Information and Privacy Commissioner,
Ontario, Canada

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

# ORDER MO-3579

Appeal MA17-41

Ottawa Police Services Board

March 27, 2018

**Summary:** The appellant submitted a request to the police for statistical information relating to the numbers of provincial offence charges and warnings issued for several calendar years. In response, the police issued a decision letter claiming that the appellant's request was frivolous and vexatious under section 4(1) and did not process the request. In this order, the adjudicator finds that the appellant's request is not frivolous or vexatious and orders the police to issue an access decision.

**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 the following two-part request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act* or *MFIPPA*) to the police:

> Please provide the number of PON charges issued by the OPS in the calendar years (all requests should be separated by calendar year) for January 1, 2012 to December 31, 2012, January 1, 2013 to December 31, 2013, January 1, 2014 to December 31, 2014, January 1, 2015 to December 31, 2015 and January 1, 2016 to November 30, 2016 using the same search parameters used for FOI request [specified file number] using the source RMS ticket browse. Please provide the number of PON Charges that were voided in the same calendar years listed above, January 1, 2012 to December 30, 2012, January 1, 2013 to December 31,

> 2013, January 1, 2014 to December 31, 2014, January 1, 2015 to December 31, 2015, and January 1, 2016 to November 30, 2016 using the same search parameters used for request 16-345 using the source RMS ticket browse.
>
> Please provide the number of PON warnings issued by the OPS in the calendar years for January 1, 2012 to December 31, 2012, January 1, 2013, to December 31, 2013, January 1, 2014 to December 31, 2014, January 1, 2015 to December 31, 2015 and January 1, 2016 to November 30, 2016 using the same search parameters used for FOI request [specified filed number] using the source RMS ticket browse. Please provide the number of PON warnings that were voided in the calendar years for January 1, 2012 to December 30, 2012, January 1, 2013 to December 31, 2013, January 1, 2014 to December 31, 2014, January 1, 2015 to December 31, 2015, and January 1, 2016 to November 30, 2016 using the same search parameters used for request 16-345 using the source RMS ticket browse.

[2] The police issued a decision letter claiming that the request was frivolous and vexatious pursuant to sections 4(1)(b). The appellant appealed the police's decision to this office and a mediator explored settlement with the parties. No mediation was possible and the file was transferred to the adjudication stage of the appeals process in which an adjudicator conducts an inquiry. During the inquiry, the parties provided written representations in support of their position.

[3] In this order, I find that the appellant's request is not frivolous or vexatious for the purposes of the *Act*, and order the police to issue an access decision.

## DISCUSSION:

[4] The sole issue to be determined in this decision is whether the appellant's present request is 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.

[5] 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 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.

[6] 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.[1]

[7] An institution has 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**

[8] As noted above, Section 5.1 of Regulation 823 under the *Act* prescribes three grounds for a frivolous or vexatious claim:

- where the request results in a pattern of conduct that amounts to an abuse of the right of access;
- where the request results in a pattern of conduct that interferes with the operations of the institution; and
- where the request was made in bad faith or for a purpose other than access.

**Pattern of conduct that amounts to an abuse of the right of access or interfere with the operations of the institution**

[9] 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 excessive by reasonable standards?
- *Nature and scope of the requests*: Are they excessively broad and varied in scope or unusually detailed? Are they identical to or similar to previous requests?
- *Purpose of the requests*: Are the requests intended to accomplish some objective other than to gain access? For example, are they made for "nuisance" value, or is the requester's aim to harass government or to break or burden the system?

[1] Order M-850.
[2] Order M-850.

- *Timing of the requests*: Is the timing of the requests connected to the occurrence of some other related event, such as court proceedings?[3]

[10] 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.[4]

[11] 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.[5]

[12] 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.[6]

[13] 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.[7]

***Representations of the parties***

[14] In their representations, the police state:

> [t]he RMS is a live database with information constantly being added, modified and/or deleted for a multitude of reasons, therefore, the statistical information obtained today would not be the same as information previously obtained.

[15] The police also state that they explained to the appellant that redoing any statistics at this time "would result in a different outcome as any false ticket warnings were deleted from the database during the investigation process".

[16] The police take the position that the appellant's filing of the present request demonstrates a pattern of behaviour that amounts to an abuse of the right of access. In support of this position, the police submits that:

- The appellant has made a total of 15 requests under the *Act* in less than a year and the statistical information responsive to the present request was already disclosed to the appellant in a previous request.

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[3] Orders M-618, M-850 and MO-1782.
[4] Order MO-1782.
[5] Order MO-1782.
[6] Order M-850.
[7] Order M-850.

- The appellant filed the present request in an effort to have the statistical information at issue reformatted in the same manner as the information she received in response to an earlier request; and

- The appellant submitting similar requests multiple times, with "slight changes" in each request places a burden on the system.

[17] The police also question the appellant's purpose and timing of her request. The police submit that the appellant is a family member of one of the police officers subject to disciplinary hearings arising from a provincial offences ticket audit. The ticket audit relates to an investigation the police's professional standards branch launched to look into allegations that several police officers were writing up warnings for traffic infractions that either did not occur or were not communicated to drivers.

[18] In their representations, the police states:

> This office is of the opinion that the purpose of obtaining the requested [statistical information] by the appellant was to undermine the integrity of the ongoing investigations at the time.

[19] In response, the appellant maintains that she filed the present request for no other purpose but to obtain access to the requested information. She advises that she was told by a police officer that it should only take a "minute or two" to generate a report for the specified dates in the police's database. She also argues that she would have never filed so many requests if she was satisfied with the information that was provided to her. The appellant states:

> When I received fabricated responses, I sent in another request pointing out that I knew the information was not correct and tried to refine my request to get the information I desired. I argue that if [the police] had provided me with truthful information using their RMS database, I would have never made 15 *MFIPPA* requests.

[20] In response to this concern, the police state:

> The FOI section was not trying to deceive or provide false information. Staffing issues and workload issues were the reasons that the FOI sought the assistance of the CIAU Section. Also, the use of Excel Spreadsheet was a new process to the FOI Section at the time these requests were received.

[21] The police also acknowledge that a general query from the same database referenced in the appellant's request and representations will produce a list of all tickets issued for the dates entered in a very short amount of time. However, the police advise that this information alone does not respond to the appellant's request for the number of voided charges and warnings.

[22] In support of their position that the present request amounts to a pattern of conduct that would interfere with its operations, the police state that retrieving the information at issue from its database is a "…time consuming process and takes, at a minimum, an hour to process". The police submit that since the information produced from a ticket browse query does not reveal the requested totals, that information must be added to a spreadsheet to generate a record which responds to the request. The police advise that the format of the spreadsheet can be in block format or in linear format (the format preferred by the appellant).

[23] The police advise that the spreadsheet previously disclosed to the appellant which is in her preferred format contains an error in the header manually added to the title of that spreadsheet.[8] As a result of the error, the police take the position that the information disclosed to the appellant in the earlier request "was inconsistent with the other information that was provided".

### ***Decision and Analysis***

[24] Having regard to the submissions of the parties, I find that the police have not provided sufficient evidence to support a finding that the appellant's pattern of conduct amounts to an abuse of the right of access or interferes with the operations of the police. I also am not satisfied that the police have demonstrated that the appellant's request was made for a purpose other than to obtain access.

[25] In my view, the information at issue in this appeal is unique in that the timing of the request could lead to different results. The police, themselves, advise that the database is populated with information that is "constantly being added, modified and/or deleted".

[26] Given the nature of the information at issue, I do not find that the number of requests the appellant has filed is excessive by reasonable standards. Even if the present request is identical or similar to previous requests, taking into account the fact that the results could change with the passage of time, I find that the nature and scope of the request is reasonable. In addition, the police admit that an inadvertent error may have produced an "inconsistent" result in a prior request, which in my opinion would legitimately lead to some confusion on the part of the appellant.

[27] I also considered the police's position that the timing of the appellant's request sought to undermine the integrity of ongoing investigations which contributed to a pattern of conduct which amounted to an abuse of the right of access. However, I find that the police failed to adduce sufficient evidence to establish that this is a relevant factor in the circumstances of this appeal. For instance, I was not provided with evidence that processing the request required the police's freedom of information office to have any contact with the professional standards branch while it conducted its

[8] The police advise that the header which states "charges-voided" should say "charges-void warning". The police state that "[t]his means that when the ticket was initially created the 'class' of the ticket was 'issued' – and the status of the ticket was 'void-warning'.

investigations. Instead, their evidence suggests that processing the request involves a query search of their database and the subsequent creation of a spreadsheet which is to be performed by records management personnel. Even if I was provided with evidence that processing the request necessitated the interruption of ongoing investigations, there is no evidence that the time the police anticipate it will take to process the request would result in the investigations being undermined.

[28] For similar reasons, I find that the police provided insufficient evidence to establish that the appellant's pattern of conduct interferes with the operations of the police's freedom of information office. Though I accept the police's evidence that processing the request would take a minimum of an hour to process, I do not agree with their characterization of this amount of time as "significant". Even if I look at the cumulative effect of processing 15 requests, there is insufficient evidence to support a finding that the appellant, by filing the requests, interfered with the police's operations. As mentioned above, 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. In addition, the police's statement that CIAU staff assisted in processing one previous request because its freedom of information office faced staffing or workload issues falls short of establishing interference with its operations. In any event, the *Act* enables an institution to charge a fee for processing some requests.[9] There are also provisions in the *Act* to enable an institution to request an extension of time to process a request.[10]

**Purpose other than to obtain access**

[29] The police do not allege that the appellant made the present request in bad faith. However, the police's submission that the appellant filed the request in an effort to frustrate ongoing investigations suggest that they take the position that the appellant filed the present request for a purpose other than to obtain access.

[30] 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.[11]

[31] Previous orders have found that 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".[12]

[32] In order to qualify as a "purpose other than to obtain access", the requester would need to have an improper objective above and beyond a collateral intention to use the information in some legitimate manner.[13] Where a request is made for a purpose other than to obtain access, the institution need not demonstrate a "pattern of

[9] See Section 45 and Regulation 823.
[10] See section 20(1).
[11] Order M-850.
[12] Orders MO-1168-I and MO-2390.
[13] Order MO-1924.

conduct".[14]

### *Decision and Analysis*

[33] I find that the police have failed to adduce sufficient evidence to demonstrate that the appellant's request was made for a purpose other than to obtain access.

[34] I considered whether there is sufficient evidence to conclude that the appellant filed the request for a purpose other than to obtain access without also considering whether it demonstrates a "pattern of conduct". In my view, the police's evidence that the appellant is related to one of the police officers subject to the ticket audit falls short of demonstrating that the request was made for a purpose other than to obtain access. In addition, for the same reasons I discounted the police's argument above that the appellant filed the request to interfere with ongoing investigations. I also find that the police failed to demonstrate that the appellant filed the request for a purpose other than to obtain access.

[35] In my view, there is nothing improper about the appellant's request which may result in access to information about the numbers of warnings and cautions issued and voided by the police for a specified period of time. In order to qualify as a "purpose other than to obtain access", the requester would need to have an improper objective above and beyond a collateral intention to use the information in some legitimate manner.[15]

[36] For the reasons set out above, I find that the appellant's request is not frivolous or vexatious and I order the police to issue an access decision in response to it.

## ORDER:

1. I do not uphold the police's decision that the appellant's request is frivolous or vexatious under section 4(1)(b).

2. I order the police to issue an access decision for records responsive to the appellant's two-part request, treating the date of this order as the date of the request.

Original signed by
Jennifer James
Adjudicator

March 27, 2018

[14] Order M-850.
[15] Order MO-1924.