

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3570

Appeals MA17-125 and MA17-137

Township of Carling

March 1, 2018

Summary: The appellant submitted two requests under the *Act* for records relating to Shore Road Allowances and an identified property. The township denied the appellant access to the responsive records, claiming his requests were frivolous or vexatious under section 4(1) of the *Act*. The appellant appealed the township's decisions. In this order, the adjudicator does not uphold the township's decisions and orders it to issue decisions 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*.

Orders and Investigation Reports Considered: Interim Order MO-1168-I

OVERVIEW:

[1] The appellant, on behalf of his client, submitted two requests under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Township of Carling (the township) for records relating to Shore Road Allowances and an identified property. The appellant's requests resulted in appeals to the IPC. I will describe each appeal below.

MA17-125

[2] In this appeal, the appellant requested access to "records of all closures and conveyances of Shore Road Allowances in the township to date." In its decision, the

township identified the appellant's request as seeking records of all closures and conveyances of Shore Road Allowances in the township to date as well as all records, including communications, relevant to the appellant's application to acquire a Shore Road Allowance.

[3] The township denied the appellant access to the responsive records. The township advised the appellant,

... the request is deemed to be frivolous/vexatious due to the intent communicated by your client to our office regarding his desire and methods to acquire [an identified individual's neighbouring] property. As well as solicitor/client privilege and a number of other reasons. Also, all documents that would be available to your client that were requested would be in the form of minutes and bylaws that are already available on the Township website which you can obtain on your own.

[4] The appellant appealed the township's decision.

[5] During mediation, the appellant clarified his request to include a list of all closures and conveyances of allowances as well as all staff reports, council minutes or decisions and communications relating to his application to acquire a Shore Road Allowance. The township maintained that the appellant's request is frivolous or vexatious due to its broad scope. The township stated the request involved many files dating back to 1966 and processing the request would create a substantial hardship for the township, given its small staff and the amount of time needed to gather the records. The township reiterated that certain responsive records are available online.

[6] The appellant confirmed his position that his request is not frivolous or vexatious. The appellant also asserts that the township's website does not contain all the information he requested, such as staff reports, bylaws and accompanying documents. Furthermore, the appellant alleged that the township had a practice of deleting its emails once it responded to them.

MA17-137

[7] The appellant submitted a multi-part request to the township for all records relating to an identified property, its use, any issues relating to its compliance with the Zoning By-Law, a Shore Road Allowance and any issues relating to the appellant's application to acquire the Allowance. The appellant included a list of eight types of records he considered to be responsive to his request.

[8] The township issued a decision to the appellant denying him access to the responsive records. The township stated that it denied the appellant access to five types of the records identified in his request

mainly because the request is deemed to be frivolous/vexatious due to the intent communicated by your client to our office regarding his desire and

methods to acquire [an identified individual's neighbouring] property. As well as solicitor-client privilege and a number of other reasons.

With regard to two types of records, the township stated that all responsive records are publicly available in the form of minutes and bylaws on the township's website. Finally, the township stated there are no records responsive to one of the types of records in the appellant's request.

[9] The appellant appealed the township's decision.

[10] During mediation, the appellant clarified his request to be for nine types of records, including all compliance records, construction records and land use applications relating to the identified property and/or Shore Road Allowance, and all correspondence relating to the properties and individuals involved. However, the township maintained that the appellant's request is frivolous or vexatious due to its broad scope. The township stated that the request involved many files dating back to 1966 and processing the request would create a substantial hardship for the township, given its small staff and the amount of time needed to gather the records. The township also reiterated that certain responsive records are available online.

[11] The appellant confirmed his position that his request is not frivolous or vexatious. The appellant also asserts that the township's website does not contain all the information requested, such as staff reports, bylaws and accompanying documents. Furthermore, the appellant alleged that the township had a practice of deleting its emails once it responded to them.

The Inquiry

[12] The appeals could not be resolved through mediation and they were transferred to the adjudication stage, where an adjudicator conducts an inquiry. I am the adjudicator for these appeals.

[13] Upon review, I decided to consider whether the appellant's requests are frivolous or vexatious, first. I made this decision because of the volume of responsive records, the nature of the issues and the township's position. In addition, I note that the township did not provide the IPC with a copy of the records responsive to the request. I began my inquiry by inviting the township to submit representations in response to a Notice of Inquiry. The township submitted representations. I did not seek representations from the appellant.

[14] In the discussion that follows, I do not uphold the township's decision that the requests are frivolous or vexatious within the meaning of section 4(1). I order the township to issue proper access decisions to the appellant respecting access to any responsive records.

DISCUSSION:

[15] The sole issue to be determined in this decision is whether the appellant's requests are frivolous or vexatious under section 4(1)(b) of the *Act*. 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.

[16] Section 5.1 of Regulation 823 of the *Act* elaborates on the meaning of the terms *frivolous* and *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.

[17] 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.¹

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

Grounds for a frivolous or vexatious claim

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

[19] 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?

¹ Order M-850.

² *Ibid.*

- *Nature and scope of the requests:* are the requests excessively broad and varied in scope or unusually detailed? Are they identical or similar to previous requests?
- *Purpose of the requests:* are the requests intended to accomplish some objective other than to gain access? For example, did the requester make the requests 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?³

[20] 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.⁴

[21] Other factors, particular to the case under consideration, can also be relevant in deciding whether a pattern of conduct amounts to an abuse of the right of access.⁵

[22] The focus should be on the cumulative nature and effect of a requester's behaviour. In many cases, ascertaining a requester's purpose requires the drawing of inferences from his or her behaviour because a requester seldom admits to a purpose other than access.⁶

[23] In its representations, the township submits that it deemed the requests to be frivolous or vexatious based on the following:

- Threatening comments made by the appellant directly to the township's Chief Building Official indicating that if the township did not help the appellant there would be repercussions and hardship to the township
- The appellant's actions in trying to use the township to force another property owner into selling their property
- The requests are too broad in scope and the appellant "fully knew" this would cause hardship on the township given its size

The township also summarized the appellant's involvement with the township and his application to purchase his Shore Road Allowance from the township. Finally, the township described the records it disclosed to the appellant, including zoning by-laws, links to the township's minutes and agendas, and links to all township by-laws.

[24] I find the township did not provide sufficient evidence to support a finding that the appellant's pattern of conduct *amounts to an abuse of the right of access*. To date,

³ Orders M-618, M-850 and MO-1782.

⁴ Order MO-1782.

⁵ *Ibid.*

⁶ *Ibid.*

it appears the appellant has only made two requests to the township. The township did not indicate the appellant submitted more than the two requests that are the subject of this order. I find that two requests, even if they are broad in nature, are not excessive in number by any reasonable standard.

[25] In addition, while I acknowledge that the requests are broad and varied in scope, they are not excessively so. Similarly, I find that the requests are not unusually detailed. While there are likely a large number of records responsive to the requests in the township's custody or control, I do not find the appellant's requests are excessively broad. During mediation, the township asserted that the requests involved many files dating back to 1966. The township advised the mediator that there are approximately 300 case files relating to shore road allowances and provided her with a chart of the 300 cases. I reviewed the chart and the township did not indicate the approximate number of records or pages of records relating to these cases. In addition, the township did not provide me with an approximate number of records relating to the neighbouring property. In other words, the township did not provide me with enough information regarding the number of records responsive to the appellant's request to support its claim that the appellant's requests are excessively broad or varied in scope. Moreover, the township did not provide me with any evidence to suggest that the requests are similar or identical to any other request(s) made by the appellant.

[26] Upon review of the township's representations regarding the appellant's conduct, I find that his conduct does not relate to the exercise of his right of access or his use of the township's access to information resources. Instead, the appellant's conduct relates to his desire to purchase a Shore Road Allowance from the township as well as the neighbouring property. A pattern of conduct that amounts to an abuse of the right of access must relate to the individual's exercise of his right of access and his use of the access to information resources of an institution. The IPC interpreted the phrase *pattern of conduct* as "requiring recurring incidents of similar requests on the part of the requester (or with which the requester is connected in some material way)."⁷ I adopt this interpretation for the purposes of this appeal and find that the township did not establish such a pattern of conduct.

[27] In conclusion, I find the township did not provide sufficient evidence to support a finding that the appellant's requests fall within a pattern of conduct that *amounts to an abuse of the right of access*. Specifically, the township did not provide me with sufficient details relating to the number, complexity or timing of the appellant's requests. Upon review of the circumstances and the township's history with the appellant regarding his proposed Shore Road Allowance, 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

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

⁷ Order M-850.

one that would obstruct or hinder the range of effectiveness of the institution's activities.⁸ Interference is a relative concept that must be judged on the basis of the circumstances a particular institution faces.⁹ 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 varies accordingly.¹⁰

[29] The township submits the appellant submitted his requests knowing they would create hardship on the township given the small number of staff it employs. However, the township did not provide any further details regarding the number of staff it employs or the time and/or resources that would be required to respond to the appellant's requests. Further, the township did not provide me with any information describing how the appellant's requests might affect its staff's daily activities. Therefore, I find the township did not establish that the requests give rise to a pattern of conduct that would interfere with its operations, as contemplated by the frivolous or vexatious provision in the *Act*.

[30] I note the *Act* provides a number of alternative measures to relieve an institution faced with a request that may affect its operations.¹¹ Specifically, I refer the township to the *Act's* fee provisions in section 45 and the related provisions in Regulation 823, which may provide some relief. The fee provisions of the *Act* support a *user pay* principle and the township could use these provisions to lessen any possible interference in responding to the appellant's request and achieve some cost recovery.¹² In addition, a time extension under section 20(1) of the *Act* may also provide some relief and assistance to the township.

Bad faith or for a purpose other than to obtain access

[31] Where a request is made in bad faith, the institution does not need to demonstrate a *pattern of conduct*.¹³ *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.

⁸ *Ibid.*

⁹ Order M-850.

¹⁰ *Ibid.*

¹¹ Order M-906 and M-1071.

¹² Order M-1071.

¹³ Order M-850.

[32] 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.¹⁴

[33] I find the township did not demonstrate that the appellant made his requests in bad faith. The fact that there is some history between the township and the appellant is an insufficient basis for a finding that the appellant made his request in bad faith.¹⁵ As noted in Interim Order MO-1168-I, the question to ask is whether the appellant has some illegitimate objective in seeking access under the *Act*. Following this approach, I am not persuaded that the appellant's history with the township indicates that his reasons for requesting access to the records are not genuine.

[34] In addition, while the township makes a number of claims regarding the purpose of the appellant's requests, it did not provide any evidence to support its claims. The township merely asserts the appellant made his requests in full knowledge that they would create hardship on the township. I reviewed the township's submissions and find they do not demonstrate to my satisfaction that the appellant's requests were motivated by bad faith or a desire to burden the town's resources.

[35] In conclusion, I find the township did not establish that the appellant's requests are frivolous or vexatious within the meaning of the *Act*.

Additional matters

[36] As an additional matter, I note that the township's decisions in response to the appellant's access requests included both its decision that the requests are frivolous or vexatious and, in the alternative, that certain records are exempt from disclosure. The precise wording relating to the exemption claims is as follows:

As well as solicitor/client privilege and a number of other reasons... all documents that would be available to your client that were requested would be in the form of minutes and bylaws that are already available on the Township website which you can obtain on your own.

The township did not identify the specific exemptions it claims apply to the records in its decision letters. From the decision letter alone, it appears that the township withholds some or all of the responsive records under sections 12 (solicitor-client privilege) and 15(a) (information published or available to the public).

[37] The township attached an "Index of Records" to each decision letter that appears to add to the township's exemption claims. Each Index of Records contains: (1) the item number in the appellant's request; (2) a "General Description"; (3) the township's decision regarding disclosure; (4) the exemption(s) claimed; and (5) "Comments/Explanations". In the Index of Records, the township refers to sections 7(1) (advice or recommendations), 8(1)(a)(b) and (f) (law enforcement), 12 (solicitor client

¹⁴ *Ibid.*

¹⁵ Order PO-3465.

privilege) and 14(1) (personal privacy) to withhold the records, in addition to its frivolous and vexatious claim. While the township refers to the specific items or types of records identified in the appellant's request, it does not offer any description of the responsive records it located. In addition, the "Comments/Explanations" column of the Index of Records only contains a copy of the section of the *Act* claimed.

[38] Section 22(1) of the *Act* identifies the information required to be in an access decision. The relevant portions of section 22(1) state,

(1) Notice of refusal to give access to a record or part under section 19 shall set out,

...

(b) where there is such a record,

(i) the specific provision of this Act under which access is refused,

(ii) the reason the provision applies to the record,

[39] As set out above, section 29(1) requires that a notice of refusal to give access, contained in the institution's decision letter, must indicate the specific section of the *Act* under which access is refused and the reason why the section of the *Act* applies.

[40] Past decisions of the IPC indicate that the purpose of the content set out in section 22(1) in the decision letter is to permit a requester to make a reasonably informed decision whether to appeal the institution's decision.¹⁶ To further assist institutions, the IPC's document *Drafting a Letter Refusing Access to a Record*¹⁷ provides guidance for institutions on the kind of information they should include in decision letters, including:

- An index of records;
- A document number assigned to each record and a general description of each record;
- An indication of whether access has been granted or denied for each record or part of a record;
- The specific provision of the *Act* for which access has been denied to each record or each part of a record;
- An explanation of why the provision applies to each record or part of a record;
- The name and position of the individual making the decision; and

¹⁶ Order M-913.

¹⁷ Online available at: <https://www.ipc.on.ca/wp-content/uploads/Resources/num-1.pdf>.

- A paragraph informing the requester that he or she can appeal the decision to this office.

[41] The township's decisions in response to the appellant's requests did not contain a number of the elements set out above. For example, the Index of Records does not describe the *records* responsive to the requests in the "General Description" column but reproduces the item of the request subject to the particular exemptions claimed. Therefore, the township did not provide a general description of the records at issue. In addition, the township did not provide the appellant with an explanation as to why the exemptions claimed applied to each record or part of a record. Moreover, there are inconsistencies between the exemptions referred to in the actual decision letters and those identified in the Index of Records.

[42] In my view, the township's decision letters and Index of Records are such that the appellant is not able to determine what records it located, what records were denied under which exemptions, whether the township responded to the appellant's request in its entirety and whether certain records that might be responsive to the appellant's request exist.

[43] Given the lack of detail in the township's original access decisions, I will order the township to issue proper access decisions to the appellant respecting access to records responsive to his two requests in accordance with the requirements of the *Act*, with reference to the IPC's document *Drafting a Letter Refusing Access to a Record*.

ORDER:

1. I do not uphold the township's decision that the requests are frivolous or vexatious under the *Act*.
2. I order the township to issue access decisions to the appellant respecting access to records responsive to his two requests, treating the date of this order as the date of the request.

Original Signed By _____
Justine Wai
Adjudicator

_____ March 1, 2018