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

ORDER MO-2390

Appeal MA07-152
Appeal MA07-228

Halton Regional Police Services Board

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NATURE OF THE APPEAL:

This order addresses two requests submitted by the requester to the Halton Regional Police (the Police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*).

The first request, submitted on March 7, 2007 (addressed in Appeal MA07-152), was for the following:

1. The complete annotated list the [Police] compiled regarding correspondence which the [Police] alleged were generated/authorized by myself to the [Police] including but not limited to the office of the Chief of Police, the Police Services Board, the Service's Legal Counsel and Freedom of Information Branch.

2. All correspondence (including but not limited to facsimile cover sheets and emails) that were generated/authorized by myself and received by the [Police] including but not limited to the office of the Chief of Police, the Police Services Board, the Service's Legal Counsel and Freedom of Information Branch from 1998 to present.

3. The annotated list the [Police] complied regarding the phone calls generated by myself to the [Police] which may include but not limited to the office of the Chief of Police, the Police Services Board, the Service's Legal Counsel and Freedom of Information Branch.

4. The records which detail the contents of the telephone conversations in item "3" above.

The second request, submitted on May 21, 2007 (addressed in Appeal MA07-228), was for the following:

1. All the records in question which were provided to [another Police agency] by the [Police] including but not limited to: police notes and statements of [two named staff sergeants, a named detective sergeant and four named constables], as well as the documents and log entries from [a named individual], all in relation to myself.

2. All correspondence which [were] sent by the [Police] in relation to the aforementioned records to [another Police agency] including but not limited to correspondences which were addressed to [a named inspector], [a named sergeant], [a named staff sergeant], [a named superintendent from another Police agency], by the [Police] or an employee thereof.

3. All correspondence and records which were received by the [Police] which were sent by the [another Police agency] to the [Police] in relation to myself.

4. All of the records in question which were provided to the Crown Attorney in the Halton area, by the [Police], including but not limited to police notes and statements of [two named staff sergeants, a named detective, and three named constables] in relation to myself.

5. All correspondence and records which were received by the [the Police] which were sent by the Crown Attorney in Halton to the [Police] in relation to myself.

In each case, the Police denied access to the records requested on the basis that the requests were frivolous or vexatious within the meaning of sections 4(1)(b) and 20.1(1) of the *Act*.

The requester (now the appellant) appealed the Police's decisions.

Each file proceeded separately through the mediation stage of the appeal process, with Appeal MA07-152 proceeding ahead of Appeal MA07-228 by several months. The mediator assigned to mediate the two appeals was unable to resolve the issues and the files were referred to the adjudication stage of the appeal process for inquiries.

Each file then proceeded separately through the inquiry process. In each case, I issued a Notice of Inquiry, seeking representations from the Police on the frivolous or vexatious issue. The Police submitted representations for each file and agreed to share the non-confidential portions with the appellant.

I then sought representations from the appellant in each appeal, and included with my Notice of Inquiry the non-confidential portions of the Police's representations. Portions of the Police's representations were severed due to confidentiality concerns. The appellant submitted representations for each appeal.

I then decided to seek reply representations from the Police, who submitted reply representations in each case. The appellant was then given an opportunity to respond to the Police's reply representations in each case and the appellant did so.

During the course of reviewing the evidence in Appeal MA07-152, I decided to go back to the Police to seek further representations regarding whether the "annotated lists" that comprise parts 1 and 3 of the March 7th request exist. The Police responded by producing one annotated list responsive to part 1 of that request.

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 power to invoke section 4(1)(b) could have "serious implications" on the ability of the appellant to obtain information under the *Act*. The Police indicate that they understand that the use of this power should "not be exercised lightly" and that decisions should be made with "much thought and careful consideration." The Police also state that they are well aware that the onus rests on them to establish that the appellant's requests are frivolous or vexatious. However, it is their position that the circumstances of this appeal are unique and that they have met 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 for making a request 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 representations submitted by the Police in each appeal are very similar.

The Police state that since 1999 the appellant has made a number of access requests and that the Police have, in the past, diligently processed each and every one of them. The Police also note that during this same period of time the appellant has also pursued a number of privacy complaints. The Police submit that they have been fair with the appellant and have tried to satisfy his rights of access over this period of time.

However, the Police state in their representations for Appeal MA07-152 that "there is clear and convincing evidence to suggest that the appellant's current requests are designed to abuse the system and are therefore being made in bad faith." The Police make a similar statement in their representations for Appeal MA07-228.

The Police submit that the majority of these requests "overlap in terms of what is being requested" to the point where requests for information have been "duplicated." The Police take issue with the manner in which the appellant has used the *Act* to request information, suggesting that the appellant's requests are "part of a pattern of conduct that amounts to an abuse of the right of access." The Police state that the current requests are "but another attempt to seek access to records which, for the most part, have already been made available to the appellant or which have been denied under one of the exemptions contained in the *Act*."

The Police state that processing these requests would necessitate having to re-notify various police officers, Police employees and affected parties, in effect, duplicating the work that has already been done and consuming an unreasonable proportion of their resources.

In addition, the Police submit that many of the records requested would have been destroyed in accordance with their Records Retention Schedule By-law and, accordingly, no longer exist.

In response, the appellant agrees that he has submitted numerous access requests to the Police. He states that these have been legitimate requests for records relating to "numerous allegations" advanced by the Police to his employer and the conduct of various police officers in relation to these allegations.

With regard to Appeal MA07-152, the appellant believes that the records he is seeking are "contained in one specific file and would not necessitate other personnel and/or police officers to be diverted from their regular duties to facilitate the processing of [his] request." The appellant makes a similar argument in relation to the records in Appeal MA07-228.

With respect to Appeal MA07-152, the appellant adds that there should be no need for the Police to notify affected parties because he is not seeking records that contain the personal information of other identifiable individuals and that in the event any of the records do contain the personal information of affected parties it can be severed.

With respect to Appeal MA07-152, the appellant argues that the Police have not provided sufficient evidence to establish that his request is frivolous or vexatious, having failed to provide specifics regarding:

- the number of requests launched by the appellant
- the number of appeals in which the Police, after going through the mediation process, reconsidered its initial decision to deny access and provided access to records
- the number of appeals that proceeded through the adjudication stage, in which the Police were ordered to disclose information to the appellant
- the number of outstanding appeals.

With regard to Appeal MA07-228, the appellant states that the records requested are "similar in nature" to the Police records he sought in related Orders MO-2086 and MO-2266, but that the time periods in question are different. In those cases, the appellant states that the information he was seeking was for the period between May 19, 2005 and August 6, 2005. Conversely, in Appeal MA07-228, the appellant states that the records being sought are for the time period between August 6, 2005 through December 1, 2006 (in the case of records shared between the Police and another Police agency) and March 18, 2004 through September 1, 2006 (with regard to records shared between the Police and Crown Attorney in the Halton area).

The appellant concludes that his sole motivation for making the two requests at issue was to obtain access to the records sought, spurred by a desire to understand allegations put forward to his employer by the Police. He states that he is unclear as to the basis for the Police's allegations that his request is frivolous or vexatious, aside from their general accusations of "bad faith" and "abuse of process".

I invited the Police to provide reply representations in response to those submitted by the appellant. In particular, with regard to Appeal MA07-152, I asked the Police to "make specific reference to the appellant's past requests, which they allege are repeated in this latest request." In addressing this issue, I suggested that the Police should "list the request number, appeal number and the substance of each relevant past request."

The Police responded, in part, to the appellant's representations, providing details regarding the number of requests he has submitted. The Police submit that between 1999 and 2005 the

appellant made a total of 21 requests: one in 1999, four in 2000, one in 2002, seven in 2003, five in 2004 and three in 2005. The Police assert that in 2006 the appellant submitted 27 requests, 18 of which came within a short period of time. The Police argue that some of the requests have as many as three parts to them. Accordingly, the Police suggest that while the actual number of requests submitted in 2006 totals 21, if you consider the parts of these requests as separate and distinct requests, the real total for 2006 is 27. The Police also provided limited information regarding the substance of the requests submitted in 2006. They did not provide copies of the requests or any other detailed information in this regard.

The Police identified in their reply submissions two 2006 requests that they claimed were frivolous or vexatious. The Police state that, while the appellant appealed the Police's decisions in relation to those requests, he later withdrew his appeals after receiving the Police's representations.

In reply representations submitted for Appeal MA07-152, the Police raise the May 21st request as an illustration of the kind of multi-part request that they believe could be viewed as five separate and distinct access requests.

The Police assert that it is apparent from documents attached to the appellant's representations as appendices that he has made "similar requests" in the past and has had access to the records in the past. The Police also state that the appellant has already acknowledged having made an access request in the past for the records sought in Appeal MA07-152.

The Police refute the appellant's contention that records sought in the two requests are contained in one centralized file. The Police state if this were the case the process of responding to the appellant's requests would be simplified. The Police reiterate that locating the records would necessitate Police personnel being diverted from their regular duties to attend the Freedom of Information Unit again to process the appellant's requests. The Police also state that contrary to the appellant's view that affected parties would not have to be notified, they would have to go through the notification process again as this is required whenever an appeal is launched where responsive records contain the personal information of other identifiable individuals. With regard to records relating to a Halton-based Crown Attorney, the Police state that to the best of their knowledge a Crown Brief does not exist.

The Police add that while the substance of the appellant's privacy complaints are not in themselves frivolous or vexatious, when taken together with the large number of access requests a frivolous or vexatious pattern of conduct emerges.

The Police conclude that they are not in a position to document each and every request that has been made by the appellant due to the "purge criteria" established by their Records Retention Schedule.

In responding to the Police's reply, the appellant argues that the Police failed to respond to the concerns I raised in my invitation to address the appellant's past request history. The appellant states that while the Police provided a detailed list of access requests that he is alleged to have

submitted with corresponding Police file numbers, they did not identify which of his past requests have been repeated in these latest requests.

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 the jurisprudence of this office and 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 whether the facts relevant to these appeals 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

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*. In my view, the evidence before me does not support such a conclusion in these cases.

As set out above, with regard to Appeal MA07-152, I specifically asked the Police, in reply, to comment on the appellant's past requests and to demonstrate how they are repeated in the March 7th Request. I acknowledge that the Police did provide some information regarding requests made in 2006, including request numbers and brief descriptions of the substance of each of these requests. However, in my view, the Police submissions fall below what is required in order to meet this criterion. The Police provide little, if any, information regarding the substance of the requests made in years other than 2006. In my view, the comments provided by the Police regarding the appellant's request history do not shed any light on the extent to which the information sought in the March 7th request was the subject of past requests. And, despite the Police's assertions, it is not self-evident from the evidence before me that the appellant has made similar requests in the past. I concur with the appellant that the Police have not identified which, if any, of his past requests are repeated in the March 7th request. Accordingly, I view the March 7th request as a new request.

Therefore, I find that the Police have not established that the appellant has engaged in a "pattern of conduct" as required by section 5.1(a) of the regulations with respect to the March 7th request.

Turning to Appeal MA07-228, I find for similar reasons that the Police have not established that the appellant has engaged in a "pattern of conduct" in regard to the May 21st request. For the most part, the Police have made general statements suggesting that the information sought in the May 21st request has been requested previously. However, with the exception of the request that is the subject of discussion in Orders MO-2086 and MO-2266, the Police have not made any direct comparisons to previous access requests.

In the series of appeals involving Orders MO-2086 and MO-2266 the appellant sought access to information for the period between May 19, 2005 and August 6, 2005. In the May 21st request the appellant is seeking access to information for two different time frames: August 6, 2005 through December 1, 2006 (in the case of records shared between the Police and another Police agency) and March 18, 2004 through September 1, 2006 (with regard to records shared between the Police and a Crown Attorney in the Halton area).

I acknowledge that there are some similarities between the May 21st request and the request that was at issue in Orders MO-2086 and MO-2266. The nature of the information sought in the May 21st request, specifically with regard to records shared between the Police and another Police agency, is somewhat similar. However, the time frame is completely different. In the case of the records shared between the Police and a Halton Crown Attorney, there is some time overlap, but the substance of this portion of the May 21st request did not form part of the previous request that is the subject of Orders MO-2086 and MO-2266.

Accordingly, I am satisfied that the May 21st request does not establish recurring incidents of related or similar requests. In my view, the May 21st request is a request for new information. In conclusion, 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 with respect to the May 21st Request.

My findings regarding "pattern of conduct" are sufficient to dispose of the claims by the Police that the March 7th and May 21st requests are frivolous or vexatious within the meaning of that phrase in section 5.1(a) of the regulation. Accordingly, I need not consider the other factors for the application of that section. However, for the sake of completeness, I will address the number of requests submitted by the appellant since the Police have raised this as a factor and commented extensively on it. Also for completeness, I will comment on the extent to which the processing of the appellant's requests would amount to a "pattern of conduct that would interfere with the operations of the institution".

I acknowledge that the appellant has made a large number of requests in the nine years between 1999 and the end of 2007. In particular, the appellant submitted 21 requests, some of which are multi-part in nature, in 2006 alone. However, while the appellant's activity in 2006 represents an unusual number of requests, it appears to be an anomaly over the nine year period. The next highest number of requests came in 2003, in which the appellant submitted seven, and in 2007, the most recent year, the appellant only submitted two requests. Accordingly, I do not feel that the number of requests submitted by the appellant is excessive by reasonable standards. I have also reviewed the other factors (nature and scope of requests, timing of the requests and purpose of the requests) and find that, on the evidence presented, they are not relevant factors to be considered in the determination of whether the appellant's requests fall into a pattern of conduct that amounts to the abuse of the right of access.

Turning briefly to the other criteria in section 5.1(a), the Police appear to be suggesting that processing the appellant's requests would amount to a "pattern of conduct that would interfere with the operations of the institution". The basis for this argument appears to be that processing the appellant's requests would necessitate having to re-notify various police officers, Police employees and affected parties, resulting in a duplication of the work that has already been done and consuming an unreasonable proportion of their resources. I find the position of the Police unconvincing for two reasons.

In light of my findings above that the March 7th and May 21st requests are for new information, I am satisfied that the Police would not be required to do anything out of the ordinary to process these requests. Accordingly, I see no basis for suggesting that processing these requests would somehow obstruct or hinder the effectiveness of the Police's activities.

Having found that section 5.1(a) of the regulation does not apply, I will now consider whether section 5.1(b) applies in the circumstances of these appeals.

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].

As stated above, the term "bad faith" has been defined in Order M-850. In discussing the meaning of that term, former Assistant Commissioner Tom Mitchinson states:

> "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 these appeals. The Police's reliance on the "bad faith" criterion appears to be tied to their belief that the appellant is engaged in conduct designed to abuse the access system. While I acknowledge the Police's frustration with the appellant's high level of contact with their office, including the filing of a large number of access requests, particularly in 2006, several privacy complaints and ongoing correspondence, in my view, there is no evidence before me to demonstrate that the appellant is motivated by some dishonest purpose. I am satisfied that the appellant has a genuine desire to seek the information he has requested, perhaps motivated by a desire to better understand allegations of misconduct against him presented by the Police to another Police agency.

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 his 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.

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 my analysis in these appeals. 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, I am prepared to accept that the appellant legitimately seeks access to the information, based on his stated reasons. On the strength of 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.

Accordingly, I find that the two requests by the appellant were not made in bad faith or for a purpose other than to obtain access, and therefore do not fall within the scope of section 5.1(b).

Conclusion

I find that section 4(1) of the *Act* and section 5.1 of Regulation 823 do not apply to the appellant's two requests that are the subject of the appeals. However, while I have found that the requests in this case fall below the threshold for a frivolous or vexatious finding, a continuing pattern of multiple requests for similar information could produce a different result in the future.

ORDER:

1. I do not uphold the decisions of the Police that the appellant's requests in Appeals MA07-152 and MA07-228 are frivolous or vexatious.

2. I order the Police to issue two access decisions respecting the requests that gave rise to Appeals MA07-152 and MA07-228, in accordance with section 19 of the *Act*, treating the date of this order as the date of the requests, and without recourse to a time extension under section 20 of the *Act*.

Original signed by: January 30, 2009
Bernard Morrow
Adjudicator