

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3049

Appeals MA13-256, MA13-257, MA13-293

Town of Espanola

May 16, 2014

Summary: The town received three requests for access to the town's cheque registry and credit card expenses covering three separate time periods. The town issued a decision advising that the requests were frivolous or vexatious pursuant to section 4(1)(b) of the *Municipal Freedom of Information and Protection of Privacy Act*. In this order, the adjudicator does not uphold the town's decisions and orders it to issue access decisions with respect to the responsive records.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 4(1)(b).

Orders and Investigation Reports Considered: Order MO-1924.

OVERVIEW:

[1] The Town of Espanola (the town or Espanola) received three requests under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*) for:

1. a copy of the town's cheque registry for the period of February 1st to the 28th, 2013.

2. a copy of the town's cheque registry for the period of March 1st to March 31st, 2013 and records of all town expenditures made by credit card for the month of March.
3. a copy of the town's cheque registry for the period of April 1st to May 31st, 2013, and records of all Town expenditures made by credit card for the months of April and May.

[2] The town issued decisions denying access to the responsive records, as it was the head's opinion that the requests were frivolous and vexatious pursuant to section 4(1) of the *Act*.

[3] The requester (now the appellant) appealed the town's decisions to deny access and appeal files MA13-256, MA13-257 and MA13-293 were opened.

[4] During mediation, the appellant explained that she belongs to a citizen's group formed with the purpose of attending town hall and council meetings and reporting to the public via its website and through a local newspaper as to what was discussed and/or decided. The appellant explained that the group does not form opinions when reporting on meetings, and focuses on stating the facts. The group also makes requests for information from the town and posts this information on its website and in the local newspaper.

[5] The town explained to the mediator that it had denied access to the records as the appellant has displayed a pattern of conduct that interferes with the operations of the institution and, in its view, has requested information for a purpose other than to obtain access. The town advised that it is very small and usually receives one or two formal access requests in a year. The town explained that by August 2013, the appellant and her group had made more than 10 requests in 2013. The town explained that it finds it onerous to process this number of requests.

[6] The town also expressed concern that the appellant and the group of which she is a part misrepresent the information they are given when reporting to the public, leading to incorrect information being disclosed to the citizens of the town.

[7] As no further mediation was possible, these files were transferred to the adjudication stage of the appeals process where an adjudicator conducts an inquiry. Representations were sought and exchanged between the parties in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction 7*.

[8] In this order, I do not uphold the town's decisions and order it to issue the appellant with decisions respecting access to any responsive records.

DISCUSSION:

Are the requests for access frivolous or vexatious?

[9] Section 4(1)(b) 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.

[10] 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.

[11] 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.¹

[12] An institution has the burden of proof to substantiate its decision to declare a request to be frivolous or vexatious.²

The Town's Representations

[13] The town provided detailed specific representations with supporting documentation to demonstrate that there has been a pattern of conduct that amounts

¹ Order M-850.

² Order M-850.

to an abuse of the right of access, which interferes with its operations, and that the requests have been made in bad faith and for a purpose other than to obtain access.

Pattern of conduct that amounts to an abuse of the right of access

[14] The town states that for the period 2004 to 2011, only two freedom of information requests were processed by it. In 2012, the town processed a total of 19 requests, and from January to September 2013, the town processed 13 requests. According to the town, all of these requests, except for one or two, were from the appellant or the group which she represents.

[15] The town's freedom of information coordinator (the foic) states that:

While the number of requests themselves has increased the workload, I would not consider them to significantly interfere with the operations of the institution; however the repercussions as a result of providing this information has contributed to even more informal requests and criticisms of both town staff and council, through social media and personal comments.

[16] The town states that there was a request from the appellant for the cheque registry for January 1, 2012 to October 31, 2012, which was provided, and that a summary of selected information was placed on her group's website. The town states that it has no objections to sharing the cheque registry, however, actions taken to summarize selected information without referencing the related budget document (a publicly available document) or other pertinent information, leads readers of this information to believe the amounts are unjustifiably high or inappropriate.

[17] The town also states that members of the group, which the appellant chairs, followed town employees and members of the volunteer fire department and kept notes of their whereabouts in order to cross reference these with Visa charges at a local restaurant on a specific date. More than one staff member have made comments that they feel harassed by members of this group.

[18] The town states that the appellant's group publishes misleading information on its website for the sole purpose of leading website readers to unfounded conclusions about the town's spending.

Bad Faith

[19] The town states that the appellant, or members of her group, have made phone calls or otherwise contacted various town contractors and the Ontario Fire Marshall's office questioning information that group members have received from the town. The town states that the nature of these calls was indicative of bad faith.

[20] The town states that the appellant and her group's actions have significantly impacted municipal operations through the time required to respond to formal and informal inquiries, the poor morale it has contributed to and the overall animosity growing among the community through both word of mouth and social media sites.

The Appellant's Representations

[21] The appellant lists herself as the chairperson of the group in her representations. The appellant states that her group's intent has been to keep the residents of Espanola apprised of the governance of their community. The group attends council meetings, and presentations, examine meeting agendas, file freedom of information requests when necessary, and present this public information in an objective and factual manner via the group's website and articles.

[22] The appellant admits that there have been incidents when the group's executive fact-checks statements, but not in a malicious fashion.

[23] The appellant states that the first item on the present town Council's first agenda was to unanimously remove the cheque registry from the agenda, which negated many years of past practice; no questions were asked by any councilor; no discussion took place; and no reasons were given.

[24] The appellant states that town residents find it extremely difficult to obtain access to public information relating to the town's governance unless it is via the freedom of information process. The cost for this research is \$7.50/15 minutes plus \$0.20/copy per page, in accordance with the fees prescribed by the *Act* and regulations. Acquiring this material often takes in excess of 30 days and in several instances an appeal to the IPC had to be made before information was forthcoming. The appellant states that this pattern is not unique to the freedom of information process and that for example, it is often the case that:

- Letters and emails go unanswered.
- Special "in camera" meetings are held on a regular basis (25 in 22 months).
- Departmental reports have omitted several large purchases which were only accessed through freedom of information requests.
- Espanola is in a dire financial predicament yet residents are not being adequately apprised of decisions made on their behalf.

[25] The appellant states that in 2012, her group members only filed 13 of the 19 requests and in 2013, it only filed seven of the 13 requests. The appellant says the town has considered a non-group member's requests as part of her group's requests.

[26] The appellant disputes the other allegations by the town, including the allegation that her group's members contacted contractors or are following staff and volunteer firefighters and taking notes. In an email to this office, the appellant added that if this has happened, then it was done without the knowledge or the encouragement of her group's executive.

[27] The appellant refers to statistics from the group's webpage that represent a monthly look at town departmental spending. She states that since this information is public, and no opinions are offered, there should be no reason not to obtain it and to post it on the group's website for interested residents.

[28] The appellant states that her group made a written request to have a five minute Question & Answer period following regular council meetings, which was refused. They then made the decision to verify two statements made during council meetings which they felt may be incorrect and that this was not done to contradict town councilors.

[29] The appellant also states that she contacted Ontario Fire Marshall's office to ascertain whether the town had a Mutual Aid Agreement with Sudbury and that at no time did she lead him to believe that she worked for the town. She denies that any of her group members contacted town contractors.

[30] The appellant states that her group does not publish misleading information on its website. When it found out about this allegation, the group filed a freedom of information request to obtain these inaccuracies and found out that the majority of these assertions seem to be opinions or are not correct.

The Town's Reply Representations

[31] In reply, the town disputes the appellant's allegations and responded to all of the individual items listed in the appellant's representations. It also indicated that it had stopped making public the cheque registry, the record requested by the appellant, in order to avoid disclosure of third party or personal information.

[32] The town states that due to the small size of the municipality, it does not have a sufficient budget to employ a full-time freedom of information coordinator, but these tasks have been combined with the current Clerk-Treasurer/Administrator function. The freedom of information coordinator often finds it difficult to accumulate information and respond to requests within the 30 day limit but always responds to these requests.

[33] With respect to the actual number of requests, the town states that:

...it's really splitting hairs as to the number of requests received from either the executive or members of the group. Regardless of who obtains the information, the information is shared in what the municipality feels is an inappropriate manner.

[34] Concerning the volume of requests generated by the appellant and her group, the town states that:

The performance measures for *MFIPPA* requests for single-tier and upper-tier municipalities were recently released. The median figures for 2012 were 72.22 and 10.43 respectively per 100,000 population. Espanola has a population base of 5,364, interestingly enough if you multiply either number 13 or 19 by an equivalent factor ($100,000/5,364$), you would have approximately 242 or 354 requests for a similar population.

[35] Concerning specific requests, the town provided details of requests that resulted in misinformation being posted on the group's website. It states that:

... if the [group] is confused with the information then they should be addressing the [town] not an individual councilor who failed to respond. They then present this information to the public as fact? ...The process of responding to resident concerns, is that council will bring the issue to administration, who will then provide the answers, answers are sometimes verbal and sometimes in the form of a written letter. There was no correspondence from the [the group] prior to this public presentation.

[36] The town repeats that it would not object if the information was being published as provided to the group. However, it states that by summarizing selected information the group is attempting to direct the opinion of readers to support the group's opinions as to the town's spending.

[37] The town also states that many of the cost-saving suggestions put forward by the group to council were, in fact, personal attacks on staff and mean-spirited.

[38] The town states that its governance model includes an elected council whose purpose is to provide responsible and accountable government. This model includes open public meetings, the disclosure of full agenda items, quarterly financial reports, annual audited financial statements and compliance with various laws and regulations in the Province of Ontario.

[39] In summary, the town states that it does not object to providing the information requested by the appellant and her group, its objection is that this information is being

used for no other reason than to manipulate town residents to believe that the elected council and the organization as a whole are in some way misappropriating tax dollars, which is not true. The town states that the amount of time it takes to respond to the appellant and her group's requests is insignificant in comparison to the amount of time spent responding to inquiries which result from the group's distribution of selected information, thereby interfering with the operations of the institution.

[40] I obtained further representations from both parties. Essentially these submissions repeated previous representations made by the parties.

Analysis/Findings

[41] In this order, I need to determine whether the appellant's requests are frivolous or vexatious. In making this determination, I need to consider whether there are reasonable grounds to conclude that the request is:

- part of a pattern of conduct that amounts to an abuse of the right of access,
- part of a pattern of conduct that would interfere with the operations of the institution,
- made in bad faith, or
- made for a purpose other than to obtain access.

[42] If I find that the appellant's requests are frivolous or vexatious, I will uphold the town's decision. In addition, I may impose conditions such as limiting the number of active requests and appeals the appellant may have in relation to the particular institution.³

Pattern of conduct that amounts to an abuse of the right of access

[43] 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.⁴ In this appeal, I have no evidence of misconduct of the town in responding to the appellant's requests.

[44] 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.⁵

³ Order MO-1782.

⁴ Order MO-1782.

⁵ Order MO-1782.

[45] The focus should be on the cumulative nature and effect of a requester's behaviour. In many cases, ascertaining a requester's purpose requires the drawing of inferences from his or her behaviour because a requester seldom admits to a purpose other than access.⁶

[46] I will now deal with the following factors that may be relevant in determining whether a pattern of conduct of the appellant amounts to an "abuse of the right of access":

Number of requests

[47] The town has not indicated in its representations the number of requests that the appellant has made herself. I only have evidence of the three requests at issue in this appeal. I find that the number of requests made by the appellant is not a relevant factor in my determination. The town also appears to be stating in its representations that the number of requests made by the appellant's group is not a problem, but that the manner in which the appellant and her group disseminate the information they receive from the town is problematic.

Nature and scope of the requests

[48] The town has not provided evidence that the appellant's requests are excessively broad and varied in scope, unusually detailed, or that her requests are identical to or similar to previous requests. I find that the nature and the scope of the requests made by the appellant are not relevant factors in my determination.

Purpose of the requests

[49] The town's representations focus on its position that the appellant has filed requests for the sole purpose of leading the group's website readers to reach unfounded conclusions about the town's spending. The appellant disputes this and states that the information gleaned from the requests is published in an objective and factual manner.

[50] Based on my review of the parties' representations, I find that the appellant's requests are intended primarily to obtain access to the town's cheque registry, which was information the town in the past had made public. Nevertheless, I agree with the town that the appellant and her group's requests may result in harassment of the town's staff because of the manner in which the readers of the group's website respond to the information published by the group.

⁶ Order MO-1782.

Timing of the requests

[51] I have no evidence that the timing of the appellant's requests is connected to the occurrence of some other related event.⁷

[52] Overall, I find that there are not reasonable grounds to conclude that the appellant's requests are part of a pattern of conduct that amounts to an abuse of the right of access.

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

[53] 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.⁸

[54] Interference is a relative concept that must be judged on the basis of the circumstances a particular institution faces. For example, it may take less of a pattern of conduct to interfere with the operations of a small municipality than with the operations of a large provincial government ministry, and the evidentiary onus on the institution would vary accordingly.⁹

[55] Espanola is a small municipality. The appellant and her group's actions have significantly impacted municipal operations through the time required to respond to formal and informal inquiries resulting from the appellant and her group's use of the information it has received from the town.

[56] I agree with the town that the appellant requests are part of a pattern of conduct that interferes with the operations of the town.¹⁰

Bad faith

[57] Where a request is made in bad faith, the institution need not demonstrate a "pattern of conduct".¹¹

[58] "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

⁷ Orders M-618, M-850 and MO-1782.

⁸ Order M-850.

⁹ Order M-850.

¹⁰ Order M-850.

¹¹ Order M-850.

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.¹²

[59] Although there is animosity between the town and the appellant and her group, I find that there is not sufficient evidence to determine that there exists a conscious doing of a wrong because of dishonest purpose or moral obliquity. Accordingly, I determine that there are not reasonable grounds to conclude that the requests were made in bad faith for the purposes of section 4(1)(b).

Purpose other than to obtain access

[60] 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.¹³

[61] Previous orders have found that an intention by the requester 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".¹⁴

[62] In order to qualify as a "purpose other than to obtain access", the requester would need to have an improper objective above and beyond a collateral intention to use the information in some legitimate manner.¹⁵

[63] Where a request is made for a purpose other than to obtain access, the institution need not demonstrate a "pattern of conduct".¹⁶

[64] In Order MO-1924,¹⁷ 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 John 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

¹² Order M-850.

¹³ Order M-850.

¹⁴ Orders MO-1168-I and MO-2390.

¹⁵ Order MO-1924.

¹⁶ Order M-850.

¹⁷ See also Orders MO-2326, PO-2761, PO-3121 and PO-3325.

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. ...[R]equesters may also seek information to assist them in a dispute with the institution, or to publicize what they consider to be inappropriate or problematic decision 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. [Emphasis added].

[65] I adopt the approach set out by former Senior Adjudicator Higgins in Order MO-1924 for the purposes of this appeal. I find that the town has not provided sufficient evidence to support a finding that the appellant’s requests were made for a purpose other than to obtain access.

[66] I also find that the appellant and her group genuinely seek access to the records at issue in this appeal. I acknowledge that there is animosity between the appellant’s group and the town, in that the group has previously publicly disclosed information that the town believes paints it in a negative, and sometimes inaccurate, light and as such causes other individuals to seek clarification from the town or its councilors.

[67] Should the appellant be granted access to some or all of the responsive records, the group may publicly disclose some, but not all, of the information that they contain. However, as noted above, in Order MO-1924, former Senior Adjudicator Higgins stated that “requesters...may seek information ... to publicize what they consider to be inappropriate or problematic decision or processes undertaken by institutions.”

[68] Therefore, I find that regardless of what the appellant chooses to do with the information that she seeks, it is clear that her purpose for making the requests is genuine and that the appellant legitimately seeks access to the responsive records. As a result, I find that the town has failed to establish that the request was made by the appellant for a purpose other than to obtain access as contemplated in section 5.1(b) of Regulation 823.

Conclusion

[69] From my review of the parties’ representations, it is clear to me that the town is primarily concerned about the appellant and her group’s actions in making requests for

records and posting select information from the town's records on their website. This has caused the town to spend significant time responding to inquiries.

[70] The appellant is the chairperson of the group. She made the requests at issue in these three appeals in her own name, not on behalf of the group.

[71] Requests could be made by any other individual member of the group. As the requests at issue were made in the appellant's personal capacity, I am only able to make an order against the appellant, not the group, which did not make the request. Other than the appellant, the individual members of this group are not parties to this appeal.

[72] Overall, I find that the appellant's requests at issue in this appeal are not frivolous or vexatious as contemplated by section 4(1)(b) of the *Act*. Accordingly, I will order the town to provide the appellant with a decision letter in response to her requests.

[73] However, I recognize that the situation between the town, the appellant and her group has resulted in much time and resources being wasted by the town in dealing with issues peripheral to the actual requests made by the appellant and her group. It would be more effective and beneficial to the town, the appellant and her group if they worked co-operatively to allow the town's freedom of information system to run efficiently.

[74] Some suggestions for making this system more effective and for reducing unnecessary waste of town resources are the following:

- The town could publish its responses to freedom of information requests on its own website, particularly, information it had published before, such as the cheque registry (less any personal or third party information).
- The town could be more proactive in releasing information. As such, the town should take note of the Commissioner's publication of *Access by Design (AbD)*, which consists of fundamental principles that encourage public institutions to take a proactive approach to releasing information, making the disclosure of government-held information an automatic process where possible - access as the default.¹⁸
- The town, where appropriate, could seek an extension of time to respond to a request in accordance with section 20(1) of the *Act*, which reads:

¹⁸ http://www.ipc.on.ca/images/Resources/accessbydesign_7fundamentalprinciples.pdf

A head may extend the time limit set out in section 19 for a period of time that is reasonable in the circumstances, if,

(a) the request is for a large number of records or necessitates a search through a large number of records and meeting the time limit would unreasonably interfere with the operations of the institution; or

(b) consultations with a person outside the institution are necessary to comply with the request and cannot reasonably be completed within the time limit.

- The town could utilize the fee provisions set out in section 45(1) of the *Act* in processing requests. If the fee is of concern, the appellant and those in her group should work constructively with the town to narrow the scope of the request. The appellant and her group should also consider whether they are able to advance a compromise solution which would reduce costs, both prior to and also after making their request.¹⁹
- If the town refuses to give access to a record or part of a record because the head is of the opinion that the request for access is frivolous or vexatious, then in its decision letter, the town should provide the reasons for this determination as required by section 20.1(1)(b) of the *Act*. In the appeals in this order, the town did not do so. As such, the appellant was not directly informed by the town as to the reasons for its decision and was not provided with an opportunity to resolve the town's concerns directly.
- If the town is of the opinion that the group's website, or any other website or publication, has published false information, then appropriate legal action could be taken by the town in response.
- If the appellant and her group want to benefit the town and its residents, then they should disseminate, and respond to, the information they receive from the town in a fulsome manner that encourages an environment of transparency and accountability, not in a selective manner that is distrustful and causes needless waste of town resources responding to queries about incomplete or inaccurate information.

¹⁹ Orders M-166, M-408 and PO-1953-F.

ORDER:

1. I order the town to provide the appellant with a decision letter in response to her three requests for access, in accordance with the provisions of the *Act*, treating the date of this order as the date of her requests.
2. In order to verify compliance with provision 1 of this order, I reserve the right to require the town to provide me with a copy of the decision letter provided to the appellant.

Original Signed By: _____
Diane Smith
Adjudicator

_____ May 16, 2014