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

ORDER:

1. I uphold the City's decision under section 4(1)(b) of the *Act* that the appellant does not have a right of access to the records she requested because her requests are 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 City 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 her requests and/or appeals that exist at any given time to proceed to completion, the appellant shall notify both this office and the City and advice as to which matter she wishes to proceed.

   (c) If the appellant fails to pursue any of her 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 her behalf or under her direction.

4. At the conclusion of one year from the date of this order, the appellant, the City 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: October 31, 2006
Beverley Caddigan
Adjudicator