

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER MO-3528

Appeal MA17-254

The Town of Hanover

November 23, 2017

**Summary:** The town received a request for access to information relating to a settlement with the Saugeen Valley Conservation Authority. The town denied the appellant 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 the town's decision. In this order, the adjudicator does not uphold the town's decision. The adjudicator orders the town 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), section 5.1 of Regulation 823 under the *Act*.

### OVERVIEW:

[1] The appellant submitted a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Town of Hanover (the town) for access to the following:

- Minutes of settlement with SVCA 2013 [i.e. the Saugeen Valley Conservation Authority];
- All documents, records, photos related to "settlement" leading up to court approved agreements 2008 through 2013; and
- All costs paid for by the municipality as approved by council.

[2] The town issued a decision to the appellant denying him access to the requested

records. The town denied the appellant's request on the basis that it is frivolous or vexatious. The town further clarified that it based this decision on the appellant's lawsuit against the town and his "continuous accusations of corruption."

[3] The appellant appealed the town's decision. In his appeal, the appellant stated his lawsuit does not relate to his access request.

[4] During mediation, the town confirmed its position that the appellant's request is frivolous or vexatious within the meaning of section 4(1)(b) of the *Act*. The appellant confirmed his interest in pursuing access to the records responsive to his request.

[5] A mediated solution could not be reached and the appeal was transferred to the adjudication stage of the appeal process for an inquiry. I began my inquiry by sending a Notice of Inquiry setting out the facts and issues on appeal to the town. The town submitted representations. I decided it was not necessary for me to seek the appellant's representations.

[6] In this order, I do not uphold the town's decision that the request is frivolous or vexatious within the meaning of section 4(1). I order the town to issue a decision to the appellant 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). Section 4(1)(b) reads,

Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless,

the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

[8] Section 5.1 of Regulation 823 of the *Act* elaborates on the meaning of the terms *frivolous* or *vexatious*. Section 5.1 states,

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*. Therefore, an institution should not exercise the discretionary power lightly.<sup>1</sup>

[10] An institution bears the burden of proof to substantiate its decision to declare a request to be frivolous or vexatious.<sup>2</sup>

## **Grounds for a frivolous or vexatious claim**

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

[11] 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 of requests excessive by reasonable standards?
- *Nature and scope of the request:* Is the request excessively broad and varied in scope or unusually detailed? Is it identical to or similar to previous requests?
- *Purpose of the request:* is the request intended to accomplish some objective other than to gain access? For example, was it made for “nuisance” value or is the requester’s aim to harass government or to break or burden the system?
- *Timing of the request:* is the timing of the request connected to the occurrence of some other related event, such as court proceedings?<sup>3</sup>

[12] The institution’s conduct may also 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.<sup>4</sup>

[13] 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.<sup>5</sup>

[14] 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.<sup>6</sup>

[15] In its representations, the town submitted a timeline of interactions with the appellant to support its position that the appellant’s request is frivolous or vexatious. In

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<sup>1</sup> Order M-850.

<sup>2</sup> Order M-850.

<sup>3</sup> Orders M-618, M-850 and MO-1782.

<sup>4</sup> Order MO-1782.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*

particular, the town indicates the appellant filed two Statements of Claim with the Ontario Superior Court of Justice in which he alleged that identified town staff, council members or executives defamed or demeaned him. The town states both actions were dismissed. The town also submits the Superior Court ordered costs against the appellant in relation to his second lawsuit, but the appellant has yet to pay them.

[16] The town also submits that the appellant sent a fax to members of the town's council alleging corruption in relation to the subject matter of his access request. Finally, the town submits the appellant placed a letter to the editor in the local newspaper alleging a member of the town's council is acting in a negligent manner.

[17] I find the town did not provide me with sufficient evidence to support a finding that the appellant's pattern of conduct "amounts to an abuse of the right of access." To date, it appears the appellant has only made a single request with the town. The town did not indicate the appellant submitted more than one request. I find that one request is not excessive in number by any reasonable standard.

[18] In addition, I find the request is not excessively broad or varied in scope or unusually detailed. While there may be a large number of records responsive to the request in the town's custody or control, I do not find this request to be excessively broad. In any case, the town did not indicate whether there would be a large number of records responsive to the appellant's request. Moreover, there is no evidence before me to suggest the request is similar or identical to any other request(s) made by the appellant.

[19] Regarding the timing of the request, the town suggests the appellant made his request in reaction to his unsuccessful civil actions. The town did not provide any evidence to support this claim. In addition, it appears the appellant made his access request a number of months after his second action was dismissed. Given the passage of time and in the absence of further information from the town, I find there is no evidence before me that the referenced related events (i.e. the legal actions) support a finding of an abuse of the right of access.

[20] In conclusion, I find the town did not provide 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 town did not provide me with information relating to the number, complexity or timing of the appellant's request. Upon review of the circumstances and the timeline provided by the town, I find the appellant's actions do not amount to an abuse of the right of access under the frivolous and vexatious provisions in the *Act*.

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

[21] 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.<sup>7</sup> Interference is a relative concept that must be judged on the basis of the circumstances a particular institution faces.<sup>8</sup> 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.<sup>9</sup>

[22] The town did not make any submissions on whether the request is part of a pattern of conduct that would interfere with its operations. In the absence of any representations, I find the town did not provide sufficient evidence to support a finding that the appellant's request falls within a pattern of conduct that would interfere with the town's operations. The town did not provide me with information describing how the appellant's request might impact its staff's daily activities, for example. Therefore, I find the town 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 or for a purpose other than to obtain access***

[23] Where a request is made in bad faith, the institution does not need to demonstrate a *pattern of conduct*.<sup>10</sup> *Bad faith* is 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 judgment 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.

[24] Similarly, 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.<sup>11</sup> Previous orders have found 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*.<sup>12</sup> In order to qualify as a "purpose other than to obtain access", the request would need to have an improper objective above and beyond a collateral intention to use the information in some legitimate manner.<sup>13</sup>

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<sup>7</sup> Order MO-850.

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*

<sup>12</sup> Orders MO-1168-I and MO-2390.

<sup>13</sup> Order MO-1924.

[25] The town submits the appellant's efforts to obtain information from the town are part of a "collateral attack." The town submits that the appellant has no interest in the contents of the information he seeks access to. As well, the town submits the appellant does not seek information for the public good or to protect his personal rights and interests. The town submits that, because the appellant was unsuccessful with his civil actions, he is now "using other means to apply pressure, embarrass the town, and ultimately avoid the consequences of paying" the outstanding costs ordered by the Superior Court.

[26] In his appeal form, the appellant states that the lawsuit the town's decision letter refers to is related to a different matter. The appellant also stated that his lawsuit is not relevant to his access request.

[27] I find the town did not provide me with sufficient evidence to demonstrate the appellant made his request in bad faith or for a purpose other than to obtain access. While the town makes a number of claims regarding the appellant's purposes for the request, it does not provide any evidence to support its claims. Further, the town did not provide any evidence to link the appellant's lawsuits with his access request. The town merely asserts the appellant is using the FOI process to "apply pressure, embarrass the town, and ultimately avoid the consequences of paying costs." I reviewed the town's submissions and find it did not demonstrate to my satisfaction that the appellant's request was motivated by bad faith or a desire to burden the town's resources.

[28] In conclusion, I find the town 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 town's decision that the request is frivolous or vexatious under the *Act*.
2. I order the town 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: \_\_\_\_\_  
Justine Wai  
Adjudicator

November 23, 2017 \_\_\_\_\_