

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3112

Appeal MA13-577

Corporation of the City of Clarence-Rockland

October 17, 2014

Summary: The city received a request for access to information relating to previous access to information files identified by number. The city denied access to any responsive records on the basis that the request was frivolous or vexatious within the meaning of section 4(1) of the *Act*. The appellant appealed this decision. In this order, the city's decision is not upheld and the city is ordered to issue a decision respecting access to any responsive records to the appellant.

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: Orders 850 and MO-1782.

OVERVIEW:

[1] The Corporation of the City of Clarence-Rockland (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

Please provide access to documents released from your access to information file number: 2013-01, 2013-02, 2013-03, 2013-09, 2013-13, 2013-21, 2013-28, 2012-07, 2012-14, 2012-17, 2012-19, 2012-20, 2012-23, 2011-03, 2011-04,

2011-08, 2011-14. Please do not make photocopies. I will review documents and decide on my review if copies are needed.

[2] The city issued a decision letter stating that the request is frivolous pursuant to section 4(1)(b) (frivolous or vexatious) of the *Act*.

[3] The requester, now the appellant, appealed the city's decision.

[4] During the course of mediation, the appellant advised the mediator that he is of the view that the request is neither frivolous nor vexatious. The city maintained its position that it is frivolous.

[5] As a mediated resolution could not be reached, the appeal was transferred to the adjudication stage of the appeal process for an inquiry. I began my inquiry into this appeal by sending a Notice of Inquiry setting out the facts and issues on appeal to the city, initially. The city declined to submit representations. Because of the manner in which I have decided this appeal, it was not necessary for me to seek the representations of the appellant.

[6] In this order, I do not uphold the city's decision that the request is frivolous or vexatious within the meaning of section 4(1) and I order it to issue the appellant a decision respecting access to any responsive records.

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.¹

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

[11] Despite its initial claim that the appellant's request is frivolous, the city has not submitted any evidence or submissions respecting its position that the appellant's request falls within the definition of "frivolous or vexatious" as contemplated by section 4(1)(b).

Grounds for a frivolous or vexatious claim

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

[12] 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

¹ Order M-850.

² Order M-850.

“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?³

[13] 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

[14] 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

[15] 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

[16] In the absence of any representations submitted by the city to supports its claim that the appellant’s request is “frivolous or vexatious” I find that it has not provided sufficient evidence to support a finding that the appellant’s request falls within a pattern of conduct that “amounts to an abuse of the right of access.” The city has not provided me with information relating to the number, complexity or timing of the requests that the appellant has made. In the absence of detailed evidence describing the nature of the appellant’s actions, I find that the city has not established a pattern of conduct that amounts to an abuse of the right of access under the frivolous or vexatious provision in the *Act*.

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

[17] 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.⁷

[18] 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

³ Orders M-618, M-850 and MO-1782.

⁴ Order MO-1782.

⁵ Order MO-1782.

⁶ Order MO-1782.

⁷ Order M-850.

operations of a large provincial government ministry, and the evidentiary onus on the institution would vary accordingly.⁸

[19] Again, in the absence of any representations submitted by the city, I find that it has not provided sufficient evidence to support a finding that the appellant's request falls within a pattern of conduct that "would interfere with the operations of the institution." The city has not provided me with information describing how the appellant's request might impact its staff's daily activities. In the absence of detailed evidence describing the nature of the appellant's actions, I find that the city has not established that the request gives rise to a pattern of conduct that would interfere with its operations as contemplated by the frivolous or vexatious provision in the *Act*.

Bad faith

[20] Where a request is made in bad faith, the institution need not demonstrate a "pattern of conduct".⁹

[21] "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 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.¹⁰

[22] Once again, the city has not provided me with any evidence to substantiate a finding that the appellant's request was made in bad faith. Accordingly, I find that it has not established that the appellant's request is frivolous or vexatious on the basis of bad faith.

Purpose other than to obtain access

[23] 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.¹¹

⁸ Order M-850.

⁹ Order M-850.

¹⁰ Order M-850.

¹¹ Order M-850.

[24] 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".¹²

[25] 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.¹³

[26] Where a request is made for a purpose other than to obtain access, the institution need not demonstrate a "pattern of conduct".¹⁴

[27] Finally, in the absence of any representations from the city, there is no evidence to support a finding that the appellant's motives for seeking access to the responsive record is in some way improper or for a purpose other than to obtain access. Accordingly, I find that the city has failed to establish that the request was made for a purpose other than to obtain access and therefore, I find that the request is not frivolous or vexatious on that basis.

[28] In conclusion, I find that the city 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 city's decision that the request is frivolous or vexatious under the *Act*.
2. I order the city 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: _____
Catherine Corban
Adjudicator

October 17, 2014 _____

¹² Orders MO-1168-I and MO-2390.

¹³ Order MO-1924.

¹⁴ Order M-850.