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

ORDER MO-2326

Appeal MA-050444-3

Toronto Police Services Board

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NATURE OF THE APPEAL:

The Toronto Police Services Board (the Police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information related to the *Safe Streets Act* (the *SSA*). The requester specifically requested the following:

> All available data on the total number of offences issued by the Toronto Police under the *Safe Streets Act* since its enactment in 2000, including but not limited to:
>
> - the section of the Act under which each particular offence was issued,
> - the division to which the offence-issuing officer was attached,
> - the badge number of the offence-issuing officer,
> - and any available information on the outcome of the offence, – i.e. guilty, fee paid, charge withdrawn, jail term, etcetera.

The Police issued an interim decision in which they stated that they would disclose information relating to the total number of charges laid under the *SSA*, for the time period requested, by section and by unit. The Police also provided the requester with a fee estimate.

The requester appealed the fee estimate to this office and the fee estimate issue was resolved during mediation. The Police then issued a final decision to the requester and granted access to information regarding the total number of offences issued by the Police under the *SSA* since 2000. The information included the section of the *SSA* pursuant to which the specific offences were issued and information relating to the Division to which the issuing officer was assigned.

The Police, however, denied access to the badge numbers for the issuing officers on the basis that the *Act* does not apply to the information in accordance with section 52(3)3 of the *Act*.

The requester appealed that decision to this office. I was assigned the role of the adjudicator in that appeal. Following the exchange of representations, I issued Order MO-2252. In that order, I found that section 52(3)3 did not apply to the police officers' badge numbers severed from pages 1 to 27 of the records and, as a result, ordered the Police to make an access decision with respect to that information.

The Police complied with Order MO-2252, by issuing a decision under section 20.1(1) of the *Act* denying access to the badge numbers pursuant to section 4(1)(b) of the *Act* on the basis that "the request is vexatious in nature." The Police explained:

> The decision was determined after much consideration of the following factors:
>
> 1. Public interest, health or safety override.
> 2. Personal information where the requester has a vested interest.
> 3. Absurd Result.

1. Public interest, health and safety override

> Section 4(1) of the *Act* states; "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…,

> (b) the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious."

Under the *Act*, section 5(1) mandates an institution to:

> *…disclose any record to the public or persons affected if the head has reasonable and probable grounds to believe that it is in the public interest to do so and that the record reveals a grave environmental, health or safety hazard to the public.*

Your request for the specific badge numbers of each officer who issued a Provincial Offence Ticket (POT) under the Safe Streets Act since its enactment on January 31, 2000, does not, in my opinion, qualify under section 5(1) of the *Act*. To date, you have not provided this office with any material, arguments or documentation to support your right of access to these records based on an environmental, health or safety hazard to the public.

2. Personal information where the requester has a vested interest

It is the TPS' understanding that you have not personally been affected by a TPS member issuing you a POT under the Safe Streets Act since its enactment. Therefore, your vested interested is not for personal reasons; in fact, upon your own disclosure to the writer, these records are solely for the purpose of writing an article and enhancing its interest to the public.

3. Absurd Result

While it has previously been determined that badge numbers are public records; given the context of your request, I carefully examined whether or not withholding the requested records could be considered absurd.

Since you have been provided with an extensive breakdown of Safe Streets Act tickets issued by individual officer (badge removed), Division, year and section of the Act, I have found there to be no grounds for an absurd result. In fact, disclosure of the specific badge numbers (as you have indicated yourself) will be for the sole purpose of identifying each officer by how many tickets he/she has issued.

Conclusion

Therefore, I have concluded that your request is vexatious in nature as it appears to be for career enhancement and not for greater public awareness.

The requester (now the appellant) appealed the Police's decision to this office. As mediation did not resolve the issues, the appeal was referred to me for an inquiry.

I began my inquiry by issuing a Notice of Inquiry to the Police inviting them to submit representations on the facts and issues set out in the notice and on any other issues that they decide are relevant. I also requested that the Police submit representations on the application of any exemptions that they may wish to rely upon in the event that I decide that the appellant's request is not frivolous and vexatious. In the Notice of Inquiry, I stated:

> Should you fail to make representations on the exemptions at this time, and I find that the request is not frivolous or vexatious, I may order that the information at issue be disclosed.

I received representations from the Police which included submissions relating to their characterization of the request as frivolous or vexatious, but no representations were provided regarding the application of any discretionary or mandatory exemptions under the *Act*.

After carefully reviewing the representations of the Police, I decided that it was not necessary for me to invite the appellant to submit representations.

RECORDS:

At issue are the police badge numbers severed from the information provided to the appellant in response to her initial request. This is information that I found to be subject to the *Act* in Order MO-2252.

DISCUSSION:

FRIVOLOUS OR VEXATIOUS

The *Act* and Regulations provide institutions with a summary mechanism to deal with requests that an institution views as frivolous or vexatious. It has been said in previous orders 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. On an appeal to this office, the onus of demonstrating that there are reasonable grounds for concluding that a request is frivolous or vexatious is on the institution [Order M-850].

The Police acknowledge in their representations that the "standard" for the application of this section is "extremely high". However, it is their position that the circumstances of this appeal are unique and that they do meet the standard for the section's application.

Several provisions of the *Act* and Regulations are relevant to this issue. Section 4(1)(b) states:

> Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless,
>
> > the head is of the opinion 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.

In many cases, ascertaining a requester's purpose requires the drawing of inferences from his or her behaviour because a requester seldom admits to a purpose other than access. [Order MO-1782]. A pattern of conduct that would "interfere with the operations of an institution" is one that would obstruct or hinder the range of effectiveness of the institution's activities [Order M-850].

Where a request is made in bad faith, the institution need not demonstrate a "pattern of conduct" [Order M-850]. "Bad faith" has been defined as:

> The opposite of "good faith", generally implying or involving actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfil some duty or other contractual obligation, not prompted by an honest mistake as to one's rights, but by some interested or sinister motive. ... "bad faith" is not simply bad judgement or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity; it is different from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with furtive design or ill will [Order M-850].

Where a request is made for a purpose other than to obtain access, the institution need not demonstrate a "pattern of conduct" [Order M-850]. A request is made for a purpose other than to obtain access if the requester is motivated not by a desire to obtain access, but by some other objective [Order M-850].

Representations

The Police submitted representations in which they state that the appellant's motive for seeking access to the information at issue in this appeal is to "make a better story" that she intends to sell to the media. They describe the appellant's motives as "potentially malicious" and state:

> During one of many telephone conversations between the writer and the appellant, the appellant agreed that she was not acting on behalf of those individuals who received a ticket, nor was she making a political stance on the existence of the Safe Street Act for greater public interest.

The Police also argue that the appellant's "waffling" tactics during mediation of the previous appeals are evidence of a pattern of conduct amounting to an abuse of the right of access, bad faith and demonstrating a purpose other than to obtain access. They state that the appellant's position regarding access to this information changed throughout the mediation process in relation to the first appeal. They argue that the appellant's changing position reveals a "level of insignificance and [a] manipulating approach." They argue that the appellant refused to participate in the mediation of this appeal and this is also a factor that weighs in favour of a finding that the request is frivolous and vexatious.

Other aspects of the Police's argument are somewhat difficult to decipher. For example, the Police state:

> It has been determined throughout the previous two (2) adjudication processes that police officer badge numbers are public records. The consistent argument expressed by the TPS surrounds the context and premise which the appellant has verbally identified and requests how she receives the badge numbers; thus convincing the TPS the request is vexatious in nature.
>
> The TPS went to paramount levels to provide the appellant with records relating to the Safe Street Act. While the requester was denied access to the specific badge numbers of each issuing officer, she was provided with ample opportunity to provide a rational (besides selling a story to the media) in order to determine if a different perspective or further discretion was required on behalf of the TPS.

The Police quote from Order MO-2111 in support of their position that the request is frivolous or vexatious. The Police state:

> The following quotes from Order MO-2111 assist the TPS' reliance on section 4(1)(b) and section 5.1 of Regulation 823:
>
> Adjudicator Beverly Caddigan states:
>
> > I find that the purpose of the appellant's request is intended to accomplish some objective other than access.
> >
> > In my view, the appellant's behaviour demonstrates a lack of regard for the access process and intent to unduly burden the City.
>
> Adjudicator Beverly Caddigan further states:
>
> > 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

Findings and Analysis

Section 5.1(a)

Pattern of Conduct that Amounts to an Abuse of the Right of Access

Previous orders of this office have found that in order to meet this criterion, the institution must demonstrate that the appellant has made recurring requests of a related or similar nature or that requests have been made of this nature that the requester is connected with in some material way [Order M-850]. In determining whether or not the "pattern of conduct" exists, the focus should be on the cumulative nature and effect of a requester's behaviour.

The determination of what constitutes "an abuse of the right of access" has been informed by both the jurisprudence of this office in addition to the case law dealing with that term. In the context of the *Act*, it has been associated with a high volume of requests, taken together with other factors. Generally, the following factors have been considered as relevant in determining whether a pattern of conduct amounts to an "abuse of the right of access":

- *The number of requests* – whether the number is excessive by reasonable standards;

- *the nature and scope of the requests* – whether they are excessively broad and varied in scope or unusually detailed, or, whether they are identical to or similar to previous requests;

- *the timing of the requests* – whether the timing of the requests is connected to the occurrence of some other related event, such as court proceedings; and

- *the purpose of the requests* – whether the requests are intended to accomplish some objective other than to gain access without reasonable or legitimate grounds. For example, are they made for "nuisance" value, or is the requester's aim to harass the government or to break or burden the system. [Orders M-618, M-850, MO-1782, MO-1810]

It has also been recognized that 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].

I will consider below whether the facts relevant to this appeal support a conclusion that the appellant has engaged in a pattern of conduct that amounts to an abuse of the right of access.

Pattern of Conduct

The Police do not specifically comment on the question of whether or not the appellant's behaviour amounts to a "pattern of conduct" although the evidence provided regarding the appellant's change of position throughout the mediation process appears to be the basis for their claim that a "pattern of conduct is established". Previous orders cited above have made it clear that the "pattern of conduct" that is required to support a finding that this part of the test has been met relates to recurring incidents of related or similar *requests*. That has not been the case here. The appellant made one request for access to this information and the appeals that have arisen as a result of the one request related to the fees and the claim by the Police that the information was excluded under section 52(3).

Even if I accept that the appellant did change her position on numerous occasions during the mediation stage of the previous appeals and did decline the opportunity to mediate the issues in this appeal, I find that this would not be a sufficient basis to find that the appellant's behaviour amounted to a "pattern of conduct" in section 5.1(a) of Regulation 823. Appellants have the right during mediation to take a different position regarding access to information without prejudice to their right to reassert that position at a later date. This is the nature of mediation. In my view, throughout their representations, the Police exaggerate the impact of the appellant's actions during mediation.

Further, having successfully appealed the Police's initial decision that the badge numbers were excluded from the *Act*, only to have the Police then take the position that her request was "vexatious", the appellant's reluctance to participate in mediation during this appeal is understandable. Having taken the position that the appellant's continued insistence on receiving the specific badge numbers was now frivolous or vexatious, it is unclear what part of the appellant's request the Police believe could have been successfully mediated.

There is no evidence to support a finding that the appellant has made a number of similar or related requests, in fact, just the opposite is true. Therefore, I find that the Police have not established that the appellant has engaged in a "pattern of conduct" in section 5.1(a) of the regulations.

My finding is sufficient to dispose of the claim by the Police that this request is frivolous or vexatious within the meaning of that phrase in section 5.1(a) of the regulation. However, for the sake of completeness, I will consider the other criteria for the application of that section and the Police representations as they relate to that other criteria.

Number of requests

As I have noted above, the appellant has only submitted one request relating to this information and the Police have not suggested that they have received any other requests from the appellant seeking access to the same or similar information. In these circumstances, I find that the number of requests is not sufficiently high to be a relevant factor in weighing in favour of finding that a pattern of conduct exists that amounts to an abuse of the right of access.

Nature and scope of the request

As noted above, the Police state that during mediation, the appellant changed her mind on a number of occasions as to whether or not she would seek access to the police badge numbers. If true, for the reasons cited above, I find that this is not a sufficient basis to find that the request is "excessively broad or varied in nature or excessively detailed or comprehensive." Nor have the Police submitted any other evidence that would support such a finding.

Therefore, I find that the nature and scope of the request is not a factor that would support a finding that a pattern of conduct exits that amounts to an abuse of the right of access.

Timing of the Requests

The Police have not submitted sufficient evidence to support a finding that the timing of the requests is a relevant factor to be considered and I therefore find that the timing of the request is not a relevant factor in my determination.

Purpose of the Requests

The Police did submit representations that address this issue. They claim that the purpose of the request is other than to obtain access. That issue arises under section 5.1(b) of the Regulation and is addressed below. In the context of section 5.1(a), as previously stated, the Police submit that the appellant intends to write a story regarding the requested information. However, I find that although the appellant claims that the information relating to the badge numbers will "make a better story" there appears to be no evidence that the purpose of the information is to embarrass the Police.

The Police state that the appellant has shown a "disregard for the men and women who serve this city" and "the potential for the unjustified disruption and scrutiny to the service and those specific officers is highly probable." The only basis for this statement seems to be the appellant's insistence on obtaining specific badge numbers. No credible evidence is provided by the Police that supports the contention that the appellant is intent on "disruption" or lacks respect for police officers who issue *SSA* tickets.

Other evidence submitted by the Police suggests that the appellant has been forthcoming since the initial request regarding her motives for seeking access as she consistently maintained that she intends to write a story to sell to the media. It should be noted that this is a perfectly legitimate use of the *Act* and is not sufficient to support a finding that the sole purpose of the access request is to embarrass or disrupt the Police. I will deal with this issue more fully when discussing the applicability of section 5.1(b).

In my view, in the circumstances of this appeal, it would not be reasonable to conclude that the appellant is abusing her right of access to information solely on the basis that she has changed her mind at mediation regarding the scope of the request or on the basis that she intends to use the information to write a story that she will ultimately sell to the media. Therefore, I find that the Police have not satisfied me that this is a factor that I should consider when weighing whether or not there has been an abuse of the right of access.

As there is insufficient evidence to support a finding that any of the factors discussed above apply, I find that the appellant's conduct in this appeal is not a pattern of conduct that amounts to an abuse of the right of access.

Pattern of conduct that would interfere with the operations of the institution

In my view, the Police have also not submitted sufficient evidence to support a finding that the appellant's request exhibits a pattern of conduct that would interfere with the operations of the Police. Although the Police have made efforts to mediate the issues that have arisen in the context of this appeal and they appear to be frustrated by the appellant's failure to drop her desire for access to specific badge numbers, that is not a sufficient basis to support a finding of interference with the operations of the institution. There is no suggestion that the requests for

this information would obstruct or hinder the range of effectiveness of the institution's operations [Order M-850]. Although the Police state, as noted above, that the request has "[t]he potential [to lead to] the unjustified disruption and scrutiny to the service", they do not explain how that might occur, nor is it clear to me that this would be the case. In my view, the claim is not sufficiently supported by the evidence before me.

Accordingly, I find that the Police have not established that the request submitted by the appellant to date amounts to a pattern of conduct that would interfere with the operations of the institution.

Before I turn to a consideration of section 5.1(b) of the *Act*, I will comment on the Police's reference to Order MO-2111 and the passages quoted from that order. The facts and circumstances of Order MO-2111 are significantly different from the facts and circumstances before me in this appeal. The appellant in that appeal made over 27 requests for access to information that were similar in nature and scope and the requests required the institution to revisit issues that had been previously addressed. Former Adjudicator Caddigan also found that the requests were overly broad and the representations submitted by the appellant merely repeated the information that was contained in the request. The Adjudicator also found that the representations contained accusations against staff at the institution and a finding was made that they were part of a personal agenda to fix blame for some losses incurred by the appellant.

The circumstances of this appeal are quite different. The appellant made a single request for access to information. The only reason that there have been three appeals relating to this access request is because of the manner in which the Police chose to respond to the requests. The circumstances surrounding the filing of this appeal are described in detail in the Nature of Appeal section above and I need not repeat them here. It is sufficient to say that these are not analogous to those of Order MO-2111 and therefore those findings are not applicable to this appeal.

Section 5.1(b)

Bad faith

Under the "bad faith" portion of section 5.1(b), a request will qualify as "frivolous" or "vexatious" where the head of the institution is of the opinion, on reasonable grounds, that the request is made in bad faith. If bad faith is established, the institution need not demonstrate a "pattern of conduct" [Order M-850].

The term "bad faith" has been defined in Order M-850 by former Assistant Commissioner Mitchinson as:

> "bad faith" is not simply bad judgement or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity; it is

> different from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with furtive design or ill will [Order M-850].

Applying the definition of bad faith referred to above, I find that there is simply no evidence before me to support a finding of bad faith on the part of the appellant in this appeal. At best, the Police have described the appellant's motives as "potentially malicious" however there is no evidence before me that would support a finding that the motives or intentions of the appellant are malicious or potentially so. The appellant has been open and honest about the use to which she intends to make of the information disclosed. The Police have not suggested nor does the evidence lead me to infer that the appellant is attempting to harass the Police. As stated by Adjudicator Laurel Cropley in Order M-1154, there is nothing in the *Act* which delineates what a requester can and cannot do with information once access has been granted to it. The fact that the appellant may use the information in a manner that is disadvantageous to the Police does not mean that her reasons for using the access scheme are not legitimate. There is no evidence that the appellant is acting with some dishonest or illegitimate purpose or goal.

Further, I note that the Police have claimed that the request is frivolous or vexatious only after having been required to issue a new decision by Order MO-2252. If the Police's section 4(1)(b) claim had any merit, I would have expected them to make this claim when initially responding to the appellant's original request. To proceed through the entire appeal process leading up to the issuance of Order MO-2252 and only then to claim that the original request was frivolous or vexatious only serves to undermine the institution's position.

Therefore, I find that the Police have failed to establish that the request was made by the appellant in bad faith for the purposes of section 5.1(b).

For a purpose other than to obtain access

A request is made for a purpose other than to obtain access if the requester is motivated not by a desire to obtain access, but by some other objective. This is similar to the factor that is relevant in a determination of whether requests amount to an abuse of process under section 5.1(a), but where a request is made for a purpose other than to obtain access under section 5.1(b) it can be deemed as "frivolous or vexatious" without the institution having to demonstrate a "pattern of conduct" [Order M-850].

Previous orders have found that the fact that the request for access is motivated by an intention to take issue with a decision made by an institution or to take action against an institution, is not sufficient to support a finding that the request is "frivolous or vexatious" [Order MO-1168-I]. I adopt this approach for the purposes of my analysis of this appeal.

In Order MO-1924, Senior Adjudicator John Higgins provided extensive comments on when a request may be found to have a purpose other than to obtain access. In that case, the institution argued that the objective of obtaining information for use in litigation or to further a dispute

between an appellant and an institution was not a legitimate exercise of the right of access. In rejecting that position, Senior Adjudicator Higgins stated:

> This argument necessitates a discussion of whether access requests may be for some collateral purpose over and above an abstract desire to obtain information. Clearly, such purposes are permissible. Access to information legislation exists to ensure government accountability and to facilitate democracy (see *Dagg v. Canada* (Minister of Finance), [1997] 2 S.C.R. 403). This could lead to requests for information that would assist a journalist in writing an article or a student in writing an essay. The *Act* itself, by providing a right of access to one's own personal information (section 36(1)) and a right to request correction of inaccurate personal information (section 36(2)) indicates that requesting one's personal information to ensure its accuracy is a legitimate purpose. Similarly, requesters may also seek information to assist them in a dispute with the institution, or to publicize what they consider to be inappropriate or problematic decisions or processes undertaken by institutions.
>
> To find that these reasons for making a request are "a purpose other than to obtain access" would contradict the fundamental principles underlying the *Act*, stated in section 1, that "information should be available to the public" and that individuals should have a "right of access to information about themselves". In order to qualify as a "purpose other than to obtain access", in my view, the requester would need to have an improper objective above and beyond a collateral intention to use the information in some legitimate manner.

I adopt the approach set out by Senior Adjudicator Higgins for the purposes of this appeal. The Police have not provided sufficient evidence to support a finding that the appellant's request was made for a purpose other than to obtain access. As previously noted, the appellant has been forthcoming from the outset about the reasons for requesting this information. I am prepared to accept that the appellant legitimately seeks access to the information. The fact that the appellant may decide to write a story that mentions the badge numbers of police officers who have issued tickets under the *SSA* is not an adequate basis to find that the request is for a purpose other than to obtain access pursuant to section 5.1(b). In fact, access to information for journalistic purposes is a long-recognized and legitimate use of Ontario's access to information regime. Based on the analysis set out in Order MO-1924 by Senior Adjudicator Higgins, I am satisfied that the position taken by the Police is without merit.

I find that section 4(1) of the *Act* and section 5.1 of Regulation 823 do not apply in the circumstances of this appeal.

I have found above that the request is not frivolous or vexatious. Given these findings and the fact that the Police have not claimed that any discretionary exemptions apply to the information at issue, I must consider whether any mandatory exemptions apply. Having carefully reviewed

the records, I find that the information is not subject to any mandatory exemptions in the *Act* and therefore, I will order that the information be disclosed to the appellant.

ORDER:

1. I do not uphold the decision of the Police.

2. I order the Police to disclose to the appellant the police badge numbers severed from the records by sending her a copy by **August 8, 2008**

3. In order to verify compliance with the provisions above, I reserve the right to require the Police to provide me with a copy of the information sent to the appellant.

Original Signed By: July 9, 2008
Brian Beamish
Assistant Commissioner