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

ORDER MO-2436

Appeals MA08-38 & MA08-45

Toronto Police Services Board

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NATURE OF THE APPEALS:

This order addresses appeals arising from two requests submitted by the same individual to the Toronto Police Services Board (the Police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*).

In the first request, the requester described records obtained from the Police through previous requests and indicated that he was seeking access to "the records of police investigation completed after case concluded regarding" a specific arrest number, and the corresponding "CE" and court file numbers.

The same individual submitted the second request one month later, and it referred to two incidents at a named business during which he was asked to leave the premises by a police officer. The requester acknowledged that he had already obtained the records related to the incidents through earlier access requests, but stated that he was now seeking access to "the completed police investigation records of [named business and location] for the period of three years from January 1/97 to December 31/99 regarding complaint about me."

The Police issued two decision letters to the requester in response to the two requests. Each contained the following nearly-identical wording:

> Pursuant to subsection 20.1 of [the *Act*] I am of the opinion that your request is frivolous, and as such, your request is being refused for the following reason(s):
>
> Since 2002 you have submitted 28/29 applications to the Toronto Police Service – Freedom of Information and the Protection of Privacy Unit. Amongst your applications (including this application) you have 17 submissions requesting information regarding matters at [the named business and location]. In particular, you appealed our decision regarding file #07-1992 and during the mediation process you were provided the very records you are requesting with this application (I.P.C. Appeal MA07-312).
>
> You have been provided all of the records in which you are entitled to access under the *Act* regarding the [named business and location] under the control of the Toronto Police Service. As such, any future correspondence regarding these matters that you forward to the Toronto Police Service, or any of its members, will also be considered frivolous.

The requester, now the appellant, appealed these decisions to this office, which appointed a mediator to explore resolution of the issues. As it was not possible to resolve the appeals through mediation, they were transferred to Adjudication and assigned to me to conduct an inquiry.

I sent a joint Notice of Inquiry outlining the facts and issues to the Police, initially, to seek representations, which I received. Next, I sent a modified Notice of Inquiry, and a complete copy of the representations of the Police, to the appellant to invite his submissions, which I received. Upon review of the appellant's submissions, I decided to seek reply representations from the

Police. I sent a complete copy of the appellant's representations to the Police and subsequently received brief reply representations from them, which were accompanied by voluminous attachments.

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. Previous orders have found 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 appeal to this office, the burden of proof rests on the Police to demonstrate that there are reasonable grounds for concluding that a request is frivolous or vexatious [Order M-850].

Several provisions of the *Act* and Regulations are relevant to the issue of whether a request is frivolous or vexatious. These provisions read as follows:

Section 4(1)(b) of the *Act*:

> 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 20.1(1) of the *Act*:

> A head who refuses to give access to a record or a part of a record because the head is of the opinion that the request for access is frivolous or vexatious, shall state in the notice given under section 19,
>
> > (a) that the request is refused because the head is of the opinion that the request is frivolous or vexatious;
> >
> > (b) the reasons for which the head is of the opinion that the request is frivolous or vexatious; and
> >
> > (c) that the person who made the request may appeal to the Commissioner under subsection 39(1) for a review of the decision.

Section 5.1 of Regulation 823:

> 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.

Representations

The Police state that the appellant has submitted "well over 50 requests" which are identical or vary only slightly in nature and scope. The Police submit that each of the numerous requests have been reviewed and considered on their own merit, but the sheer number, and similarity of, the appellant's requests provide a reasonable basis to conclude that a pattern of conduct amounting to an abuse of the right of access has been established.

The Police rely on Order M-850 in support of the argument that "abuse of process" can be established in situations where a process is used more than once for the purpose of "revisiting an issue which has been previously addressed." According to the Police, the appellant has been advised a number of times that he has received all of the records and information relating to the incident at the specific location which he is entitled to under the *Act*. The Police state: "…the appellant in [Appeal MA08-38] requested the very same records he was provided during the appeal MA07-312."

The Police note that they have also advised the appellant that he should "discontinue submitting identical and/or similar requests." The Police submit that the appellant did not heed this advice and "subsequently submitted more requests of a similar nature."

> The [Police] receive a very high volume of requests each year. In order to facilitate a timely response to our requesters, it is imperative the requests we receive are submitted in "good faith", where the sole objective is to gain access. Our resources are already stretched to their limits and having to entertain requests that are frivolous or vexatious (as is the case with the appellant) only permits an undue burden to the institution which affects our ability to meet compliance with other requests received.

The Police submit that the appellant's pattern of conduct demonstrates that his purpose is to accomplish an objective other than to gain access. In the Police's view, since the appellant has been informed that all of the records concerning the incident of concern to him have been disclosed through previous requests, his persistence in submitting similar requests suggests that

he is submitting such requests in "bad faith". According to the Police, "there is no logical reason" for the appellant to continue submitting the nearly-identical requests "other than to disrupt the operations of this institution."

According to the Police, the appellant has continued to send requests to them by fax since the Notice of Inquiry was issued. The Police list 11 separate faxes received by them in the month of the Notice's issuance. The Police conclude by stating:

> To allow this appellant to continue submitting requests that are identical or of a similar nature only "obstructs or hinders the effectiveness of the institution's activities" [Order M-850].

The appellant maintains that he has submitted the requests solely for the purpose of obtaining access to the requested records, and he maintains that he is acting in "good faith." The appellant also takes the position that the Police have failed to establish a pattern of conduct on his part that amounts to an abuse of the right to access.

With his representations, the appellant provided two charts that represent his summary of the access requests submitted to the Police. "Chart A" outlines the requests the appellant says that he has submitted respecting the specified incident at the business (Appeal MA08-38), while "Chart B" outlines requests he has submitted that refer to the years 1997 to 1999, as requested in Appeal MA08-45.

According to the appellant, he has submitted eight requests related to the specified incident at the business (Appeal MA08-38). However, the appellant explains that he has done so at least partly because the Police have provided different responses to the requests. Further, as I understand the appellant's argument, the different responses to these requests justify the additional requests so that he can be satisfied that all responsive records have been identified.

The appellant submits that the time period covered by the request in Appeal MA08-38 is January 1, 2000 to November 28, 2002, while the time period clearly specified in the request leading to Appeal MA08-45 is January 1, 1997 to December 31, 1999. With reference to Appeal MA08-45, the appellant states that he has submitted eight requests related to the year 1997 "mainly because of different responses by [the] Freedom of Information Unit."

In response to the reference by the Police to the faxes sent by him after the Notice of Inquiry was issued, the appellant takes the position that these contacts with the Police do not relate to Appeal MA08-38.

The remainder of the appellant's representations do not otherwise address the issue of whether the requests are "frivolous or vexatious."

In seeking reply representations, I asked the Police if a spreadsheet or listing of the appellant's requests had been created for the purpose of coordinating the Freedom of Information Unit's response. In reply, the Police indicated that no spreadsheet cataloguing the appellant's request history existed. Instead, the Police provided copies of request tracking sheets "pertaining to the

appellant's applications for information regarding any charges/complaints laid against him," and the specified incident at the business. The Police also sent copies of the appellant's letters sent by fax over the 14 month period preceding the date of the reply representations. These faxed letters form a ten-inch thick pile.

The Police subsequently submitted copies of several additional faxes sent to them by the appellant after they had sent me the other copies. I asked staff from this office to contact the Police to advise them not to send copies of any subsequent faxes from the appellant.

Analysis and Findings

In my view, the evidence provided by the Police, and the overall circumstances, support a conclusion that the appellant's requests in Appeals MA08-38 and MA08-45 form part of a pattern of conduct that amounts to an abuse of the right of access for the purposes of section 5.1(a) of Regulation 823.

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 the requirements of section 5.1(a) of Regulation 823, the institution must show a "pattern of conduct" by demonstrating that the appellant has made recurring, and often voluminous, requests of a related or similar nature [Order M-850]. In Order MO-2390, Adjudicator Bernard Morrow observed that the cumulative nature and effect of the requester's behaviour may also usefully guide the determination of the existence of a "pattern of conduct."

The next determination under this section is whether the established pattern of conduct constitutes "an abuse of the right of access." In Order M-850, former Assistant Commissioner Tom Mitchinson reviewed the common law for assistance in formulating an appropriate interpretation of the term "abuse of the right of access," stating:

> In *Foy v. Foy* (No. 2) (1979), 26 O.R. (2d) 220, 102 D.L.R. (3d) 342 (C.A.), Howland C.J.O. makes the following comments on the *Vexatious Proceedings Act* (now incorporated into the *Courts of Justice Act*):
>
> > The word "vexatious" has not been clearly defined. Under the Act the legal proceedings must be vexatious and must have been instituted without reasonable ground. In many of the reported decisions legal proceedings have been held to be vexatious because they were instituted without any reasonable ground. As a result the proceedings were found to constitute an abuse of the process of the Court. **An example of such proceedings is the bringing of one or more actions to determine an issue which has already been determined by a Court of competent jurisdiction**.

> The court appears to be saying that proceedings instituted without any reasonable grounds are an abuse of process. In the context of the *Act*, this might apply to a request for information of a trivial or contemptibility unimportant nature.
>
> In a similar vein, the Court in *Donmor Industries Ltd. v. Kremlin Canada Inc.* (1991), 6 O.R. (3d) 501 (Ont. Gen. Div.) struck out a statement of claim because it involved re-litigating matters that had been the subject of a previous, unsuccessful action between the same parties. The Court decided to rely on "abuse of process" rather than the doctrine of *res judicata,* stating:
>
> > I think the stronger position is to hold that these plaintiffs are abusing the court process in **attempting to put forward again issues which were either raised in the first action or which were known to them and left unraised at the time of the first action.** To allow them to do so is to permit a duplication of proceedings with the inherent danger of conflicting findings of fact on identical issues.
>
> From this case, and *Foy v. Foy* (No. 2), above, it appears that **another way of abusing the process of the court is to bring one or more actions to determine matters previously dealt with.** Based on my review of the case law in this area, a number of duplicative and repetitive actions is the most common basis for courts to find that their processes have been abused [emphasis added].

It has been recognized that certain factors, particular to the case under consideration, may be relevant in deciding whether a pattern of conduct amounts to an abuse of the right of access [Order MO-1782]. In addition, Order MO-2390 provides a helpful summary of the main factors found in previous orders of this office to be relevant in the determination of whether the established pattern of conduct constitutes "an abuse of the right of access," including:

- 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].

I agree with these principles, and I have adopted them in my analysis of the appeals before me.

Pattern of Conduct

In my view, a reasonable basis exists for the Police to have concluded that the appellant has demonstrated a pattern of conduct. The appellant has regularly and continually submitted requests that are moderately varied in wording, but frequently relate in one way or another to the identified business. I am satisfied that the appellant's requests related to this identified business constitute "recurring incidents of related or similar behaviour" on the part of the appellant. Accordingly, I find that the evidence before me demonstrates a pattern of conduct.

Furthermore, I note that the voluminous documents submitted with the Police's reply representations consist of several hundred letters (more than 500 pages), that were faxed by the appellant to the Police. These faxed contacts cover a 14 month time period. My review of these documents indicates that they relate to the appellant's requests for access, as well as the seeking of clarification and confirmation from various Police staff members. I also note that the faxes address the subject matter, namely the specified incident and/or business, in these appeals, but also other appeals to this office, and other processes related to the specified incident and business. In my view, the cumulative nature and effect of these voluminous faxed contacts with the Police are also suggestive of a "pattern of conduct" [Order MO-2390].

The question remains whether the requests in these two appeals constitute an abuse of process.

Amounts to an Abuse of Process {of the Right of Access}

I have considered the factors found in previous orders to be relevant to the question of whether a pattern of conduct amounts to an abuse of process. In my view, the number and nature of the appellant's requests and his contacts, generally, with the Police provide persuasive and cumulative evidence of an abuse of process.

To begin, I will address the factors that, in my view, are not supportive of a finding that the appellant's conduct amounts to an abuse of process. First, there is no evidence before me to suggest that the *timing* of the appellant's requests is connected in any way with the occurrence of other related events, such as court proceedings. Indeed, any court proceedings related to the incident at the business appear to be long past. Accordingly, I find that this factor is not relevant to my determination in the present appeals.

I have also considered the evidence available respecting the *purpose* of the requests, that is, "whether the requests are intended to accomplish some objective other than to gain access without reasonable or legitimate grounds." As previously stated, past orders have found this to be a relevant consideration where there is evidence to support a finding that the requests are made for "nuisance" value, to harass the government, or to burden the system [Orders M-618, M-850, MO-1782 and MO-1810].

Based on the overall circumstances of these requests, I do not accept the argument put forth by the Police that "there is no logical reason" for the appellant's requests other than to perpetrate a

"nuisance" upon the Police or to "disrupt the operations of this institution." The appellant himself refers to different responses to his various requests, and a desire to receive a uniform response to them. In the circumstances, therefore, and although there may be other explanations for the appellant's motivation in submitting the requests, I am not satisfied that the appellant is exercising his access rights for "nuisance" value or to harass the Police. Accordingly, I do not place significant weight on this factor in my determination of whether or not the appellant's pattern of conduct amounts to an abuse of process.

Respecting the *number* of requests, however, I have considered "whether the number is excessive by reasonable standards." According to the Police, the appellant has submitted over 50 requests, some of which were the subject of appeals to this office. This number is somewhat at odds with the number given in the decision letters provided to the appellant some seven months prior to the submission of representations, which is "28/29." It may be that the larger number refers to the grand total of the appellant's requests, while the 28/29 refers only to the specific business. Notwithstanding this lack of clarity, however, I accept the evidence of the Police that the number of requests is very high. Moreover, from this office's records, I am able to confirm that as of the opening date of the later of these two appeals, the appellant had filed 27 appeals with this office. 23 of them are with the Police, and 22 of the 23 were initiated in the four year time period immediately preceding the filing of Appeal MA08-45, which is the later of the two appeals before me. Accordingly, I find that the number of the appellant's requests is a relevant factor, particularly taken in conjunction with the factor I will now address.

Closely related to the number of the requests submitted by the appellant is the matter of the *nature and scope* of the requests. In the circumstances of these appeals, including the evidence presented by the Police and my own review of the documented contacts, I am satisfied that the two requests in Appeals MA08-38 and MA08-45 are similar and, in some respects, nearly identical, to previous requests. The appellant seeks to distinguish between the two requests under consideration by asserting that the time period covered by the request in Appeal MA08-38 is January 1, 2000 to November 28, 2002, while the time period contemplated in Appeal MA08-45 is January 1, 1997 to December 31, 1999. However, a plain reading of the request leading to the first appeal (MA08-38) reveals that there is no time frame given. Rather, it is a specific grouping of records ("… of police investigation completed after case concluded …") sought with no time period identified. Some of the appellant's previous requests have not imposed a time frame to limit the scope, while others have. There is, in my view, a considerable degree of overlap between the requests related to this named business in terms of the time periods, and the subject matter of each is either similar or virtually identical.

In Order MO-1921, Adjudicator Donald Hale addressed the application of the frivolous and vexatious provision to a requester in circumstances that bear a remarkable degree of similarity to the facts of these appeals:

> 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 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 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.

In my view, the reasons of Adjudicator Hale have resonance for the determination of the appeals before me. I also agree with the comments of the former Chief Justice in *Foy v. Foy* (cited above) and the findings of former Assistant Commissioner Mitchinson in Order M-850 that an abuse of process is established where it can be shown that the (litigant or) appellant has brought one or more actions to determine an issue which has already been dealt with or determined. For example, I accept the evidence of the Police that the records requested by the appellant, and provided to him, in Appeal MA07-312 are the same as those requested in Appeal MA08-38.

The appellant has submitted requests to the Police for identical, or very similar, information and has followed up those requests with a steady stream of faxed contacts to any number of individuals internal to the Police, particularly the Freedom of Information Unit. In the circumstances, I find that this pattern of conduct amounts to an abuse of process.

Accordingly, I find that the appellant's pattern of conduct amounts to an abuse of the right of access. It is therefore unnecessary for me to address the Police's submissions under section 5.1(b) of Regulation 823 that the requests are "made in bad faith or for a purpose other than to obtain access."

Conclusion and Remedy

Having considered the circumstances of these appeals and the evidence provided by the Police, I find that the Police have established that there are reasonable grounds for the Police to consider the appellant's requests as part of a pattern of conduct that amounts to an abuse of the right of access. Therefore, I uphold the decision of the Police to refuse to process the appellant's requests on the basis that they are frivolous or vexatious for the purposes of section 4(1)(b) of the *Act*.

In past orders, the Commissioner's office has determined that it was necessary to impose certain restrictions on requesters who were found to have submitted frivolous and vexatious requests [Orders MO-1810, MO-1841 and MO-1921]. In those appeals, the adjudicator imposed certain conditions restricting the appellant's right to make access requests under the *Act* to that institution. In Order MO-1810, Adjudicator Rosemary Muzzi stated the following:

> 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.

I am satisfied that the circumstances of the appeals before me are such that it is appropriate to limit the appellant's access to information matters with the Police to one at a time, and I will account for this in the terms of my order, below.

ORDER:

1. I uphold the decisions of the Police under section 4(1)(b) of the *Act* that the appellant does not have a right of access to the records he requested in Appeals MA08-38 and MA08-45 because the requests are frivolous or vexatious, and I dismiss this appeal.

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. The Police are not required to process any further access to information requests by the appellant related to the named business and location.

   b. For a period of one year following the date of this order, I am imposing a one-transaction limit on the number of other 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.

   c. Subject to the one-transaction limit described in provision 2.b 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 advise as to which matter he wishes to pursue.

   d. 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.b.-2.d. of this order, failing which, its terms shall continue in effect until such time as a variance is sought and ordered. Notwithstanding any application regarding provisions 2.b.-2.d. under this provision, provision 2.a. will continue in force and may not be varied upon application.

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: June 30, 2009
Daphne Loukidelis
Adjudicator