

Information and Privacy Commissioner,  
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,  
Ontario, Canada

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## ORDER MO-2872

Appeal MA12-544

The Corporation of the Township of Larder Lake

April 22, 2013

**Summary:** The appellant sought access to certain information pertaining to building permits. The township decided to deny access to the information claiming that the request was frivolous and vexatious. The adjudicator does not uphold the township's decision and orders it to provide a decision letter in response to the appellant's access request.

**Statutes Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 4(1)(b), 20.1(1); Regulation 823 to the *Act*, section 5.1.

**Orders Considered:** M-850, M-860, MO-1924.

### BACKGROUND:

[1] The Corporation of the Township of Larder Lake (the township) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

A copy of [two named individuals'] application for a building permit for [specified property]

A copy of the building permit issued [for] the [specified property] described above and who authorized and signed it

A copy of [a third named individual's] application for a building permit for [another specified property]

A copy of the building permit issued to [the above-stated third named individual] and who authorized and signed it

[2] The township identified responsive records, but denied access to the requested information on the basis that the request was "not only trivial but also vexatious in nature".

[3] The requester (now the appellant) appealed the township's decision.

[4] At mediation, the appellant advised that he was not seeking access to any personal information that may be contained in the records that are responsive to this request. The township maintained its position that the request was frivolous and vexatious.

[5] Mediation did not resolve the appeal and it was moved to the adjudication stage of the appeals process where an adjudicator conducts an inquiry under the *Act*.

[6] I commenced the inquiry by seeking representations from the township on the facts and issues set out in a Notice of Inquiry. The township advised that it would be relying on correspondence that it had previously sent to the mediator in support of its position that the request was frivolous and vexatious. I determined that it was not necessary to seek the representations of the appellant to dispose of this appeal.

## **RECORDS**

[7] The records that the township identified as responsive to the request consist of construction permits and related documentation.

## **DISCUSSION**

### **Frivolous and Vexatious Request**

[8] The township alleges in the letter it sent to the mediator that the appellant's four emails inquiring about building permit information, which predated the request at issue in this appeal, demonstrated "a more aggressive and threatening tone". The township submits that "the request was made only after he was denied a building permit", and that the request "was made for purposes other than to obtain information."

[9] 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.<sup>1</sup>

[10] Section 4(1)(b) of the *Act* 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.

[11] Section 20.1(1) of the *Act* states:

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.

[12] Similarly, sections 5.1(a) and (b) of Regulation 823 prescribe that:

A head ... shall conclude that the request for a record or personal information 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.

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<sup>1</sup> Order M-850.

[13] An institution has the burden of proof to substantiate its decision that a request is frivolous or vexatious.<sup>2</sup>

[14] 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.<sup>3</sup>

[15] As indicated above, section 5.1(a) of Regulation 823 provides that a request is frivolous or vexatious if, among other things, it is part of a "pattern of conduct that amounts to an abuse of the right of access." Previous orders of this office have explored the meaning of this phrase.

[16] In Order M-850, former Assistant Commissioner Tom Mitchinson commented on the meaning of "pattern of conduct". He stated:

[I]n my view, a "pattern of conduct" requires recurring incidents of related or similar requests on the part of the requester (or with which the requester is connected in some material way).

[17] Additionally, in establishing whether a "pattern of conduct" exists, the focus should be on the cumulative nature and effect of a requester's behaviour.

[18] 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".<sup>4</sup>

[19] The term "bad faith" has been defined in Order M-850 by former Assistant Commissioner Mitchinson 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 fulfill 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.

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<sup>2</sup> Order M-850.

<sup>3</sup> Order MO-1782.

<sup>4</sup> Order M-850.

***Pattern of conduct***

[20] As noted above, paragraph (a) of section 5.1 of Regulation 823 requires the head of an institution to conclude that a request is frivolous or vexatious if 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.

[21] As set out above, a "pattern of conduct" requires recurring incidents of related or similar requests on the part of the requester.<sup>5</sup> I have not been provided with any evidence of any related or similar access requests under the *Act* made by the appellant in this appeal. I find that the affected party has failed to establish 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 township."

***Bad faith***

[22] As noted above, paragraph (b) of section 5.1 of Regulation 823 requires the head of an institution to conclude that a request is frivolous or vexatious if 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.

[23] Applying the definition of bad faith referred to above, I find that there is insufficient evidence before me to support a finding of bad faith on the part of the appellant in this appeal. In my view, the township has somewhat exaggerated the tone of the emails. In my opinion, the evidence tendered in support of its assertion that the request was made in bad faith, is far from the kind of evidence required to establish this ground.

[24] In my view, the township has failed to meet the threshold of establishing on reasonable grounds, that the access request is made in bad faith.

***Purpose other than to obtain access***

[25] 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.<sup>6</sup> Previous orders have discussed whether requests made for a purpose other than to obtain access qualify as "frivolous or vexatious" within the meaning of section 5.1(b) of Regulation 823.

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<sup>5</sup> Order M-850

<sup>6</sup> Order M-850.

[26] In Order M-860, former Senior Adjudicator John Higgins noted:

... if the appellant's purpose in making requests under the *Act* is to obtain the information to assist him in subsequently filing a complaint against members of the Police, in my view this does not indicate that the request was for a purpose other than to obtain access; rather, the purpose would be to obtain access **and** use the information in connection with a complaint. [Emphasis in original]

[27] In Order MO-1924, former 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, former 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.

[28] I adopt the approach set out by former Senior Adjudicator Higgins for the purposes of this appeal. The request is for building permit information. It would appear from the evidence tendered by the township that the appellant is aggrieved about the

process and feels unfairly treated by the town with respect to a building permit that he sought, but was denied.

[29] I find that the township has not provided sufficient evidence to support a finding that the appellant's request was made for a purpose other than to obtain access. Although the appellant was not asked to submit any representations regarding his purpose for seeking access, in the circumstances before me, I am not satisfied that the appellant is making the request for a purpose other than to obtain access to the requested records.

[30] In my view, the township has failed to meet the threshold of establishing on reasonable grounds, that the access request is made for a purpose other than to obtain access.

### **CONCLUSION**

[31] The tests under 5.1 of Regulation 823 set a high threshold that, in my view, has not been met in the circumstances of this appeal. Based on this analysis, I find that the township has not established the requirements of either section 5.1(a) or (b) of the regulation and has not established reasonable grounds for finding that the request made by the appellant is frivolous or vexatious within the meaning of section 4(1)(b) of the *Act*. Therefore, I find that the township cannot rely on sections 5.1(a) or (b) of the regulation to decline to process the appellant's access request.

### **ORDER:**

1. I do not uphold the decision of the township.
2. I order the township to issue an access decision in response to the appellant's request, treating the date of this order as the date of the request and without recourse to a time extension, all in accordance with sections 19, 21 and 22 of the *Act*.
3. I further order the township provide me with a copy of the access decision issued to the appellant pursuant to Provision 2 of this order when the decision is issued.

Original Signed by: \_\_\_\_\_  
Steven Faughnan  
Adjudicator

\_\_\_\_\_ April 22, 2013