Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3406

Appeal MA16-248

Town of Iroquois Falls

February 7, 2017

Summary: The Town of Iroquois Falls (the town) received a request for access to information relating to a number of items, including the town's Community Development Team, a named company, the former Mayor, the Northeastern Ontario Municipal Association, and the Mayor's Task Force. The town granted access to records, in part. It denied access to portions of the request, advising that these portions were frivolous or vexatious under section 4(1)(b) of the *Municipal Freedom of Information and Protection of Privacy Act*. During the mediation of the appeal, the appellant raised the issue of reasonable search relating to other items he requested. In this order, the adjudicator upholds the town's search for responsive records in relation to parts of the request. However, she does not uphold the town's decision that portions of the request were frivolous or vexatious. The town is ordered to issue an access decision to the appellant responding to those parts of the request.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 4(1)(b) and 17; section 5.1(a) of Regulation 823.

Orders and Investigation Reports Considered: Orders M-850 and MO-3150.

OVERVIEW:

[1] This appeal disposes of the issues raised as a result of an appeal of an access decision made by the Town of Iroquois Falls (the town) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The salient parts of the request are for:

- Copies of the Iroquois Falls Community Development Team meeting minutes for two specified years;

- Clarification of a difference in total year-end accounting totals in a specified year;

- Copies of all communications between employees of a named company, including specific employees, to the former Mayor and named councillors over a specified time period. The communications include emails, voicemails, briefing notes, meeting minutes, agenda and calendar invitations, scheduling notes, memos, and text and mobile messages;

- Copies of communications from the former Mayor and the town on the topic of the Mayor's Task Force and/or the Northeastern Ontario Municipal Association (NEOMA) over a specified time period;

- Copies of correspondence received by the Mayor and the town from the Mayor's Task Force and NEOMA over a specified time period. Correspondence includes emails, voicemails, briefing notes, meeting minutes, agenda and calendar invitations, scheduling notes, memos, and text and mobile messages; and

- Copies of all financial statements and director minutes related to the Mayor's Task Force over a specified time period, including emails, voicemails, briefing notes, meeting minutes, agenda and calendar invitations, scheduling notes, memos, and text and mobile messages.

[2] In response, the town issued a decision letter to the requester. With respect to the first item (item 1), the town advised the requester that no responsive records exist. With respect to the second item (item 2), the town provided an answer to the requester's question, but no records. With respect to the remaining four items (items 3-6), the town advised the requester that these portions of the request were frivolous or vexatious under section 20.1 of the *Act*.

[3] The requester, now the appellant, appealed the town's decision to this office. During the mediation of the appeal, the appellant raised the issue of reasonable search with respect to items 1 and 2. In particular, the appellant advised the mediator that minutes of the Community Development Team meetings should exist, and that a cheque should exist from the town to NEOMA. The appellant also advised the mediator that the appeal includes the town's decision that items 3-6 of the request are frivolous or vexatious.

[4] The appeal then moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry. I sought and received representations from the parties, which were shared in accordance with this office's *Code of Procedure*. During the inquiry, the town located records responsive to items 1 and 2, and provided them to the appellant. The appellant maintains that the town's searches were not reasonable.

[5] For the reasons that follow, I uphold the town's search relating to items 1 and 2

as reasonable. Conversely, I do not uphold the town's decision with respect to items 3-6 and I order the town to issue an access decision to the appellant.

RECORDS:

[6] The records that are the subject matter of the town's search are responsive to items 1 and 2.

ISSUES:

A. Did the town conduct a reasonable search for items 1 and 2 of the request?

B. Is the request for access to items 3-6 frivolous or vexatious?

DISCUSSION:

Background

[7] The town provided background information regarding custody of the records. The town advises that the Iroquois Falls Community Development Team (CDT) was incorporated in 1999 and operated as a legal entity separate from the town. Although the town appointed two members of town Council to the CDT board, the CDT's operations were overseen by its own board and not town council. The majority of the CDT's funding was from grants awarded by the town. In early 2015, the town decided to eliminate the grant to the CDT, and the CDT subsequently dissolved its operations. As a result, the town received the CDT's records for storage and these records are now in the town's custody and control.

Issue A. Did the town conduct a reasonable search for items 1 and 2 of the request?

[8] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search as required by section 17.[1] If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[9] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.[2] To be responsive, a record must be "reasonably related" to the request.[3] A reasonable

[1] Orders P-85, P-221 and PO-1954-I.
[2] Orders P-624 and PO-2559.
[3] Order PO-2554.

search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.[4] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.[5]

[10] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.[6]

[11] The town provided its evidence by way of affidavit, sworn by its Clerk-Administrator, who has personal knowledge of the facts provided in the affidavit. The town advised that the initial search for records relating to item 1 yielded no responsive records. A subsequent search, as part of another request made by the appellant, led to the discovery of responsive records in an unrelated binder. In particular, the town located an agenda and minutes from the first year of the two-year period, and an agenda and draft minutes from the second year of the two-year period. As a result of the second search, the town provided the appellant with access to these records.

[12] With respect to item 2 of the request, the town submits that in his request, the appellant did not request access to records, but simply sought clarification on how to interpret the financial statements which he already had as a result of a previous access request. The town further argues that it provided the clarification the appellant sought in its decision letter. However, the town goes on to state that in a subsequent access request the appellant requested the cheque that is the subject matter of item 2. In response, the town provided him with access to that cheque. The town also provided a copy of that cheque to this office.

[13] In his representations, the appellant has raised a number of issues and questions concerning the town, a corporation, a lawsuit, a non-profit group, and the CDT. Many of the questions posed by the appellant do not directly relate to access to records or to reasonable search under the *Act*, but rather to the actions and motivations of the various organizations referred to by the appellant.

[14] With respect to the search for records responsive to item 1 of the request, which is for minutes of the CDT's meetings over a two-year period, the appellant submits that with all of the financial transactions and apparent planning that was taking place during this period, records must exist. The appellant also questions why the second search conducted by the town wasn't done in the first place. The appellant then raises a number of questions about the composition of the CDT, the method by which it conducted its business, including the apparent infrequency of meetings, and the quality of the minutes that were provided to him by way of the second search.

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[4] Order M-909, PO-2469 and PO-2592.
[5] Order MO-2185.
[6] Order MO-2246.

[15] On my review of the representations provided by the town, I am satisfied that it conducted reasonable searches for responsive records, taking into account all of the circumstances of this appeal. As previously stated, a reasonable search is one in which an experienced employee expends a reasonable amount of effort to locate records which are reasonably related to the request. The town has provided an explanation of the nature and extent of the searches conducted in response to both this request and the subsequent request. The second search, in particular, yielded the type of records that the appellant was of the view should exist. The appellant's representations in this appeal do not provide sufficient evidence to establish a reasonable basis for concluding that the town's search for meeting minutes was inadequate, or that further records exist. Consequently, I am satisfied that the searches with respect to item 1 of the request were reasonable in the circumstances.

[16] Concerning item 2 of the request, the appellant acknowledges that he has a copy of the cheque to NEOMA, but goes on to pose a number of questions regarding the financial trail of that cheque and the circumstances surrounding its inception. Given the scope of the request in item 2, and that the town has located the cheque and provided the appellant with a copy of it, I find that it conducted a reasonable search for records responsive to this item.

Issue B. Is the request for access to items 3-6 frivolous or vexatious?

[17] The town claims that the appellant's access request for items 3-6 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.

[18] The town is claiming the application of Section 5.1(a) of Regulation 823 under the *Act*, which elaborates on the meaning of the terms frivolous and vexatious as follows:

> 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;

[19] 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.[7] An institution has the burden of proof to substantiate its

[7] Order M-850.

decision to declare a request to be frivolous or vexatious.[8]

[20] 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.[9]

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

[21] The town states that the appellant made six access requests under the *Act*, totalling 44 items over a seven-month period. The town set out the requests, in chronological order, as follows:

- Request 1 - a specific CDT item. No responsive records were located;
- Request 2 – items related to an Asset Purchase Agreement and a former mill site property;
- Request 3 – CDT audited financial statements over a five-year period. Disclosed to the appellant;
- Request 4 – this is the request at issue in this appeal. Numerous CDT items were requested;
- Request 5 – numerous and similar CDT items related to Request 4; and
- Request 6 – an expansion in scope to the prior CDT requests and includes other items related to the former mill site property (pre-feasibility study/agreement).

[22] The town submits that portions of the request are frivolous and vexatious because they are excessively broad in scope. The town states:

> For example, all communications between various persons including emails, voicemails, briefing notes, calendar invitations, scheduling notes, memos and text and mobile messages over various periods of time, etc. The scope of the Requester's denied requests, which are under Appeal . . . are excessively broad and similar in nature. It would take the Town an inordinate amount of time to ascertain what is or is not available within the records that are being kept in storage on behalf of the former CDT.
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> As for the purpose of the Requester's request(s), it can be inferred from past Town experience and general knowledge of the Requester's activities with respect to not only the Town but other organizations that his aim is usually to *attack* and/or *harass* said organizations including some of their

[8] *Ibid*.
[9] Order MO-1782.

> employees or affiliates (i.e. Town, [named company], CDT, NEOMA, FONOM, local hospital, local [named organization]).
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> The Town itself receives a multitude of email communications from [the appellant], well over 100 just this year alone and this has been ongoing for numerous years. These emails . . . are often condescending in nature; are marked as official requests, complaints or correspondence; or are simply *jabs* at the Town or particular individuals. The Freedom of Information requests are just an extension of the activities undertaken by [the appellant], which also extends to communications through the media. . .
>
> It is also our experience that the Requester often refuses to accept facts and information, preferring instead to spread misinformation through the media or other. . .

[23] The appellant submits that the town has not provided an adequate explanation as to why his request is frivolous or vexatious. He also submits that the town is intentionally withholding records from him, which flies in the face of openness and transparency.

[24] As previously stated, section 5.1(a) of Regulation 823 provides that a request is frivolous or vexatious if, among other things, it is part of a *pattern of conduct that amounts to an abuse of the right of access*. Previous orders of this office have interpreted the meaning of this phrase, including former Assistant Commissioner Tom Mitchinson in Order M-850. In that order, he stated:

> [I]n my view, a *pattern of conduct* requires recurring incidents of related or similar requests on the part of the requester (or with which the requester is connected in some material way).

[25] In addition, in establishing whether a *pattern of conduct* exists, the focus should be on the cumulative nature and effect of a requester's behaviour.

[26] What constitutes an abuse of the right of access has been examined by this office, as well as case law dealing with that term. It has been interpreted as consisting of 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*:[10]

- *The number of requests* – whether the number is excessive by reasonable standards;

[10] Orders M-618, M-850, MO-1782, MO-1810 and MO-2289.

- *The nature and scope of the requests* - whether they are excessively broad and varied in scope or unusually detailed, or, whether they are identical to or similar to previous requests;

- *The timing of the requests* – whether the timing of the requests is connected to the occurrence of some other related event, such as court proceedings; and

- *The purpose of the requests* – whether the requests are intended to accomplish some objective other than to gain access without reasonable or legitimate grounds. For example, are they made for nuisance value, or is it the requester's aim to harass the institution or to break or burden the system.

[27] It has also been recognized that other factors, particular to the case at hand, can also be relevant in deciding whether a pattern of conduct amounts to an abuse of the right of access.[11]

[28] In Order MO-3150, Adjudicator Steven Faughnan found that, contrary to the institution's position, the appellant's request was not frivolous or vexatious. In making this finding he stated:

> The *Act* imposes statutory obligations on institutions with respect to the disclosure of government-held information. It requires the institution to disclose information upon request, where that information is not excluded from the *Act* or is not subject to exemption from disclosure. In *Toronto Police Services Board v. (Ontario) Information and Privacy Commissioner*,[12] the Ontario Court of Appeal affirmed the strong public accountability purposes served by the *Act* and the need to *ensure that citizens have the information required to participate meaningfully in the democratic process*. This is reflected in the purposes of the *Act* and in the fact that the Commissioner may make orders regarding disclosure of information that are binding on institutions.

[29] Adjudicator Faughnan's comments underscore the importance of the access-to-information regime, and that an institution's power to decide that a request is frivolous or vexatious should not be taken lightly. In this appeal, I find that the town has failed to provide sufficient evidence to establish a pattern of conduct that amounts to an abuse of the right of access.

[30] As previously stated, past orders of this office have interpreted the concept of a pattern of conduct that amounts to an abuse of the right of access as consisting of a high volume of requests, taken together with other factors, listed above.

[31] For ease of reference, the portions of the request at issue are as follows:

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[11] Orders MO-1782 and MO-2289.
[12] 2009 ONCA 20 (CanLII) (reversing [2007] O.J. No. 2441).

- Copies of all communications between employees of a named company, including specific employees, to the former Mayor and named councillors over a specified time period. The communications include emails, voicemails, briefing notes, meeting minutes, agenda and calendar invitations, scheduling notes, memos, and text and mobile messages;

- Copies of communications from the former Mayor and the town on the topic of the Mayor's Task Force and/or the Northeastern Ontario Municipal Association (NEOMA) over a specified time period;

- Copies of correspondence received by the Mayor and the town from the Mayor's Task Force and NEOMA over a specified time period. Correspondence includes emails, voicemails, briefing notes, meeting minutes, agenda and calendar invitations, scheduling notes, memos, and text and mobile messages; and

- Copies of all financial statements and director minutes related to the Mayor's Task Force over a specified time period, including emails, voicemails, briefing notes, meeting minutes, agenda and calendar invitations, scheduling notes, memos, and text and mobile messages.

[32] In each of these items, the specified time period is two years.

[33] In the circumstances of this appeal, I find that, the number of requests is not excessive by reasonable standards. At the time the appellant made the request that is the subject matter of this appeal, he had made three access requests in the previous three-month period of time. In past cases where this office has found that the number of requests is excessive by reasonable standards, the number has been much larger. For example, in Order MO-2111, 27 requests were received and in MO-2289, 626 requests were received.

[34] Concerning the nature and scope of the requests, I find that the request at issue is not identical or similar to the three previous requests. While items 3-6 set out above, may be broad in scope, this does not lead to the conclusion that it is frivolous or vexatious. There are procedural steps set out in the *Act* that can assist an institution in processing broad requests, which I will address below.

[35] Concerning the timing and purpose of the request, I have not been provided with evidence to suggest that the appellant's reasons for seeking access are either illegitimate or dishonest, made for nuisance value, or to harass the town. In addition, the town has not provided sufficient evidence that the appellant's conduct or behaviour has established a pattern of conduct. The appellant made the access request, appealed the town's decision and participated in this inquiry.

[36] Consequently, I find that the town has not established a pattern of conduct that amounts to an abuse of the right of access for purposes of section 5.1(a) of Regulation 823.

[37] I note, however, that the town refers to two further requests the appellant has made to it. It appears that the town has responded to at least portions of those requests,[13] and the issue of whether these further requests are frivolous or vexatious are not before me. The town has described these subsequent requests and their similarity to the current request. As noted above, if requests are identical or similar to previous requests, this may inform whether the requests are made for the purpose of obtaining access, or some other objective, and whether they are frivolous or vexatious.

Pattern of conduct that interferes with the operations of the institution

[38] The town also submits that the appellant's pattern of conduct amounts to an abuse of the right of access that interferes significantly with the town's operations.

[39] The town states that it is a small municipality with a population of approximately 4,595. In 2014, a paper mill in the town closed, which created budgetary pressures on the town. Administratively and financially, the town submits, it has limited resources to deal with various responsibilities including those under the *Act*. The town's Clerk-Administrator advises that three staff members deal with all administrative matters including preparing agendas, minutes, policies, by-laws, marriage licences, handling human resource matters, emergency management, health and safety, land acquisition/disposition, planning, overseeing of major projects, legal matters and the administration of five cemeteries.

[40] The town submits that it has strived to reply to the appellant's requests as soon as possible, it has proved difficult at times, especially with so many requests and the number of items requested. The town further submits that, in the past, the appellant has hampered municipal operations with his requests.

[41] The town goes on to state:

> It has been especially frustrating with respect to the records of the CDT, which was a separate legal entity not subject to FOI requests, prior to its closure. Upon closure of the CDT, records were transported to the Town for storage and safekeeping. Having to go through another organization's records, which includes numerous file boxes and cabinet, and not knowing if a record that you are searching for even exists or how it may be filed has made the searches to date extremely time consuming.

[42] As previously stated, the appellant submits that the town has not provided an adequate explanation why the request is frivolous or vexatious. He also submits that the town is intentionally withholding records from him, which flies in the face of openness and transparency.

[43] A pattern of conduct that would interfere with the operations of an institution is

[13] See the references to the searches conducted for records which resulted in the town locating records responsive to items 1 and 2, above.

one that would obstruct or hinder the range of effectiveness of the institution's activities.[14] 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.[15]

[44] I find that the town has failed to provide sufficient evidence to establish a pattern of conduct that would interfere with the operations of the institution. This is the fourth of four requests (at the time the request was made) made by the appellant to the town, which does not amount to a multiplicity of requests made under the *Act*. Furthermore, the town accepts that it has custody or control of the records, and they are therefore subject to requests under the *Act*. Although the town refers to the limited administrative staff available to it, the efforts it has made in responding to the requests, and the fact that the searches conducted for records have been *extremely time consuming*, this is little detailed evidence to support its position that the appellant's actions interferes significantly with the town's operations.

[45] I also note that there are a number of alternative measures available to assist institutions when processing requests. These include the fee provisions in section 45 of the *Act* and the related provisions in the Regulation, and the interim access decision and fee estimate scheme described in Order 81. The fee provisions are intended to support a user-pay principle, providing a rate per hour for search time. In addition, in some circumstances, a time extension under section 20(1) of the *Act* may also be available.

[46] Previous orders have considered the fact that the *Act* provides cost recovery mechanisms that may allow institutions to mitigate or avoid any interference that may arise from processing requests, in determining whether responding to them would interfere with an institution's operations.

[47] I find that, given the circumstances of the appeal, the appellant has not engaged in a pattern of conduct that amounts to an abuse of the right of access or would interfere with the operations of the town as set out in section 5.1(a) of Regulation 823.

ORDER:

1. I uphold the town's search for records responsive to items 1 and 2 of the request as reasonable.

2. I do not uphold the town's decision with respect to items 3 through 6 of the request.

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[14] Order M-850.
[15] *Ibid.*

3. I order the town to issue an access decision in response to items 3 through 6 of the appellant's request, treating the date of this order as the date of the request, in accordance with sections 19, 21 and 22 of the *Act*.

4. I further order the town to send me a copy of the access decision issued to the appellant pursuant to Order provision 3 of this order when the decision is issued to the appellant.

Original Signed By: February 7, 2017

Cathy Hamilton
Adjudicator