

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3539

Appeals PA13-300 and PA13-303

Ministry of Children and Youth Services

October 13, 2015

Summary: The appellant made two requests to the ministry under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information. The ministry responded to the requests by declining to process them on the basis that they were frivolous and vexatious pursuant to section 10(1)(b) of the *Act*. In this order, the ministry's decision is upheld on the basis that the appellant's actions establish a pattern of conduct that amounts to an abuse of the right of access. As a result, the requests are found to be frivolous and vexatious. The order provides that the appellant's right of access will be limited to one active appeal or request at a time.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 10(1)(b); Regulation 460, section 5.1

Orders and Investigation Reports Considered: M-850, PO-3188.

OVERVIEW:

[1] The appellant made two requests to the Ministry of Children and Youth Services (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The first request, which is the subject of Appeal PA13-300, reads as follows:

...fee estimates for each and every policy and/or procedures, both historical and possibly expired **and** current and in force, which the MCSS [Ministry of Community and Social Services]/MCYS have every [sic]

created and imposed on the CASs [Children's Aid Societies] and/or the province of ON's child protection system. ***The only policy I don't need included in your response is "the Ministry Case Information Disclosure Policy."*** Please divide the fee estimates as follows: 1. one fee estimate for those policies and/or procedures which are historical and perhaps no longer in force and then 2. another fee estimate for those policies and/or procedures which are current and in force.

As well, please provide a listing of the policies by name so that I may prioritize obtaining those policies and/or procedures which are most needed immediately to be disseminated in order to attempt to provide some protection for the children and families from the MYCS and you CASs. As well, I'll wish to do an internet search for the policies and/or procedures themselves to see if they are publicly available prior to having to pay for to obtain them.

[emphasis in original]

[2] The second request, which is the subject of Appeal PA13-303, reads as follows:

A fee estimate for any and all records in the care and control of the MCYS in regard to its decision to simultaneously over the course of three days, Jan. 16/13 – Jan. 18/13, cash as many as perhaps twenty-three (?) personal cheques I had mailed into the MCYS to pay for the various records I had been requesting and obtaining during the aforementioned Nov. 16/12 – Dec. 20/12 time period.

[3] The ministry issued decision letters to the appellant advising that it would not process the requests as the ministry is of the opinion that the requests are frivolous and vexatious pursuant to section 10(1)(b) of the *Act*. Specifically, the ministry set out the following as some of the reasons for its decision:

- The nature of these requests is in bad faith and is for a purpose other than to obtain access:
 - With regard to the request at issue in PA13-300, the ministry advised the [appellant] that the request is excessively broad in scope and that he has previously demonstrated an unwillingness to clarify or narrow his requests.
 - With regard to the request at issue in PA13-303, the ministry advised the [appellant] that this request relates to a previous FOI request made by the [appellant] and appears to question the integrity of the ministry's responses. Given this determination, the ministry advised the [appellant] that there appears to be no real intent to obtain the information requested and that the purpose of

his request is to accomplish some objective unrelated to access, namely to burden the ministry.

- The number of requests the [appellant] has filed. The ministry stated that since June 2012, the [appellant] made 46 requests, which the ministry determined to be excessive.
- The ministry also advised the [appellant] that he has demonstrated a pattern of behaviour that amounts to an abuse of the right of access.

[4] The adjudicator assigned to both of these appeals decided to join the appeals and conduct a single inquiry. She sought and received representations from both the ministry and the appellant. The appeals were then assigned to me to complete the inquiry and dispose of the issues at appeal.

[5] In this order, I uphold the ministry's decision and find the appellant's requests to be frivolous and vexatious. I order the appellant's right of access under the *Act* to be limited to one active appeal or request at a time.

DISCUSSION:

[6] The sole issue before me is whether the appellant's requests for access, which are the subjects of Appeals PA13-300 and PA13-303, are frivolous and vexatious.

[7] Section 10(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.

[8] Section 5.1 of Regulation 460 reads:

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 10(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] The ministry bears the burden of proof to substantiate its decision that a request is frivolous or vexatious.²

[11] The ministry submits that the appeals arise out of the two access requests which I have described above. The ministry submits that the first request is a very broad request for every policy/procedure ever imposed on Children's Aid Societies (CASs) by the ministry or the ministry's predecessor. The second request seeks records related to the ministry having cashed the appellant's cheques received for the processing of some of his requests. The ministry submits that these requests, evaluated in their surrounding context, are frivolous and vexatious within the meaning of section 10(1)(b) of the *Act* and section 5.1 of Regulation 460.

Grounds for a frivolous or vexatious claim

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

[12] 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 appellant 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 the appellant's behaviour.

[13] 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 to be relevant in determining whether a pattern of conduct amounts to an "abuse of the right of access":

- *Number of requests*

¹ Order M-850.

² *Ibid.*

³ *Ibid.*

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?⁴

[14] In addition to its representations, the ministry provided a schedule listing the appellant's access requests from June 14, 2012 to May 9, 2013 as well as the corresponding decision letters related to those requests. The ministry also provided a CD containing emailed correspondence received by the ministry from the appellant for the past two years.

Number of requests

[15] The ministry notes that the appellant submitted 44 access requests between June 14, 2012 and May 9, 2013 which is a period of less than 12 months. It explains that of these requests, 18 of the decisions which resulted from those requests have been appealed to this office. The ministry submits that this number is markedly greater than in other appeals where this office has found the number of requests to be excessive by reasonable standards. In particular, the ministry cites PO-3188, where Adjudicator Donald Hale found that 38 requests made by the appellant in the period of approximately 17 months constituted an excessive number of requests by reasonable standards.

[16] The ministry further submits that the appellant's requests are often clustered together:

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|--------------------|----------------|
| June 14 – 22, 2012 | Requests 1 – 4 |
| September 7, 2012 | Requests 6 – 8 |

⁴ Orders M-618, M-850 and MO-1782.

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|------------------------|------------------|
| November 21 – 30, 2012 | Requests 11 – 19 |
| December 8 - 18, 2012 | Requests 20 – 29 |
| April 2 – 11, 2013 | Requests 32 – 39 |
| May 5, 2013 | Requests 40 – 44 |

[17] The ministry submits that the sheer number of requests combined with the appellant's trend of submitting large numbers of requests concurrently supports its position that the requests amount to an "abuse of the right of access."

Nature and scope of the requests

[18] The ministry submits that the scope of the appellant's requests varies, but he has established a pattern of submitting broad requests. The ministry provided the following examples of some of the requests:

- A listing of all reviews done by the ministry (or the Ministry of Community and Social Services) of agencies over which the ministries have an oversight role (request 8);
- Any and all minutes of any and all meetings of the MCYS's Child Welfare Secretariat ("CWS") (request 9);
- A listing of all CWS staff, their dates of employment, job titled, qualifications and training taken (request 22 and 31); and
- A listing of any and all internal CWS documents (request 24).

[19] The ministry advises that the appellant often failed to work productively with it to refine and narrow the scope of the requests. The ministry states:

On a number of occasions, the appellant ignored ministry efforts to have the appellant clarify his requests. Further, the ministry submits that the appellant failed to respect the access process when he refused to pay for fees incurred by one of his requests.

[20] The ministry also notes that a number of the requests are quite specific and relate to the activities of the CWS (requests 9, 13, 19, 20, 21, 22, 24, 25, 27, 28, 32 and 33), with two relating to the qualifications of specific ministry staff.

Purpose of the requests

[21] The ministry submits that the appellant's correspondence, as set out in the CD

provided with its representations, appears to indicate his frustration with Ontario's child welfare system. The ministry submits that the appellant is attempting to use the access procedure under the *Act* as a forum for advocating his positions in relation to the child welfare system. The ministry refers to examples of the appellant's correspondence where he uses the request for access as a way to criticize the ministry and the CASs. The ministry states:

Other portions of the appellant's correspondence demonstrate a significant distrust of the staff of the ministry's FOI Unit. The appellant consistently calls into question the competency and integrity of these ministry staff, often inserting antagonizing commentary into his correspondence with the ministry...That is, the appellant's behaviour seems to reflect no desire to actually receive records, but rather simply to abuse the FOI process as a means to express his frustration with the ministry.

[22] Finally, the ministry submits that the appellant's request in appeal PA13-303 is an attempt by the appellant to harass ministry staff as the request itself is an accusation that the ministry maliciously cashed his cheques received pursuant to section 24(1)(c) of the *Act*.

[23] The appellant submits that he files three or four access requests at a time because, "...that's how many FOI cases (specifically the paragraph 'identification of records' explanations) fit onto the one pg. Word Doc. FOI letters I compose and mail into them." The appellant also submits that he had subsequent communications with the ministry where the ministry advised that it would accept and process new requests only when an outstanding \$70 fee was paid. The appellant states:

(my position was that the MCYS intentionally provided me with false records which I hadn't requested: I had offered to return those records to the MCYS but they refused that resolution and instead demanded the \$70 payment)

...but with the assistance of my [named colleague] paid the fee so as to clear the way to start doing FOI work on the MCYS again.

So then in late May 2015 I filed four new FOI cases with the MCYS seeking various child protection/welfare related records.

Finding

[24] I find the ministry has established that, in the circumstances of the appeal, the number, nature and scope of the appellant's requests demonstrate a pattern of conduct which amounts to an abuse of the right of access.

[25] I have reviewed the appellant's requests that are set out in the ministry's

schedule attached to its representations and accept the ministry's submission that the appellant's 44 requests for access, in under a year, is "excessive by reasonable standards." I find the appellant's explanation that, due to word processing issues, he submits four requests at a time, to be unsatisfactory. I find the number of the appellant's requests to be compelling evidence to substantiate a finding that his requests demonstrate a pattern of conduct which amounts to an abuse of the right of access.

[26] I further find the nature and scope of the appellant's requests, combined with their number, also demonstrates a pattern of conduct which amounts to an abuse of the right of access. In particular, I find that the appellant clusters several requests on one day for records that are broad in scope. Similarly, the appellant also submits detailed requests for particular information. Further, the nature of the appellant's requests are such that his detailed requests contain additional requested adjustments or comments based on any potential fee estimate. For instance, on December 18, 2012, the appellant made 10 requests, each request containing detailed instructions and comments. For instance, request CYS2012-0072 states:

A listing of any and all records (or if there isn't a listing of the records, I want a fee estimate for the records themselves) in the care and custody of the MCYS including, but not limited to, a list identifying the organizations and their staff or any other who attended that December 5 (?), 2012 "leadership development conference" held at the Grand Hotel on Jarvis St. in Toronto and reportedly paid for by the MCYS as reported in the news report linked immediately below (ps: I also want the agenda, list of speakers, topos of the speeches, any handouts that were distributed, the bill, again reportedly picked up by the MCYS, etc...for this event):

[27] The appellant's requests not only relate to the child welfare system, but also relate to the manner his access requests are processed under the *Act*. For instance on January 7, 2013, the appellant requests:

Any and all records in the care and control of the MCYS in regards to any and all documentation it has requested from a requester (such as myself) or processes or policies it has employed against a requester (such as myself) when determining "financial hardship".

When you respond to this most recent freedom of information request: I consent to identifying information of any other requesters who may have (but more than likely not) had these same types of "produce extra documentation to prove financial hardship" demands levied against them by the MCYS.

[28] I note that in the first request, relating to the leadership development conference, the appellant was provided with a fee estimate and a deposit was

requested in order to process the request. Subsequently, the appellant requested a fee waiver, but did not provide information to substantiate it. Accordingly, the ministry declared the request abandoned.

[29] For the request in which the ministry required documentation from the appellant to assist it in determining whether the appellant had established “financial hardship”, the ministry provided the appellant with a fee estimate. The appellant did not pay the fee and the ministry declared the request abandoned. In fact, having reviewed all of the ministry’s letters to the appellant, I note that many of the appellant’s requests were never pursued and the ministry was forced to declare them as abandoned. I further note from my review of the ministry’s decision letters that several of his requests are for the same or related information. The ministry’s decision letters indicate that the appellant’s requests often required the ministry to search for records, provide a fee estimate and then follow-up with him. I must conclude that the appellant’s actions in response to the ministry’s decisions are indicative of a pattern of conduct that amounts to an abuse of the right of access.

[30] I have also reviewed the numerous emailed correspondence sent by the appellant to ministry staff following his requests. The appellant’s emails usually contain a demand for a response and a comment about the fees charged by the ministry. The appellant often threatens the ministry with a possible appeal to this office if the ministry does not provide a response. I find the evidence presented by the emailed correspondence to be particularly compelling and serves to substantiate the ministry’s submission that the appellant is using the access process under the *Act* to express his frustration with the child welfare system in Ontario and the ministry.

[31] Based on my review of the ministry’s representations, including the schedule of the appellant’s requests and the ministry’s decisions, as well as the CD containing the appellant’s emails, I find that the ministry has demonstrated, with sufficient detail, that the appellant’s requests in appeals PA13-300 and PA13-303 are part of a pattern of conduct that amounts to an abuse of the right of access. Accordingly, on this basis, I find that the ministry has established that the appellant’s request is frivolous and vexatious in nature, as contemplated by section 10(1)(b) of the *Act* and section 5.1(a) of Regulation 823.

[32] While the ministry also provided representations relating to section 5.1(b) of Regulation 823, because of the manner in which I addressed this issue, it is not necessary for me to consider whether the ministry has established that the request was made in bad faith or for a purpose other than to obtain access.

Remedy

[33] 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.⁵

[34] The ministry submits that it has established that there are reasonable grounds to find that the requests that are the subject of appeals PA13-300 and PA13-303 are frivolous and vexatious within the meaning of section 10(1)(b) of the *Act* and section 5.1 of the regulation. It also submits that the appropriate remedy would be to limit the appellant's ability to submit multiple concurrent requests.

[35] In the circumstances, I have decided that the appropriate remedy is to uphold the ministry's decision that the appellant does not have a right of access to the information he requested in appeals PA13-300 and PA13-303.

[36] In addition, in order to deal with the broader issues of the appellant's conduct, I have decided to limit the appellant's right to make requests under the *Act*. The decision to limit the appellant's access rights does not preclude a finding, where appropriate, that any current or future request is frivolous and vexatious. Accordingly, in the order provisions below, I will impose conditions limiting the appellant's ability to make concurrent requests to the ministry while still enabling him to make requests for access to information under the *Act*.

ORDER:

1. I uphold the ministry's decision under section 10(1)(b) of the *Act* that the appellant does not have a right of access to the records he requested because the requests are frivolous and vexatious, and I dismiss the appeals.
2. I impose the following conditions on the process of any requests from the appellant with respect to the ministry 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 and/or appeals 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 exist at any given time to proceed to completion, the appellant shall notify both this office and the ministry and advise as to which matter he wishes to proceed.

⁵ Order MO-1782.

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. At the conclusion of one year from the date of this order, the appellant or the ministry may apply to this office to seek to vary the terms of provision 2 of this order, failing which its terms shall continue in effect until such time as a variance is sought and ordered.
5. I impose the following additional conditions on the manner in which the appellant's future access requests are to be made:
 - the appellant is only permitted to submit a single access request at a time
 - the appellant can only make a new access request once the ministry has issued the final decision on the prior request.
6. This office remains seized of this matter for whatever period necessary to ensure implementation of, and compliance with, the terms of this order.

Original Signed by: _____
Stephanie Haly
Adjudicator

_____ October 13, 2015