Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3154

Appeals MA13-588, MA14-16, MA14-235

Municipality of South Huron

January 27, 2015

Summary: The municipality received three separate requests for access to information related to its development and planning processes. The municipality denied access to the records, taking the position that the requests are frivolous and vexatious, within the meaning of section 4(1) of the *Municipal Freedom of Information and Protection of Privacy Act*. In this order, the adjudicator upholds the municipality's decisions. The requests were found to be frivolous or vexatious on the basis that they formed a pattern of conduct that constituted an abuse of the right of access and interfered with the operations of the municipality. As a result of this decision, the adjudicator provides conditions on processing any requests from the appellant with respect to the municipality now and for a specified time in the future.

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

Orders and Investigation Reports Considered: Order M-850.

OVERVIEW:

[1] Between November 2012 and February 2014, the appellant in these appeals made six access requests under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Municipality of South Huron (the municipality). The municipality provided access decisions on the first three requests, all of which resulted in appeals to this office. The three appeals addressed in this order arose from the last

three requests made by the requestor. In these requests, the appellant seeks access to the following:

1. Copy of all yearly submissions to Information and Privacy Commission/Ontario from 1999 – [October 21, 2013].

   All records related to Exeter Community Development Fund [the Fund] from its inception to [October 21, 2013] (Fund developed with regards to sale of Exeter P.U.C.)

2. All records related to Concession 2, Part lot 18, Stephen Ward, Municipality of South Huron, from the year 2000 to [November 26, 2013].

3. All records regarding zoning changes, plan amendments, permits, property standards and MPAC for the following properties [-] all Lot 5 Lake road concession east in the former township of Stephen as well as 110 Main St. North in the Exeter Ward for the period of 2005 to [February 10, 2014].

[2] The appellant clarified the third request in two follow-up emails.

The first email read, in part:

> The request I am making is broad in scope, I am requesting all the items listed in the request. To clarify Lot 5 consists of a Hydro station, a contractors shop (70964 Bluewater Hwy) and a lumber yard (70948 Bluewater highway) fronting on Lake Road. My request is not however limited to these individual properties, but the entire lot.

The second email added the following information:

> To clarify and simplify I will only require requested information on 70964 Bluewater Hwy for the period +-2011-to-date. Unless there has been information that the municipality has failed to provide in a subsequent request. Other portion of request remains the same as described in previous email.

[3] The requests were submitted on October 21, 2013, November 26, 2013 and February 10, 2014, respectively. In each case, the municipality denied access to the requested records, taking the position that the requests were frivolous and vexatious pursuant to section 4(1)(b) of the *Act*.

[4] The appellant appealed the municipality's decisions to deny access and appeal files MA13-588, MA14-16 and MA14-235 were opened.

[5] As mediation did not resolve the appeals, the files were transferred to the adjudication stage of the appeals process where an adjudicator conducts an inquiry. I sought written representations from both parties for appeals MA13-588 and MA14-16, jointly, and separately for appeal MA14-235. The parties' written representations were exchanged in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction 7*.

[6] As the three appeals relate to the same appellant and the same institution, and arise out of the same factual background, I have decided to dispose of them in a single order.

[7] For the reasons that follow, I uphold the municipality's decisions that the requests at issue in the three appeals are frivolous or vexatious. As a result of this decision, I have set out a remedy that will enable the appellant to continue to pursue information using the *Act*, while encouraging requests that are narrower in scope and ensuring the municipality is not overburdened by the FOI process.

ISSUE:

[8] The sole issue for determination in these appeals is whether the requests are frivolous or vexatious.

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 municipality's representations

[13] The municipality provided detailed representations with supporting documentation to support its claim that there has been a pattern of conduct that amounts to an abuse of the right of access and interferes with its operations, and that the requests have been made for a purpose other than to obtain access.

[14] The municipality states that in the years prior to 2012, it received zero, one or two requests in a full year period, while between November 2012 and February 2014, it received six requests from the appellant alone. The last three requests, from October 2013, November 2013 and February 2014, are at issue in this appeal.

[15] The municipality states that each of the requests is unreasonably broad in nature, open-ended and tremendous in scope, and involves many files with up to thousands of documents. The municipality notes that the requests often span a time frame of over a decade, and that they refer to matters or properties that do not involve or belong to the appellant. The municipality indicates it felt it impossible to respond to the appellant's requests in a manner that the appellant would consider complete and thorough.

[16] The municipality submits that the freedom of information requests received from the appellant are excessive for a municipality of its size (it has approximately 10,000 residents and a staff of 50), especially when all six have proceeded to mediation and adjudication at the IPC. The municipality refers to Order M-850, in which Former Assistant Commissioner Tom Mitchinson noted that, "it may take less of a pattern of

[1] Order M-850.
[2] Order M-850.

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."

[17] The municipality submits that the work involved in processing the requests and appeals, as well as the time required to manage the associated phone calls and emails, has significantly interfered with its operations. Moreover, the municipality states that the constant submissions and continued pattern of emails and phone calls to staff constitute a pattern of conduct intended to create a nuisance and overburden and frustrate its operations.

[18] In addition to intentionally interfering with its operations, the municipality states that the appellant is seeking information to assist him in furthering a dispute he has with the municipality regarding the enforcement of property standards bylaws.

[19] The municipality provided a number of documents to support its submission that the appellant's requests were made in bad faith. These documents included copies of newspaper clippings from the local media in 2005-2006, showing an advertisement for a comedy play about building in the municipality (which was presented at the appellant's house); a letter to the editor and article written by the appellant; a 2011 court order to demolish a building belonging to the appellant; and a letter sent by a municipal solicitor in 2007 requesting the appellant to refrain from contacting municipal employees outside of regular work hours.

The appellant's representations

[20] The appellant disputes the municipality's assertion that his requests amount to harassment and an inequitable use of municipal services. He states that the municipality made no attempt to comply with his last two requests, and that he does not believe it will release many of the relevant documents unless it is ordered to do so. The appellant also states that his emails and phones calls to the municipality regarding the six requests are a normal part of the freedom of information process; they are not intended to harass municipal employees, but rather are intended to help clarify what information is being requested.

[21] The appellant states that he has to make freedom of information requests because the municipality has removed certain information from its website. Moreover, he submits that his requests are necessarily broad due to the lack of information that is publicly available to him. He indicates that he has asked to be provided with council meeting minutes so that he could narrow the scope of his requests and reduce the municipal burden, but that this request has not been fulfilled.

[22] Regarding the number of requests, the appellant states that six requests over a period of 16 months is not excessive. He also states that he believes the municipality is

using an alternate method for responding to other information requests, rather than the legislated freedom of information process, and this explains why the municipality claims to have received zero, one or two requests prior to 2012.

[23] The appellant states that the time it takes to process the appeals is likely equal to or greater than the time it would have taken the municipality to respond to his requests.

[24] The appellant disputes the municipality's assertion that his requests are made with the intention of frustrating its operations. He admits that he is in the process of writing a book describing the municipality's development and planning processes and states that the requests are a part of the research he is doing for that project.

[25] Regarding the three information requests at issue in this appeal, the appellant states that the October 2013 request was made because he does not believe that the Fund in question has sufficient oversight, and he wants to ensure that the funds are being used for the purpose intended. He submits that this information should be available through minutes of council meetings and information filings presented to councillors, and that because minutes used to be available on the municipality's website, it is reasonable to assume the information is still available in a searchable digital format.

[26] With respect to the November 2013 and February 2014 requests, the appellant submits that they were made to clarify any irregularities in the manner in which the municipality deals with businesses and to gain a better understanding of the policies and procedures used by the municipality, respectively.

[27] The appellant asserts that the allegations in the municipal solicitor's letter are unsubstantiated, and that requesting that he not contact municipal employees (many of whom are his friends and acquaintances) outside of working hours is an unreasonable demand.

[28] The appellant states that everyone has the right to comment on the activities of all levels of government and that the use of the newspaper clippings as evidence of bad faith is itself frivolous and vexatious. Regarding the meetings that were held at his home, he is proud of the public interest they generated in the workings of their local government. He submits that all of his statements were supported by facts.

[29] The appellant submits that many of his information requests predate the 2011 the court order included in the municipality's submissions. As evidence of this, he provides examples of requests he submitted to the municipality via email dating back to 2005.

The municipality's reply

[30] In reply, the municipality disputes the appellant's representations. It states that his representations are not based in fact and that the unfounded and defamatory statements included in the appellant's representations further substantiate its original arguments regarding a pattern of conduct and bad faith.

Analysis and findings

Section 5.1(a) - Pattern of conduct that amounts to an abuse of the right of access

[31] Previous orders of this office have found that in order to meet this criterion, the institution must demonstrate that the appellant has made recurring requests of a related or similar nature or that requests have been made of this nature that the requester is connected with in some material way.[3] In determining whether or not the "pattern of conduct" exists, the focus should be on the cumulative nature and effect of a requester's behaviour.[4]

[32] The determination of what constitutes "an abuse of the right of access" has been informed by the jurisprudence of this office and the case law dealing with that term. In the context of the *Act*, it has been associated with a high volume of requests, taken together with other factors. Generally, the following factors have been considered as relevant in determining whether a pattern of conduct amounts to an "abuse of the right of access":

- *The number of requests*

  Is the number excessive by reasonable standards?

- *The 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?

- *The timing of the requests*

  Is the timing of the requests connected to the occurrence of some other related event, such as court proceedings?

[3] Order M-850.
[4] Order MO-2390.

- *The 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? [5]

[33] It has also been recognized that 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.[6]

[34] I will consider whether the facts relevant to these appeals support a conclusion that the appellant has engaged in a pattern of conduct that amounts to an abuse of the right of access.

Pattern of conduct

[35] Previous orders cited above make it clear that an institution must demonstrate recurring incidents of related or similar requests to establish the "pattern of conduct" required for section 5.1(a) of the *Act*. I find the evidence before me supports the conclusion that a pattern of conduct exists.

[36] Although one request appears unrelated to the others (seeking submissions to this office as well as information about a community development fund), the appellant's other requests all relate to property development files within the municipality of South Huron. Typically, the requests are for all records held by the municipality, in relation to specified parcels of land (which themselves encompass a number of individual properties), covering a time span of close to a decade, if not more. I find there is a "pattern" in that the appellant has submitted a number of all-encompassing requests covering many years, relating to properties and property development in the municipality.

[37] I must now determine whether this pattern of conduct amounts to an abuse of the right of access, as required by section 5.1(a). I will review each of the relevant factors set out above in making this determination.

Number of requests

[38] Past orders that found a pattern of conduct showing an "excessive number of requests" for the purpose of section 5.1(a) have typically been based on a volume of requests numbering in the dozens, hundreds or even thousands.[7] Although there is no

[5] Orders M-618, M-850 and MO-1782, MO-1810.
[6] Order MO-1782.
[7] See, for example, Orders M-850, MO-1782 and MO-2436.

specific standard for an excessive number of requests, I am not persuaded that the six requests for information submitted over a period of sixteen months is excessive by reasonable standards. Accordingly, I find that the number of requests, taken by itself, does not support a finding of abuse of a right of access.

Nature and scope of the requests

[39] I find that the nature and scope of the requests are significant factors in a determination of whether the requests in these appeals are frivolous and vexatious. As framed, the requests are very broad in scope. Most of the appellant's requests seek "all records" in relation to specified parcels of land, covering close to a decade, if not more. It is true that, with respect to the third request described above, the appellant agreed to narrow one aspect of it by reducing the date range. However, this only reduced the scope of records for one property within the larger parcel covered by the request and the request otherwise remains very broad.

[40] The appellant submits that his requests are necessarily broad due to the lack of information made publicly available through the municipality's website. However, he fails to establish how the alleged lack of publicly available information justifies his requests, which are very broad in scope. I note that the website of the municipality does appear to contain minutes of Council meetings for at least the past several years. I am therefore unable to find that requests encompassing multiple properties over many years are necessary, simply because older Council meeting minutes are not posted online. I find that there is a lack of evidence to support a link between the appellant's sweeping requests and any alleged removal of minutes from the municipality's website.

[41] As noted, the appellant submitted three requests prior to the ones at issue in this appeal, all of which the municipality responded to before taking the position that the subsequent requests were frivolous and vexatious. As indicated, the municipality submitted that the responsive records in relation to each request may number up to the thousands. In fact, I note that the municipality located more than 4,000 responsive records when it conducted the search in response to the September 2013 request (which covered all records relating to a named subdivision from 1998 to September 2013).

[42] I find that the nature and scope of the requests supports a conclusion that the requests are 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.

Timing of the requests

[43] The municipality refers to a court order from 2011 in which a demolition order was issued for a property owned and developed by the appellant's construction

company. The municipality submits that this court order was a catalyst for the numerous information requests submitted by the appellant between 2012 and 2014.

[44] In reviewing the representations, however, I note that the appellant provides evidence of requests submitted to the municipality dating back to 2005, and the municipality provides evidence of several incidences of the appellant publicly criticizing the municipality in 2005 – 2006. Based on the evidence before me, I am unable to conclude that the timing of the requests at issue in the three appeals is connected to the occurrence of some other related event, namely the court proceedings. Accordingly, I find that the timing of the appellant's requests is not a relevant factor to my determination on whether there has been an abuse of the right of access.

Purpose of the requests

[45] In many cases, ascertaining a requestor's purpose requires the drawing of inferences from his or her behaviour because a requester seldom admits to a purpose other than access.[8]

[46] The municipality seeks to impugn the legitimacy of the appellant's purpose by arguing that he is using the access process to seek revenge for the municipality enforcing the property standard bylaws. In support of this submission, the municipality points to articles written by the appellant and published in the local paper, as well as a comedy show presented at the appellant's house, in which the appellant publicly criticizes the municipality's development and planning processes.

[47] Moreover, the municipality submits that the pattern of submissions, emails and phone calls is intended to create a nuisance and overburden and frustrate its operations. The appellant states that his repeated emails and phone calls are a normal part of the FOI process and are intended to help clarify what information he is requesting. He also states that his multiple requests are intended to gather information for research purposes, as he is in the process of writing a book describing the municipality's development and planning processes.

[48] The fact that the appellant may be overtly and publicly critical of the municipality, and that he may intend to use some of the records in an effort to further these criticisms, does not in itself constitute an abuse for the purpose of section 5.1(a). While I appreciate why the municipality may view the appellant's intentions with skepticism, it is not illegitimate for the appellant to seek information for the purposes he has expressed. He may be misguided or unfair in his criticisms of the municipality, but seeking information for the purpose of expressing his views is not an abuse of the *Act*. On the other hand, the sheer scope of his requests does raise a question about the relationship between his requests and his purported goals, and whether the appellant

[8] Orders MO-1782, MO-1810 and MO-2289.

was deliberately casting his net so widely knowing that it would create an enormous burden for the municipality. On balance, while I have concerns about the appellant's underlying motives, I do not conclude that the appellant is exercising his access rights for "nuisance" value or to harass the municipality.

[49] In conclusion, with respect to section 5.1(a) of Regulation 823, I find that the requests are part of a pattern of conduct, and that the nature and scope of the requests amounts to an abuse of the right of access. I come to this conclusion without making any determination that the appellant is improperly motivated. While the appellant's motivations, to the extent they can be ascertained, are relevant to a determination under section 5.1(a), they are not necessary to support a finding that a request is frivolous or vexatious within the meaning of this section.

Section 5.1(a) - Pattern of conduct that would interfere with the operations of the institution

[50] 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.[9]

[51] 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.[10]

[52] Although, as discussed above, six requests in sixteen months from this requester is not an objectively excessive number of requests, each one is very broad in scope and, as submitted by the municipality, covers up to thousands of records. I accept the municipality's submissions that the requests have placed a considerable burden on its staff. I therefore find that the appellant's requests are part of a pattern of conduct that interferes with the operations of the municipality.

[53] Given my finding that the requests are frivolous and vexatious within the meaning of section 5.1(a) of Regulation 823, it is unnecessary for me to determine whether they are also made in bad faith or for a purpose other than to obtain access.

[9] Order MO-850.
[10] Order MO-850.

ORDER:

1. I uphold the municipality's decision under section 4(1)(b) of the *Act* that the requests which have resulted in these three appeals are frivolous or vexatious. As a result, the three appeals are dismissed, without prejudice to the appellant's right to submit a new request for information in accordance with the processes set out below.

2. I impose the following conditions on the processing of any requests from the appellant with respect to the municipality 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 (including any appeal arising out of a request) under the *Act* that may proceed at any given point in time, including any requests or appeals that are outstanding as of the date of this order.

    b. Subject to the one-transaction limit described in provision 2(a) above, if the appellant wishes any of his requests and/or appeals that now exist with the municipality, including the three requests that gave rise to these appeals, to proceed to completion, the appellant shall notify both this office and the municipality and advise as to which matter(s) he wishes to proceed.

    c. Pending this notification, current appeals with this office shall be placed on hold and any outstanding requests stayed.

3. The terms of this order shall apply to any requests and appeals made by the appellant or by any individual, organization or entity found to be acting on his behalf or under his direction.

4. Notwithstanding the above, if the appellant chooses to re-submit requests that specify the exact information or records he seeks, with a date range of two years or less, the transaction limit is extended to include two requests (and appeals arising from the requests) at a time.

5. At the conclusion of one year from the date of this order, the appellant, the municipality and/or any person or organization affected by this order, may apply to this office to seek to vary the terms of this order, failing which its terms shall continue in effect until such time as a variance is sought and ordered.

6. This office remains seized of this matter for whatever period is necessary to ensure implementation of, and compliance with, the terms of this order.

Original Signed By: January 27, 2015
Sherry Liang
Assistant Commissioner