Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3292

Appeal MA14-409

City of Brampton

March 1, 2016

Summary: The sole issue in this appeal is whether the appellant's access requests under the *Municipal Freedom of Information and Protection of Privacy Act* to the City of Brampton (the city) are frivolous or vexatious. In this order, the adjudicator upholds the city's decision and finds that the requests are frivolous or vexatious because they demonstrate a pattern of conduct that amounts to an abuse of the right of access. The adjudicator imposes the condition of a one-transaction limit at a time with respect to the processing of the appellant's access requests.

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

Orders and Investigation Reports Considered: M-850.

OVERVIEW:

[1] This order disposes of the sole issue raised as a result of a decision made by the City of Brampton (the city) that the requester's access requests were frivolous vexatious.

[2] Originally, the requester made six access requests to the city under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The requests were for all paper and electronic records that refer to him and several other named individuals and/or organizations over specified time frames.[1]

[1] The city's request numbers are 14-030, 14-031, 14-032, 14-033, 14-034 and 14-035.

[3] In response, the city searched for responsive records, and issued four decision letters to the requester. The requester paid the fee required for one request and received the responsive records. The city could not locate responsive records with respect to one of the requests, and it waived the fees for that request. During the processing of the final two requests, the requester submitted nine[2] new requests to the city. In addition, the requester asked the city why it could not locate records that were responsive to parts of his initial six requests. He indicated that he was in possession of records that had been released in response to an FOI request made by a third party the previous year. The appellant believed that some of the records responsive to that request were also responsive to his requests, and, therefore, should exist.

[4] In response, the city wrote to the requester, explaining why responsive records could not be located with respect to parts of his initial access requests. In the letter, the city stated that, as was explained to the requester in previous correspondence and in the course of in-person meetings, a records search is conducted each time an access request is received at the time of the request. It went on to state that records are not kept indefinitely. It advised that records required to meet statutory obligations or to sustain administrative or operational functions are destroyed in accordance with the city's Record Retention By-Law, and that transitory records are destroyed when they are no longer needed or useful to the record holder. The city further stated that subsequent to the release of records responsive to the previous access request (made by a third party), a significant amount of transitory records in the Mayor's office were destroyed. The action, the city stated, was taken as a housekeeping initiative to purge records no longer useful to the Mayor's office, and was accompanied by a new process to limit the quantity of transitory records that are retained. The city advised that this action did not involve the destruction of any official, i.e., corporate records and that the destruction of the transitory records took place many months prior to the receipt of the first batch of requests made by the requester.

[5] The city went on to state in its correspondence to the requester that he had identified that the purpose of the new access requests was to illustrate that records which should have emerged as responsive to the original requests were *missing*. The city stated that, given its explanation regarding the destruction of transitory records, it was asking the requester to withdraw the new requests. It also advised the requester that it would not process any future access requests until all outstanding fees were paid. Lastly, the city advised the requester that he could appeal both the fees and searches to this office.

[6] The requester did not pay the fees for the remaining four requests of the original batch of requests, nor did he appeal any of these decisions to this office.

[7] The city subsequently issued another decision to the requester, stating that it had decided to deny access to any records that were responsive to the eight new access requests, because it had determined that these requests were frivolous and

[2] Two of these requests were combined into one.

vexatious.[3] The city went on to explain that it had made this decision because the requester had indicated that the purpose of the requests was to illustrate that records that should have emerged as responsive to the original six requests were missing. The city stated that the *Act* does not permit requests made for a purpose other than to obtain access or requests made in bad faith. The city also indicated that the requester had abandoned four of the original six requests and that the new requests are substantially similar (identical) to the abandoned requests, which amounts to an abuse of the right of access. Further, the city advised the requester that the two batches of requests, each of which has multi-parts were submitted to the city within a 30-day period. The city went on to state that the volume of requests was unreasonable and was beginning to interfere with the city's operations. The city then placed limitations on any future access requests including that the requester may have only one request open at a time, that the request must be clear, concise and not be in multi-part format and that no future requests would be accepted until the outstanding fees were paid.

[8] The requester (now the appellant) appealed the city's decision to this office. The appeal was not resolved during mediation and moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry. The adjudicator assigned to the appeal sought and received representations from the city. The appeal was then transferred to me to continue the inquiry. I sought and received representations from the appellant and reply representations from the city. Representations were shared in accordance with this office's *Practice Direction 7* and section 7.07 of the *Code of Procedure*. For the reasons that follow, I uphold the city's decision and find that the requests are frivolous or vexatious because they demonstrate a pattern of conduct that amounts to an abuse of the right of access. I impose the condition of a one-transaction limit at a time with respect to the processing of the appellant's access requests.

DISCUSSION:

[9] The sole issue is whether the appellant's second batch of access requests is frivolous or vexatious. Section 4(1)(b) of the *Act* states that every person has a right of access to a record or part of a record unless the head is of the opinion on reasonable grounds that the request 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

[3] The city's request numbers are 14-056, 14-057, 14-058, 14-059, 14-060, 14-061, 14-062 and 14-063.

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) provide 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.[4] An institution has the burden of proof to substantiate its decision to declare a request to be frivolous or vexatious.[5]

Grounds for a frivolous or vexatious claim

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

[12] The city is claiming that the appellant has engaged in a pattern of conduct that amounts to an abuse of the right of access. Several factors may be relevant in determining whether a pattern of conduct amounts to an *abuse of the right of access,* including:

- The number of requests;
- The nature and scope of the requests;
- The purpose of the requests;
- The timing of the requests; and
- Other factors particular to the case under consideration.[6]

[13] 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.[7]

Representations

[14] The city states that the appellant originally submitted six access requests, which were broad in scope and involved 4,293 specific searches to be applied to both hard copy and electronic records. The city's FOI coordinator contacted the appellant and suggested that the requests be combined and simplified into one request, which would

[4] Order M-850.
[5] *Ibid.*
[6] Order MO-1782.
[7] *Ibid.*

not affect the quality or quantity of responsive records. The city states that the appellant refused to do so, and insisted that the searches be conducted using the specific parameters he had provided. The city then conducted the searches using the appellant's parameters, requiring staff to conduct substantially similar searches on six different occasions. The city advises that it conducted searches for 62.5 hours and used 120 hours of administrative time[8] in processing the six requests.

[15] With respect to request 14-030 (the first of the requests), the city advises that it used the appellant's parameters to conduct the search, which took 14 hours. The city issued an access decision and waived its fee, because no responsive records were found. The city states that there was further communication between the FOI coordinator and the appellant regarding issues such as how the processing of requests are tracked, and how records are retained. In particular, the FOI coordinator provided the appellant with a copy of the tracking sheet that was used to process the request. The coordinator also advised the appellant that some records, which are considered transitory are destroyed when no longer needed by the record holder, whereas corporate records are destroyed in accordance with the city's records retention by-law.

[16] With respect to transitory records, the coordinator provided the appellant with examples of the types of records the city considers to be transitory, such as routine emails to schedule meetings, announcements of a general nature, copies of agendas and minutes, working documents, drafts of documents or preliminary versions, copies of a record where the original was sent to another business unit within the city, and documents containing requests for information where the information was subsequently provided to the individual making the request.

[17] The coordinator also informed the appellant that 1,386 pages of records which were disclosed as part of a previous access request might be of interest to him and that they were now considered to be public records, which meant that he could obtain them by paying a photocopying fee. The appellant responded by stating that the records responsive to request 14-030 were either being illegally withheld, or had been destroyed in an attempt to obstruct justice. The city states that the coordinator advised the appellant that he had the right to appeal its decision to this office, but that it appears that the appellant did not file an appeal.

[18] The city advises that it then issued access decisions with respect to the remaining five original access requests. The appellant subsequently paid the fee for request 14-031 and received the records that were responsive to that request. However, the appellant did not pay the fees for requests 14-032, 14-033, 14-034 or 14-035 or file appeals to this office in regard to these decisions. The city states that the appellant advised the coordinator that he did not intend to pay so much money for so few records, particularly since he knew that the coordinator was hiding records. According to the city, the appellant also advised the coordinator that he had records in his possession that he believed were responsive to the requests, which were records

[8] The city describes this as the time taken by the FOI Coordinator to process the six requests.

released to another requester in response to earlier access requests. The appellant went on to advise the coordinator that he was going to submit new access requests to prove that the city was deliberately denying him access to those records.

[19] The city further states that over a two-day period, just over a month after the appellant made the original six requests, he made nine new requests,[9] seeking essentially the same records as those requested in the first batch of requests. The new requests, the city advises, specified 701 searches to be applied to both hard copy and electronic records. The city states that the coordinator and the City Clerk met with the appellant to discuss the new requests. During that meeting, the city submits, the appellant stated that the purpose of the new requests was to prove that records which should have been located in response to the first requests were missing, and that he intended to use the new requests to make a point with and frustrate the Mayor's office, to teach the Mayor a lesson, and "give her a taste of her own medicine."[10]

[20] The city advises that the coordinator subsequently wrote to the appellant, advising him that it was inappropriate to abandon a request due to fees only to then submit a new, similar request, and that the new requests might be deemed to be frivolous and vexatious. The city submits that the coordinator once again advised the appellant of his right to appeal to this office regarding his concerns about the search process or the records produced.

[21] The city then wrote to the appellant, advising him that it had decided that the new requests were frivolous and vexatious. The city also placed limitations on any future access requests the appellant might make. In particular, the city advised the appellant that: he may have only one access request open at a time; the requests must be clear and concise and must not be in multi-part format; and no future requests would be accepted until the outstanding fees are paid.

[22] The city argues that the history of the appellant's requests demonstrates a pattern of conduct as that term is understood in the *Act*, namely recurring incidents of related or similar requests on the part of the requester. The city submits that the requests interrelate and closely resemble each other in that: the subject matter of the requests is identical or extremely similar; the requests are broad; and the information sought is extremely detailed in nature.

[23] With respect to the requests being duplicative in whole or in part, the city submits that there are 28 distinct pairings between the 14 requests (original and new), which show duplication, which is evidence that the sheer amount of overlap between the requests forms a pattern of conduct.[11] Essentially, the city states, the majority, if

[9] Two of the requests were subsequently combined into one request.

[10] The city's evidence regarding the processing of the requests and the interactions and communications between the appellant and the FOI Coordinator included an affidavit sworn by the coordinator, as well as copies of correspondence and emails between the appellant and the coordinator, and the internal tracking sheets.

[11] The city provided a chart setting out details of the 28 pairings that have similar requests.

not all of the requests are the same or similar in subject.

[24] The city also argues that the requests are broad, spanning many years in most cases, and the breadth of the requests is demonstrated by the number of parts. The first batch of requests consists of 4,293 parts and the second batch consists of 701 parts.

[25] The city states that this office has identified a non-exhaustive list of relevant factors to be applied in determining whether a pattern of conduct amounts to an abuse of the right of access, and that in this case the following factors apply:

- The number of requests filed, which is 15 requests within one month. Four of the original requests were abandoned and then largely duplicated in the new requests. In addition, each request has a number of parts requiring numerous searches;

- The nature and scope of the requests. The requests are all extremely detailed and ask for "all" of different kinds of records in paper and electronic form. The requests are broad, spanning many years in most cases and, as previously stated, comprised of numerous parts;

- The purpose of the requests.[12] The appellant advised the city that he was making the request to teach the previous Mayor a lesson and "give her a taste of her own medicine." The appellant's conduct also illustrates his purpose. For example: he refused to pay the fees and obtain the records; he did not appeal the fees to this office; he submitted the new requests which were largely duplicative of the first requests; he pursued records that the city indicated do not exist; he pursued records he already had; and he focused his attention on tracking sheets and information about the process rather than accessing the actual records;

- The timing or sequencing of the requests. The requests were made concurrent with the last municipal election and, taken together with the appellant's stated purpose, the timing supports the conclusion that the requests were an abuse of the right of access; and

- The appellant's conduct. The appellant called the city staffs' integrity into question, insinuating and stating outright that they could not be trusted to carry out the process honestly. This behaviour, taken together with the appellant's lack of interest in actually obtaining the requested records, demonstrates that his requests were a springboard for attacks on the city, rather than a valid use of the FOI process.

[12] The city cites Order M-947 and states that the appellant's conduct in that case closely resembles that of the appellant in this case.

[26] The city submits that the above evidence demonstrates that, on a balance of probabilities, it had reasonable grounds to deny the new requests as frivolous or vexatious.

[27] In the alternative, the city submits that it had reasonable grounds to conclude that the appellant made the requests for a purpose other than to obtain access. The city puts forward the following evidence to support its position:

- The appellant made numerous detailed, broad and duplicative requests;
- The appellant refused to cooperate with staff to make the process more efficient, necessitating significant amounts of staff time to handle his requests;
- The appellant abandoned requests when fees were required;
- The appellant failed to appeal the fees to this office;
- The appellant continued to request records which the city advised do not exist; and
- The appellant indicated, through his statements and his actions, that his requests were a springboard for personal attacks on the former Mayor and city staff, and made for their nuisance value.[13]

[28] The appellant states that, given his history with the city and the former Mayor,[14] it is reasonable to expect that he was well known to all of the parties who would have conducted searches for responsive records in response to his access requests, and that it was also a reasonable expectation not to expect the city's full cooperation.

[29] The appellant also argues that the changes that he made to his original access requests are "self-evident," and reflect a spirit of cooperation and deferral to the FOI coordinator's advice. Having conducted previous searches, the appellant states, the city should be familiar with, and efficient at, conducting similar searches with his keywords.

[30] The appellant further submits that it was reasonable to expect that the city may have destroyed records related to his original requests. The appellant states that the city advised him it would send him a letter explaining why records would be destroyed, and that it was his understanding that the first batch of requests would remain open until he received this letter. He further states that once he received the letter, his intention was to file an appeal to this office. The appellant goes on to state that he never received a letter, and only received a response from the city after six weeks. By then, he states, the thirty days available to file appeals to this office had passed.

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[13] The city cites Order M-850 to support its position and distinguishes Order MO-1924.

[14] The appellant provided very detailed representations regarding his history with the former Mayor, the Mayor's office, and a fundraising organization. The details will not be re-produced in this order.

[31] In addition, the appellant submits that the city has made incorrect conclusions about his intentions in making these access requests, including that it was his intention to somehow manipulate the (then) upcoming municipal election by filing the access requests. He also states that all of the searches he requested had merit, given that "one by one," the parties who had enabled others to, or attempted to discredit him, had been terminated from their positions. The appellant also argues that the city has exaggerated the effort required to complete the searches for responsive records.

[32] Lastly, the appellant states that he requested the tracking documents in order to verify how much time was committed to the searches and by whom. The appellant requests that: the city's Chief Information Officer take the lead in conducting the searches for records; the fees be waived for all of the requests; the restrictions on future requests be removed; and all tracking records be produced with respect to all of the requests.

[33] In reply, the city submits that the institutional resources expended on the requests is evidence of the high number and broad scope of the requests, both of which are factors in determining whether a pattern of conduct amounts to an abuse of the right of access.

[34] In addition, the city submits that the appellant cannot justify his frivolous and vexatious behaviour on the basis that he expected to be treated unfairly by the city, given that he has not demonstrated that the access process was unbalanced or unfair. The city states that the requests were processed within the parameters of the *Act* and its records retention by-law, and that staff was cooperative and did their best to assist the appellant in the circumstances.

[35] Further, the city states that all of the decision letters in response to the first batch of requests advised the appellant of his right to appeal the decisions to this office. In addition, the city advises that it sent an email to the appellant explaining the nature of transitory records before the 30-day appeal period for all of the first batch of requests had expired. In other words, had the appellant been unsatisfied with the explanation regarding transitory records, he still had time to file appeals with this office. Similarly, the city argues, if the appellant was not satisfied that the city conducted reasonable searches for responsive records, he could have filed appeals with this office, but he did not. Lastly, the city states that it is difficult to understand how the appellant determined that the searches for records were incomplete, given that he never obtained copies of the responsive records, with the exception of one of the six requests.

Analysis and findings

[36] The requirements of section 5.1(a) of the Regulation are met if the city establishes reasonable grounds for concluding that the requests are part of a pattern of conduct that amounts to an abuse of the right of access or would interfere with its operations. What constitutes "reasonable grounds" requires an examination of the specific facts of each case.

[37] In Order M-850, former Assistant Commissioner Tom Mitchinson defined the term "pattern of conduct" as requiring "recurring incidents of related or similar requests on the part of the requester . . ." He also pointed out that, in determining whether a pattern of conduct has been established, the time over which the behaviour occurs is a relevant consideration. This decision has been applied in many subsequent orders of this office.

[38] In addition, this office has enumerated other factors which may be relevant in determining whether a pattern of conduct amounts to an "abuse of the right of access," including: the number of requests; the nature and scope of the requests; the purpose of the requests; the timing of the requests; and other factors particular to the case at hand.[15]

[39] I find that the factors listed above are all relevant in determining whether the appellant is engaged in a "pattern of conduct that amounts to an abuse of the right of access," and that the evidence supports the conclusion that he is. I find that, taking the evidence into account as a whole, the city has provided me with sufficient evidence to establish that there are reasonable grounds for it to consider the appellant's second batch of requests as part of a pattern of conduct that amounts to an abuse of the right of access.

[40] In particular, with respect to the timing of the requests, the appellant made a total of fourteen requests under the *Act* (in two batches) to the city within a 37-day period.[16] The second batch of requests was received prior to the issuance of the final two decision letters in response to the first batch of requests. In reviewing the requests, I find that there is extensive duplication of content between the two batches in terms of the individuals named in the requests and the search terms the appellant has requested the city use to conduct searches. I also note that of the first six requests (the first batch), the appellant did not pursue access to the records located in response to four of them, yet requested substantially the same information in the second batch of requests.

[41] Further, all of the requests are very broad in their scope and nature. The appellant has requested "all" records in electronic and paper format, relating to multiple individuals and involving multiple search terms over relatively expansive time periods.

[42] The appellant claims that: the changes he made in the second batch of requests are "self-evident;" that it was reasonable for him to expect that the city may have destroyed records related to his original batch of requests; and that he did not receive an explanation from the city regarding the nature of transitory records until after the 30-day appeal period had expired. In my view, the evidence provided by the city demonstrates that it provided that explanation to the appellant prior to the expiration of the 30-day appeal period with respect to all of the requests within the first batch of

[15] Orders M-844 and MO-1782.
[16] Based on the dates the city received the requests, which it provided copies of to this office.

requests.[17] The appellant could have obtained the records with respect to the first batch of requests, but did not, with one exception. He could have appealed the issues of search, fee and any exemptions claimed by the city to this office with respect to these requests, but he did not. Instead, without the benefit of having the records he requested in the first batch of requests, he submitted a substantially similar batch of requests to the city within a very short period of time. For these reasons, I find that a substantial part of the appellant's purpose in making the second batch of requests is for a purpose unrelated to actually accessing the records, including a preoccupation with the FOI process itself rather than the purpose of obtaining the records themselves.

[43] Consequently, the cumulative effect of the facts lead me to view the appellant as engaging in a pattern of conduct that amounts to an abuse of the right of access. Therefore, I uphold the city's decision that the second batch of requests is frivolous or vexatious under section 4(1)(b) of the *Act*, as described further in section 5.1(a) of Regulation 823.

[44] Because of this finding, it is not necessary for me to consider whether the second batch of requests are frivolous or vexatious on the basis that they would interfere with the operations of the institution (under the second phrase in section 5.1(a) of the Regulation), or whether section 5.1(b) of the Regulation may be applicable.

[45] Turning to the appropriate remedy, in the circumstances of this appeal, I reject the remedies sought by both the city and the appellant. The appellant seeks to have the city's Chief Information Officer take the lead in conducting searches for records, have all fees waived, receive tracking records for all requests and remove the city's restrictions on future requests. I remind the appellant that he is not in a position to dictate who conducts searches for responsive records or to be provided with copies of internal FOI request tracking sheets. If the appellant is dissatisfied with a given search conducted in response to new requests, he is free to file an appeal to this office regarding the reasonableness of the search. Similarly, with respect to the appellant's position that all fees should be waived, he is free to request a fee waiver from the city, and appeal that decision to this office if dissatisfied with it.

[46] The city seeks to have only one access request open at a time, require all requests to be clear, concise and not in multi-part format, and to require that all outstanding fees be paid prior to accepting future requests. I remind the city that the outstanding fees are related to the first batch of requests, which are not the subject matter of this appeal. My finding that the appellant's requests are frivolous or vexatious relates solely to the second batch of requests, not the first. Consequently, I will not permit the city to assert that it will not process future requests until the appellant pays the fees related to the first batch of requests. With respect to future requests, the city is free to issue a fee estimate to the appellant. Similarly, I reject the city's assertion that

[17] In particular, as part of its affidavit evidence, the city provided an email it had sent to the appellant regarding this subject.

it can dictate the form of the appellant's requests.

[47] Consequently, in their totality, I find that most of the remedial conditions both parties seek are unreasonable in the circumstances.

[48] However, I am satisfied that the appropriate remedy is to limit the number of the appellant's active access to information matters with the city to one at a time. The appellant may apply to this office for an order varying the terms of this order after one year has passed from the date of this order.

ORDER:

1. I uphold the city's decision under section 4(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 or vexatious, and I dismiss the appeal. However, the appellant may choose to re-activate one of his requests in accordance with the terms of my order below.

2. I impose the following conditions on the processing of any requests from the appellant with respect to the city 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 resulting appeals under the *Act* that may proceed at any given point in time.

   (b) Subject to the one-transaction limit described in provision 2(a), if the appellant wishes any of his requests that exist at any given time to proceed to completion, the appellant shall notify both this office and the city and advise as to which matter he wishes to proceed.

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

Original Signed by: March 1, 2016

Cathy Hamilton
Adjudicator