

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-3131

Appeal MA14-30

Niagara District Airport Commission

November 27, 2014

**Summary:** The commission received a request under the *Act* for access to information relating to the appellant for the period of 1990 to present. The commission denied access to any responsive records on the basis that the request was frivolous and vexatious within the meaning of section 4(1) of the *Act*. The appellant appealed this decision. In this order, the commission's decision is not upheld and it is ordered to issue a decision to the appellant respecting access to any 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) and section 5.1 of Regulation 823 under the *Act*.

**Orders and Investigation Reports Considered:** Orders M-850, MO-1782, MO-3065 and MO-3073.

### OVERVIEW:

[1] The Niagara District Airport Commission (the commission) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to general records and personal information relating to the requester for the period 1990 to present. In his request, the requester advised that responsive records should include, but are not necessarily limited to, the following:

1. All records that have been directly or indirectly referred to in correspondence from [named commission chair] to [the requester] or the Office of the Information and Privacy Commissioner of Ontario relating to [the requester] or on behalf of any corporation to be formed by [the requester].
2. All records that have been directly or indirectly referred to in records that are referred to in paragraph [1].
3. This request also includes communications between the Niagara District Airport Commission and any third parties that relate to [the requester] or on behalf of any corporation to be formed by [the requester].
4. Records to include; but are not limited to, hand written notes, correspondence, reports, electronic files, emails, voicemail messages, handwritten notes, telephone logs or any record of any type that refers to [the requester] or on behalf of any corporation to be formed by [the requester]. [Emphasis in original].

[2] The commission issued a decision to the requester, denying him access to the requested records "on the basis that it is a futile request, as well as frivolous and vexatious, and made in bad faith". In its decision, the commission advised the requester that it found his new request to be "substantially the same as the request" which gave rise to Appeal MA13-136, which was resolved by this office issuing Order MO-3065.

[3] Additionally, the commission stated that the current request suggests that the requester is using the FOI process for the purpose of revisiting issues that were already being considered by the IPC. The commission also advised the requester that it was of the opinion that the request would interfere with the operations of the commission and potentially impact public safety. In addition, the commission told the requester that it is "of the opinion on reasonable grounds that this request is made in bad faith or for a purpose other than to obtain access". The commission also noted that the requester appears to realize, having noted the current status of its administrative staff, that his requests cause significant strain on the commission's administrative resources. The commission advised the requester that it believed his request was made to harass, disrupt, impair and burden or break the ability of the commission to operate in a safe and effective manner.

[4] The requester, now the appellant, appealed the commission's decision. The appellant is of the view that his request is not frivolous or vexatious.

[5] Mediation could not resolve the appeal and it was transferred to the adjudication stage of the appeals process where an adjudicator conducts an inquiry under the *Act*. I began my inquiry by inviting the commission to make representations in response to the issues raised in a Notice of Inquiry. The commission submitted representations. I then invited the appellant to make representations in response to the Notice of Inquiry and the commission's arguments, which were shared in accordance with section 7 of this office's *Code of Procedure and Practice Direction 7*. The appellant also submitted representations.

[6] In this decision, I do not uphold the commission's decision that the appellant's request is frivolous and vexatious. I order the commission to issue an access decision to the appellant.

## **DISCUSSION:**

[7] The sole issue to be determined in this appeal is whether the request is frivolous or vexatious under section 4(1)(b), which 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.

[8] 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.

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

[10] On appeal to this office, the burden of proof rests on the institution to substantiate its decision to declare a request to be frivolous or vexatious.<sup>2</sup>

### **Grounds for a frivolous or vexatious claim**

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

[11] 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:* is the number excessive by reasonable standards?
- *Nature and scope of the requests:* are they excessively broad and varied in scope or unusually detailed? Are they identical to or similar to previous requests?
- *Purpose of the requests:* are the requests intended to accomplish some objective other than to gain access? For example, are they made for "nuisance" value, or is the requester's aim to harass government or to break or burden the system?
- *Timing of the requests:* is the timing of the requests connected to the occurrence of some other related event, such as court proceedings?<sup>3</sup>

[12] The institution's conduct may also 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.<sup>4</sup>

[13] 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.<sup>5</sup>

[14] 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

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

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

<sup>3</sup> Orders M-618, M-850 and MO-1782.

<sup>4</sup> Order MO-1782.

<sup>5</sup> *Ibid.*

inferences from his or her behaviour because a requester seldom admits to a purpose other than access.<sup>6</sup>

[15] In its representations, the commission submits that there are reasonable grounds to believe that the request meets the grounds for finding the request to be frivolous or vexatious. The commission submits that the appellant's requests have been excessively broad and varied in scope, and identical or similar to the previous requests he filed that were resolved by this office through the issuance of Orders MO-3065 and Order MO-3073. The commission states that the request covers a period of 24 years, from 1990 to present. The commission states that, in this period, several airport managers have come and gone, as have numerous institutional heads. The commission states that there are currently no employees at the commission or the airport who were involved in or would recall the litigation relating to the appellant which dated back to the 1990's.

[16] In addition, the commission submits that the appellant is aware that his request would cause significant strain on the airport's administrative resources. The commission states that the appellant has noted that the airport's limited number of administrative staff. As such, the commission submits that it is reasonable to believe that the purpose for this request was to harass the volunteer-staff commission and its sole administrative staff member and unreasonably burden it. The commission submits that the appellant must realize that the cumulative nature and effect of his behaviour is to cause a significant strain on its administrative resources.

[17] With regard to the timing of the request, the commission submits that the current request was submitted while an earlier and similar request was already before the IPC, which resulted in Order MO-3065.

[18] In his response, the appellant states that this appeal relates to the third of three FOI requests that he made. The appellant submits that a total of three requests for information relating to three separate matters is not excessive, as he was not aware of the existence of a majority of the records prior to the commission's acknowledgement during the inquiry of his two other appeals.

[19] With regard to the scope of the request, the appellant states that the commission did not make any requests for clarification upon receipt of his request. The appellant submits that the commission should not be permitted to claim that his use of the phrase "include, but not limited to" is excessively broad and varied in scope now. The appellant also submits that it is "nonsensical and contradictory" for the commission to claim that he has requested the same or similar records to those requested in his other appeals.

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<sup>6</sup> *Ibid.*

[20] The appellant also takes issue with the commission's claims regarding its staff and resources. The appellant claims that the commission replaced its single administrative employee with another individual and decided to contract out other functions. Further, the appellant submits that the commission's claim that it is volunteer staffed is misleading as many members are paid municipal councillors.

[21] With regard to the timing of the request, the appellant submits that there are no related events, such as court proceedings, currently taking place between him and the commission.

[22] Based on my review of the parties' representations, I find that the commission has not provided me with sufficient evidence to support a finding that the appellant's pattern of conduct "amounts to an abuse of the right of access." To date, it appears that the appellant has submitted a total of three requests with the commission. Although I agree that the request at issue in this appeal is broad in scope in that the appellant appears to seek all records relating to him or any corporation formed by him, I find that three requests is not excessive in number by reasonable standards.

[23] In addition, I find that the request is not excessively broad and varied in scope or unusually detailed, nor is it identical to the previous requests that were the subject of Orders MO-3065 and MO-3073. In the request at issue in this appeal, the appellant seeks all records relating to himself and/or any corporation formed or to be formed by him. The requests at issue in Orders MO-3065 and MO-3073 related to two specified decisions made by the commission relating to the appellant and/or any corporation formed by him. While there may be a large number of records responsive to the current request in the commission's custody or control, I do not find that his request is excessively broad. Further, while there may be some overlap in the records responsive to this request and the appellant's previous two requests, I do not find that the requests are identical. Finally, with regard to the timing of the requests, I find that there is no evidence before me of any other related event of a concrete nature, such as court proceedings which may have some bearing on my decision.

[24] While it is apparent from its submissions that the commission is frustrated with the appellant's requests for information, I find that this does not constitute a pattern of conduct that amounts to an abuse of the right of access. In its representations, the commission described the effect the request will have on its resources, but it has not provided me with sufficient evidence to demonstrate that the purpose of the appellant's request is to burden its system or to harass the commission. In the absence of detailed evidence describing the nature of the appellant's actions, I find that these actions do not amount to an abuse of the right of access under the frivolous and vexatious provisions in the *Act*.

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

[25] 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.<sup>7</sup> 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.<sup>8</sup>

[26] The commission submits that there are reasonable grounds to establish that the appellant has exhibited a pattern of conduct that would interfere with the operations of the institution. The commission submits that a search for records responsive to the “excessively broad and varied [request] would, given its paucity of administrative personnel which the appellant himself pointed out, require a suspension of the performance of other duties.” The commission states that its sole administrative employee is mandated, under the airport’s *Safety Management System*, for overseeing and performing a number of operations to ensure the safe operation of the airport. Requiring that employee to neglect his regular duties to search for records responsive to the appellant’s broad request would negatively impact the safe operation of the airport and the ability of the airport to meet the strict licensing requirements under which it is permitted to operate. Further, the commission submits that the search would prevent the sole administrative employee from liaising with external entities on behalf of the volunteer commission and this would undermine the commission’s ability to perform its mandate in full.

[27] In response, the appellant submits that the staffing levels at the airport are at the sole discretion of the commission. The appellant also submits that the commission has informed Transport Canada that airport safety is not currently at risk.

[28] Upon review of the evidence before me, I find that that the commission has not provided me with sufficient evidence of the appellant’s activities to support a finding that his conduct would interfere with the operations of the institution. I recognize that the commission employs a single staff member and that the appellant’s request for information may be an intrusion into the commission’s daily responsibilities. However, I find that this does not establish a pattern of conduct that would interfere with the commission’s operation and its mandate.

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<sup>7</sup> Order M-850.

<sup>8</sup> Order M-850.

***Bad faith or for a purpose other than to obtain access***

[29] Where a request is made in bad faith, the institution need not demonstrate a "pattern of conduct".<sup>9</sup> "Bad faith" has been defined as:

The opposite of "good faith", generally implying or involving actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfil some duty or other contractual obligation, not prompted by an honest mistake as to one's rights, but by some interested or sinister motive... "bad faith" is not simply bad judgment 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.

[30] Similarly, 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>10</sup> 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"<sup>11</sup>. In order to qualify as a "purpose other than to obtain access", the request would need to have an improper objective above and beyond a collateral intention to use the information in some legitimate manner.<sup>12</sup>

[31] In its representations, the commission submits that there are reasonable grounds to believe that the request meets the grounds for being made in bad faith as the appellant is aware of the institution's lack of administrative resources. The commission also notes that as a licenced pilot, the appellant should be aware that his broad request would cause significant strain on the commission's "very thin" administrative resources. Given this awareness, the commission submits that it is not unreasonable for it to believe that the appellant's purpose in submitting the request is to harass the volunteer commission and sole administrative staff member and to burden the system. Finally, the commission submits that, for similar reasons, there are reasonable grounds to believe that the request meets the grounds for being made for a purpose other than to obtain access.

[32] The appellant submits that there are no reasonable grounds to suggest that he made his request in bad faith or for an improper purpose.

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<sup>9</sup> Order M-850.

<sup>10</sup> Order M-850.

<sup>11</sup> Orders MO-1168-I and MO-2390.

<sup>12</sup> Order MO-1924.



[33] Based on my review of the parties' representations, I find that the commission has not provided me with sufficient evidence to demonstrate that the appellant made his request in bad faith or for a purpose other than to obtain access. I appreciate the commission has limited administrative resources and that the search in response to the appellant's request would cause some strain to it and its staff. In addition, I accept that the appellant is likely aware that the commission may not have extensive administrative resources. However, I do not accept the commission's position that the appellant made this request in bad faith or that his motives for seeking access to the responsive records is in some way improper or for a purpose other than to obtain access. Although the commission has demonstrated that the search will strain its resources, it has not demonstrated to my satisfaction that the appellant's request was motivated by bad faith or a desire to burden the commission.

[34] In conclusion, I find that the commission has not established that the request is frivolous or vexatious within the meaning of the *Act* and I will order it to issue a decision letter respecting access to any responsive records.

**ORDER:**

1. I do not uphold the commission's decision that the request is frivolous or vexatious under the *Act*.
2. I order the commission to issue a decision to the appellant respecting access to the responsive records, treating the date of this order as the date of the request, and without recourse to a time extension under section 20 of the *Act*.

Original Signed By:  
Justine Wai  
Adjudicator

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November 27, 2014