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

ORDER MO-2488

Appeal MA09-134

City of Vaughan

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NATURE OF THE APPEAL:

The City of Vaughan (the City) received a 37-part request, under the *Act*, for records relating to the Major Mackenzie Streetscape Project.

The City denied access to the information responsive to the request pursuant to section 4(1)(b) of the *Act* on the grounds that the request was frivolous or vexatious. In its decision letter, the City stated that:

> It is the City of Vaughan's position that your request is part of a pattern of conduct that amounts to an abuse of the right of process, that it interferes with the operations of the institution, that it is made in bad faith, and that it is for a purpose other than to obtain access (Regulation 823 Sections 5.1(a) and 5.1(b)).

The requester's representative (now the appellant) appealed the decision.

As mediation did not resolve this appeal, the file was transferred to me to conduct an inquiry under the *Act*. I sent a Notice of Inquiry, setting out the facts and issues in this appeal, to the City initially, seeking its representations. I received representations from the City. A copy of the City's representations, except for a portion of document 116, which was withheld due to confidentiality concerns and document 122, which had been withdrawn by the City, were sent to the appellant, along with a Notice of Inquiry seeking her representations. I then received representations from the appellant.

DISCUSSION:

FRIVOLOUS OR VEXATIOUS REQUEST

In its representations, the City submits that the appellant's "inequitable consumption of City resources, her non-genuine intentions, and her mean-spirited interactions with the City" led to the City's decision to conclude that the appellant's request is frivolous or vexatious.

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

> 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 "frivolous" or "vexatious":

> A head of an institution that receives a request for access to a record or personal information shall conclude that the request is frivolous or vexatious if,

> (a) the head is of the opinion on reasonable grounds that the request is part of a pattern of conduct that amounts to an abuse of the right of access or would interfere with the operations of the institution; or
>
> (b) the head is of the opinion on reasonable grounds that the request is made in bad faith or for a purpose other than to obtain access.

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

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

The following grounds may form the basis for a frivolous or vexatious claim:

1. The requester's conduct amounts to an abuse of the right of access;

2. The requester's conduct interferes with the operations of the institution;

3. The requester has acted in bad faith in making their requests; and,

4. The requester is seeking access for a purpose other than to obtain access.

Where a request is found to be frivolous or vexatious, this office will uphold the institution's decision. In addition, this office may impose conditions such as limiting the number of active requests and appeals the appellant may have in relation to the particular institution [Order MO-1782].

The institution's conduct also may be a relevant consideration weighing against a "frivolous or vexatious" finding. However, misconduct on the part of the institution does not necessarily negate a "frivolous or vexatious" finding [Order MO-1782].

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].

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

- Number of requests

- Nature and scope of the requests

- Purpose of the requests
- Timing of the requests

[Orders M-618, M-850, MO-1782]

In this case, the evidence relating to these factors also may be relevant to the issues of "interference with the operations of the City" and whether the appellant had a purpose "other than to obtain access".

Number of requests

In support of this ground, the City provided me with a chart listing 54 access requests filed by the appellant between August 2007 and May 2009. Forty-four of these requests were filed by February 5, 2009, which was the date of the appellant's 37-part request that triggered the City's decision to apply section 4(1)(b). The City submits that:

> These requests were made with reasonable frequency in 2007 and then rose sharply in volume in September 2008. In the six month period between September 2008 and February 2009 the appellant filed 29, or just over half, of her access requests.
>
> The volume of access requests filed by the appellant is unprecedented in the City of Vaughan. The appellant was responsible for over a quarter of the access requests received by the City of Vaughan in 2008. As of the date of this submission, the appellant's requests make up 19.4 percent of the requests received in 2009. No other requester in the City comes close to matching the appellant for volume of requests.

The appellant agrees with the City that she had made 44 requests up until February 5, 2009. She states that:

> By March 2009, just 16 months and a total of 44 access requests later, a decision was made to invoke the frivolous and vexation exemption. The City states they appreciate the magnitude of this decision, yet fail to recognize the appellant's brief experience as a requester and that the appellant has not submitted any access requests prior to August 2007…
>
> [T]he appellant believes that the number of requests is not excessive, considering that the total number of requests received by the City in each year since 2004 has remained fairly stable as has their 30 day response time when comparing the appellant's 2008 requests to those in 2004. The appellant believes the City has overstated the requests to support their submission and despite the fact that the appellant's last request was date stamped by the City on February 5, 2009, the City has proceeded to focus on the appellant by filing this submission six months later…

> Based on the City's submission, 67 requests were received to date in 2009 and it appears the number of requests are headed toward the figures received in 2007. The City currently has a staff of two to handle requests… Given the City's additional staff person [to handle FOI requests] it is difficult to understand how the number of requests made by the appellant would have any negative impact on their operation.
>
> In addition to shutting the claimant down and all requestors who in some way challenge the administration and elected officials, the appellant suspects that the City's decision is in part statistically driven. The City appears to have a lower than average response rate when compared to other municipalities, especially when the number of staff and requests are factored in. It appears the City is in some ways placing blame on the appellant for their performance.

Analysis/Findings

I find that the number of requests filed by the appellant is excessive by reasonable standards [Order MO-2390]. In making this finding, I have taken into account that, according to the City, of the 54 requests; all of these requests were multipart, comprising 372 parts in total, averaging 6.5 parts per request. Many of the request parts request multiple different types of records. Twenty-seven requests were appealed to this office by the appellant. At the time the City decided to apply section 4(1)(b), the appellant had filed approximately 29 multipart requests in under a six- month period.

Accordingly, I find that the number of requests filed by the appellant is a relevant factor in favour of determining that there exists a pattern of conduct that amounts to an abuse of the right of access.

Nature and scope of the requests

The City submits that the appellant's requests are both excessively broad in scope and unusually detailed. It states that:

> The appellant's requests are, in addition to numerous, the most complex received by the City. The appellant submits requests that are composed of multiple, numbered parts that are submitted on one or two attached pages because they do not fit on the City's access and correction form… It is not unusual for one part of the appellant's access request to read like an access request in its own right. The appellant's requests pose a threefold challenge for City staff: the requests cover multiple subjects, record types, and Departments, they have open-ended wording, and they are sprinkled with the appellant's assumptions about City operations.
>
> Since 2007, the appellant has sought records from the Purchasing Services Department, Financial Services Department, Human Resources Department, Department of Planning, Legal Services Department, the Office of the City Manager, Building and Facilities, Information and Technology Management,

records of Council, Payroll, Fleet, Corporate Communications, Budgeting and Financial Planning, Reserves and Investments, and the City Clerk's Department… The appellant has asked for records ranging from security guard logs to lease agreements to cancelled cheques… Over the course of the appellant's [54] access requests, the City has issued access decisions regarding over 3500 pages of records.

The process by which responsive records are located has been reviewed and revised since the appellant began making access requests in 2007. Part of the revision has been spurred by the appellant's numerous access requests. The City has attempted to evolve to meet the appellant's information requirements but the time required to process the appellant's access request has hindered this evolution.

The difficulties that arise because of the departmental and documentary breadth of the appellant's access requests are compounded by her open-ended wording. By using phrases like "any and all" and "but not limited to", the appellant has needlessly complicated the access process. The appellant almost invariably uses one or both of the aforementioned phrases in her access requests. When asked to clarify an access request wherein she used "but not limited to", the appellant replied with a definition that clearly indicated her intent to leave her access requests open-ended… In hindsight, the City should have refused to undertake searches for records that were without a defined scope. The City's decision to search, issue access decisions, and produce responsive records was, at a most fundamental level, made with the spirit of cooperation in mind.

The final variable to be addressed regarding the appellant's access requests is the information about City operations contained in each request. …[T]he appellant has a better than average understanding of the structure and function of the City of Vaughan. The appellant has been able to assist the City by providing an indication of which City departments may hold records responsive to her access requests. That, however, is where the beneficial aspect of the appellant's knowledge of the City ends.

The City believes that the appellant is convinced of her superior knowledge of City records and transactions. In her access requests, the appellant states her beliefs about the location and existence of records with such authority that it is tempting to believe her. It is also tempting to believe that she gives these directions with the best intentions at heart. The City has come to believe otherwise, and this will be discussed in the section on the appellant's non-genuine intentions. The appellant's directions have, ultimately, caused more harm than good. The appellant has been incorrect about a number of her assertions. More importantly, the appellant does not accept that records whose existence she is sure of, do not exist (this issue is discussed at greater length in the section on mediation). The inclusion of instructions from the appellant, therefore, has slowed and confounded a number of City searches and has frustrated the mediation process.

The appellant submits that:

> …[her] requests are either very specific, for example, the appellant is criticized for relying on documents that were obtained illegally. Conversely, the requests are too broad... The appellant submits that the City was only able to identify four examples out of a total of 33 requests. Given their voluminous submission and detailed response, the appellant submits that if there were more, the City would have provided them. Also, the City provides a specific section/component of a request without providing any reference to the subject or nature of the request...
>
> With respect to "volume" of a request, the appellant's requests could hardly be compared to the other much larger requests that are requested on a daily basis, for example, in Order PO-1984…
>
> The appellant further submits that the requests themselves are specific given the broad nature of the topic. For example, [file#] specifically relates to benefits provided to [name] and claimed on Canada Revenue Forms. In order to clarify the request, the appellant suggested that the City's Finance Department or more specifically, City's Payroll or Accounting Department will have at least prepared a T4 slip in addition to all additional forms prepared for employee's receiving taxable benefits. The appellant was not aware of the form number that these taxable benefits are reported on and assumed that the City would have this knowledge. Since the City makes the operating budgets and account numbers available, the appellant quoted the account number as well as the individual budget categories, that is, gas, insurance, and so on. The appellant also stated that the taxable benefits are publicly posted so that the amount posted should correlate to the information provided in [another] request…
>
> Having stated the above, the appellant does recognize that their grammar and writing skills could use improvement at times. The appellant has always offered to assist the FOI [Freedom of Information] Coordinator, especially if the request needed clarification. It is always easier to speak than to write and expect to be understood in the same manner.

Analysis/Findings

Both the City and the appellant have provided me with numerous examples of the requests the appellant has made. Based on my review of these requests, I find that they are excessively broad and varied in scope and unusually detailed. The open-ended wording of many of the appellant's requests is such that in many cases the City could not be able to completely satisfy the requests or, more particularly, to accurately define their intended scope. The appellant's case is distinguishable from the request in PO-1984, referred to by the appellant in her representations. Order PO-1984 concerned one request for information related to a named place for a limited period of time.

In addition, although the appellant has suggested where the City may locate the responsive records, when the City does search these locations, the appellant has not been satisfied with the search undertaken. Many of her requests are worded so broadly that it is unclear to me from a reading of them, which records would be fully responsive. The appellant also has added the following sentence to many of the requests:

> If this request is deficient in any manner and/or form, please be advised that it should be viewed as an oversight and should not be viewed as an omission.

I find that by adding this sentence to her requests, as well as including the phrases "any and all" and "including but not limited to", the appellant has left it open for her to argue that additional records would be responsive, thereby providing her with the opportunity to keep her requests ongoing. Although, in certain circumstances, the phrases "any and all" and "including but not limited to" may be appropriate terms for requesters to use in seeking access, in the appellant's case these terms appear to have been used by her to keep many of her access requests ongoing and unable to be reasonably concluded.

Accordingly, I find that the nature and scope of the requests filed by the appellant is a relevant factor in favour of determining that there exists a pattern of conduct that amounts to an abuse of the right of access.

Purpose of the requests

The City believes that the appellant's requests are intended to accomplish some objective other than to gain access. It submits that:

> It is the belief of the City of Vaughan that the intentions of the appellant are non-genuine. That is, that the appellant's interest in the records of the City of Vaughan is not that of a concerned citizen...
>
> The appellant's approach to the procurement of records has been that of a management surrogate. As the access requests themselves show, the appellant readily demonstrates her knowledge of City workings and has consistently directed the City toward certain departments and/or individuals for her access requests….
>
> The appellant has attempted to dictate the entire process by which records are retrieved.
>
> On several occasions, the appellant has sent instructions as to how a search for records responsive to her access request should be carried out… These instructions often refer to a specific individual whom the appellant feels should be consulted. The appellant has also issued instructions as to whom the City should not speak to about her access requests. The instructions issued by the appellant would be followed up on daily either by phone or by e-mail. The instructions, which are euphemistically described by the appellant as "suggestions" or "hints",

> were not actually meant to offer "help", as she contends, but to ensure that the City complied with her demands.
>
> If the appellant's demands were not met, she would e-mail and/or call the City to complain that her requests were being ignored or that the City had not provided adequate assistance… There are not enough hours in a day, as the City's correspondence with the appellant outside of work hours show, to respond to the appellant's e-mails, to follow up on her concerns, to essay her search methodologies, and to spend an hour a day on the phone with her. The appellant's instructions and subsequent complaints interfered with, and slowed, the process of responding to her requests and needlessly complicated many of the City's searches…
>
> While the City of Vaughan has remained committed to assisting requesters to formulate access requests, it is the City's belief that the appellant has abused the *Act*'s inclination to grant requesters the benefit of the doubt where formulating access requests is concerned. The appellant has used the phrases "any and all" and "but not limited to" to extend her search parameters after an access decision has been issued and she is in receipt of the responsive records. She has claimed that she was seeking records that, although not mentioned in her access request, should still be disclosed because of "any and all" or "but not limited to"... Similar to the appellant's interference with search methodology, the appellant has claimed on many occasions that the City has not helped her, but it is not help the appellant is seeking. What is being sought is an ever-widening scope of records to which the appellant wishes access without making an additional access request and waiting an additional 30 days…
>
> The appellant has engaged in behaviours that have done a disservice to the *Act*. Under the guise of seeking access to information, the appellant has engaged in vexatious acts. The appellant's interference with the access request process, her circumnavigation of your Office's restrictions, and her employment of third party requesters clearly indicate her bad faith and her non-genuine intentions.

Certain portions of the appellant's representations appear to respond to the City's representations as to the purpose of her requests. She submits that:

> …[she] has made numerous sincere attempts to assist the City in responding to [her] requests, many of which have been dismissed or received with confrontation.
>
> In order to increase efficiency and save time, the appellant has used commonly used terms, such as "any and all" and "including but not limited to". This was to respond to situations where the City conducted a search and located records that were specifically requested along with related records, yet the City failed to provide or even offer the related records simply because they were not specifically requested…

> [T]he terms ["any and all" and "including but not limited to"] were used because the appellant was not aware of the content, size or depth of certain requests and the City was not in a position to discuss the request or pull the complete record and have the appellant review it prior to fulfilling a request. On this note, the City is simply being overly critical of the appellant's terminology and choice of words. If they would have referred to previous IPC Orders, they would have recognized that the terms had no negative or malicious intent…
>
> It should be noted that the appellant lives in close proximity to the Civic building, attends the building on other matters such as paying of her tax and utility invoices and at all times was sincerely interested in saving time and money for postage. The examples, although on their own "may" paint a picture of a "demanding" requestor, are simply not true or have been exaggerated. Further, the appellant submits that the rights of an anxious customer to contact a service provider should not be frowned upon or challenged. It occurs in every service environment every day. Unfortunately, the City has a monopoly on the information, its services levels and overall operations which are guided by the leadership of the department...
>
> The appellant asserts that the City has a statutory duty to provide the services required under the *Act* which undoubtedly require an appropriate level of staffing, management, expertise and commitment. [In] Order MO-1967…the Adjudicator stated there were "serious flaws" with respect to the City's access procedure respecting property files and architectural drawings maintained by its Building Standards Department and in the inconsistent manner in which it is applied. Furthermore, he stated that "the City does not ***maintain*** a "regularized system of access". The appellant believes that the City has more than sufficient staff levels to handle the incoming requests…

Analysis/Findings

Having carefully reviewed the representations of the parties and the evidence they rely on, I find that the appellant's requests have been made to accomplish some objective other than to gain 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 [Order M-850].

It appears from the appellant's representations and extensive supporting documents that her primary purpose in making access requests is to interfere with the operations of the City. The appellant's representations focus primarily on how poorly she perceives the City is managed.

The appellant has provided me with numerous newspaper articles spanning several years critical of the City, in particular its Freedom of Information process, court documents concerning ongoing litigation filed against the City both by her and by others, and an extensive history of her entire interaction with the City dating back several years before she began filing access requests. The City has provided me with a detailed breakdown and a summary of the calls, emails and personal attendances at the City made by the appellant or on her behalf concerning her access

requests. In particular, the appellant (or her representative) sent the City over 300 emails in the six month period between August 2008 and February 2009. Many of these emails contained directions on how the appellant wanted the City to process her requests. She (or her representative) also called the City about her requests on a continuous basis, sometimes almost daily.

The appellant refers to Order MO-1967, in which Adjudicator Donald Hale found that: "the City does not maintain a 'regularized system of access' for the purposes of section 15(a) [information available to the public] and the exemption does not, accordingly, apply". That is a requirement in order to find that the section 15(a) exemption applies, an issue that is not before me here. My conclusions in this case are based on the evidence provided to me, which in my view supports the position taken by the City.

I find that the sheer volume and length, as well as the content, of these emails and calls, demonstrate that they were made for nuisance value. These calls, emails and personal attendances consumed an inordinate amount of time of the City's staff in their attempts to respond to the appellant's demands.

Based upon my review of the wording of the 37-part request in this appeal, I agree with the City that the level of detail contained in this access request (and certain other requests made by the appellant) appears to demonstrate that the appellant is already in possession of many of the emails she has requested. I base this conclusion on the fact that the appellant has cited in detail in her request the names of recipients and senders of emails, who the emails were copied to, whether the email was part of an email chain or had an attachment, the e-mail subject lines and dates.

In view of these conclusions, it is not necessary for me to consider in this order whether the appellant has used third party requesters to assist her in causing interference with the operations of the City.

Based on the foregoing analysis, I find that the purpose of the requests filed by the appellant in seeking access was to interfere with the operations of the City, which is also a "purpose other than to obtain access" within the meaning of section 5.1(b) of Regulation 823. Therefore, the purpose of the appellant's requests is a relevant factor in favour of determining that there exists a pattern of conduct that amounts to an abuse of the right of access.

Timing of the requests

The appellant has filed a lawsuit against the City. Examinations for discovery, which began in November 2007, have only recently concluded. The City believes that the appellant's access requests may have been intended to pressure the City into settling her lawsuit and also to legitimize her possession of documents which, according to the City, were improperly obtained from the City's record holdings.

The appellant states that she:

> …started making requests in August 2007 after receiving resistance in obtaining information for her [court] action against the City. Her first experience was to set the stage for future requests…
>
> [T]he timing is not generally connected to the occurrence of some other related event, such as court proceedings… Aside from a potentially connected occurrence where the appellant requested a [named] Report that was widely publicized in the media, there is no connection [to the court proceedings].

Analysis/Findings

Based on my review of the appellant's representations and supporting documents, in particular the confidential portions thereof, I find that the timing of the appellant's requests supports a conclusion that the requests are part of pattern of conduct that is an abuse of the right of access. In making this finding, I have taken into account the increasing volume and complexity of her requests over time as her dispute with the City progresses.

Accordingly, I find that the timing of the requests filed by the appellant is a relevant factor in favour of determining that there exists a pattern of conduct that amounts to an abuse of the right of access.

Conclusion

In finding that the appellant's pattern of conduct amounts to an abuse of the right of access, I have considered the findings of Senior Adjudicator John Higgins in Order MO-1924, wherein he stated:

> The [institution] also suggests that the objective of obtaining information for use in litigation with the [institution] or to further the dispute between the appellant and the [institution] was not a legitimate exercise of the right of access.
>
> 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.

All of the factors listed above weigh in favour of a determination that there exists a pattern of conduct that amounts to an abuse of the right of access. Based on all of the evidence before me, I find that the appellant has an improper objective above and beyond a collateral intention to use the information obtained in her requests in a legitimate manner.

The cumulative nature and effect of the appellant's behaviour demonstrates reasonable grounds for me to find that the appellant request in this appeal is part of a pattern of conduct that amounts to an abuse of the right of access.

Based on my analysis above, I also find that the appellant has engaged in a pattern of conduct that would interfere with the operations of the City, and that she has made the request at issue in this appeal for a purpose other than to obtain access.

Therefore, I uphold the City's decision under section 4(1)(b) of the *Act* to declare the appellant's request in this appeal to be frivolous or vexatious. As such, in this order, I will impose conditions limiting the number of active requests the appellant may have in relation to the City.

ORDER:

1. I uphold the City's decision under section 4(1)(b) of the *Act* that the appellant does not have a right of access to the records she requested in this appeal because this request is frivolous or vexatious, and I dismiss this appeal.

2. I impose the following conditions on the processing of any requests from the appellant with respect to the City now and for a specified time in the future:

   (a) For a period of one year following the date of this order, I am imposing a one-transaction limit on the number of requests made by the appellant to the City under the *Act* that may proceed at any given point in time, including any requests that are outstanding as of the date of this order.

   (b) Subject to the one-transaction limit described in provision 2(a) above, if the appellant wishes any of her requests, except the request that is at issue in this appeal, that now exist with the City to proceed to completion, the appellant shall notify both this office and the City and advise as to which matters she wishes to proceed. The City will then decide the order in which it wishes to process these requests.

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

4. I impose the following additional conditions on the manner in which the appellant's future access requests are to be processed.

   - the appellant is to specify the exact information or records she is seeking, if possible, the location in which she expects the requested records to be found;

   - each request will deal with only one subject matter and will seek specific information and will not include the phrases "any and all" and "but not limited to";

   - the appellant or her representative is not to otherwise contact the City (verbally or in writing) with respect to the processing of her access requests, except and unless the City contacts her first (or her representative) for clarification of a request;

   - the City is not required to respond to any communication from the appellant concerning her access requests unless it has received this communication from the appellant by mail and this communication is either the filing of an access request made in accordance with this order or is made in direct response to a request by the City for clarification of the appellant's access request.

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.

December 22, 2009

Diane Smith
Adjudicator