Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3621

Appeal MA17-223

City of Ottawa

June 12, 2018

Summary: The City of Ottawa (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to two identified addresses. This request followed several prior requests submitted to the city for similar information. The city issued a decision taking the position that the request was "frivolous or vexatious" as described in sections 4(1)(b) and 20.1(1) of the *Act* and section 5.1 of Regulation 823 made under the *Act*.

In this order, the adjudicator finds that the request at issue is not frivolous or vexatious, and orders the city 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, sections 4(1)(b) and 20.1(1); and section 5.1. of Regulation 823.

Orders and Investigation Reports Considered: Orders MO-1924, MO-3288.

OVERVIEW:

[1] The City of Ottawa (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

> All documents related to [the] city and the appellant with respect to [two identified addresses] from May 2, 2011.

All dates on which City of Ottawa employees or contractors have entered the premises, inside or outside [two identified addresses].

All cameras directed at the outside of [identified address] by the city, from May 2, 2011 to the present.

All cameras placed within [two identified addresses] by the city, from May 2, 2011 to the present.

All audio recording devices placed within either address May 2, 2011 to the present.

All chemicals, gases, used by the city within [two identified addresses] May 2, 2011 to the present.

An accounting of all items removed, rearranged or deposited within [two named addresses] May 2, 2011 to the present.

All means of access used by the city to enter locked premises [two identified addresses] May 2, 2011 to the present.

All photos and video of [named individual] with the appellant's underwear May 2, 2011 to the present.

All documents handled, removed, copied or redistributed between [two named addresses].

All documents related to interactions between the city and Ottawa Police with respect to the appellant May 2, 2011 to the present.

Any title search of [two identified addresses] made by the city and the date [sic].

All documents with respect to interactions between city and

- [named individual]
- other residents of [named street]
- residents of [named street]

Any surveillance of the appellant by city employees and or persons under the direction of the city.

All service notes and service reports with respect to [two identified addresses] May 2, 2011 to the present.

All anonymous notes left by the city on the premises.

> Any documents left at the door 2013 and backdated to 2012.
>
> All documents with respect to dates [named individual] attended at [two named addresses].
>
> All documents relating to interaction between [named individual] and the appellant.
>
> All dates on which the city hacked the appellant's alarm system and computer May 2, 2011 to the present.
>
> Documents with respect to the drainage question 2015.

[2] The city issued a decision advising that it was denying access to the responsive records as it was of the view that the request is frivolous or vexatious pursuant to section 20.1 of the *Act*. It explained its reasons as follows:

> The request was made in bad faith for a purpose other than to obtain access.
>
> The request is substantially the same as the appellants' previous requests. A-2013-00534, A-2014-00068 and A-2016-00032.
>
> The city has disclosed over 1,000 responsive records to the appellant in response to Request A-2014-00068 and was the subject of Appeal MA14-131.
>
> Appeal MA14-131 was adjudicated and resulted in Order MO-3288 (dated Feb. 11, 2016) and PHIPA Decision 24 dated Feb. 9, 2016.
>
> The disclosed records contain reference both [of the two addresses identified in the appellant's request].

[3] The city also stated that the request appears to be intended to harass staff.

[4] The requester, now the appellant, appealed the city's decision.

[5] As a mediated resolution could not be reached, the file was moved to the adjudication stage for an inquiry. During my inquiry, I sought and received representations from both parties. The non-confidential portions of the city's representations were shared with the appellant in accordance with the principles set out in this office's *Code of Procedure* and *Practice Direction 7*. I determined that it was not necessary to share the appellant's representations with the city.

[6] In this order, I find that the city has not established that the request made by the appellant is frivolous or vexatious. The city is ordered to issue an access decision.

DISCUSSION:

Is the request for access frivolous or vexatious?

[7] The sole issue to be determined in this appeal is whether the appellant's request for access is frivolous or vexatious.

[8] 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.

[9] Section 20.1(1) of the *Act* states:

> A head who refuses to give access to a record or part of a record because the head is of the opinion that the request for access is frivolous or vexatious, shall state in the notice given under section 19,
>
> > (a) that the request is refused because the head is of the opinion that the request is frivolous or vexatious;
> >
> > (b) the reasons for which the head is of the opinion that the request is frivolous or vexatious; and
> >
> > (c) that the person who made the request may appeal to the Commissioner under subsection 39(1) for a review of the decision.

[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 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) 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] 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

[12] The city alleges that the appellant's request is frivolous or vexatious based on two of the specific grounds set out in Regulation 823: the request results in a pattern of conduct that amounts to an abuse of the right of access; and, the request was made in bad faith.

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

[13] As indicated above, 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 explored the meaning of this phrase.

[14] In Order M-859, former Assistant Commissioner Tom Mitchinson commented on the meaning of "pattern of conduct." 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)

[15] To determine whether an appellant's request forms part of a pattern of conduct that amounts to an "abuse of the right of access" as set out in section 5.1 of Regulation 823, a number of factors can be considered. In the circumstances of this appeal, I will be considering the number, the timing, as well as the nature and scope of the appellant's requests.

Representations

[16] The city notes that the request at issue is identical in scope to the appellant's previous request (A-2016-00032) which was primarily for records relating to one of the identified properties, the property in which she previously resided. In response to that request, the city granted partial access to the responsive records, although in its representations it states in that decision the city incorporated its response to earlier requests "resulting in the disclosure of several pages of records that only reference her new property." The city submits that Appeal MA16-267 was opened in respect to that decision and was subsequently withdrawn by the appellant. The city provided me with a copy of the request and the decision letter it issued in response to that request to demonstrate its similarity.

[17] The city submits, and it is evident from its decision letter in response to A-2016-

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

00032, that over 1,000 pages of responsive records pertaining to the appellant's previous property had been already disclosed to her in response to another earlier request (A-2014-00068)[3]. The city states that A-2014-00068, which it submits was also substantially similar to an even earlier request, A-2013-000534, became the subject of Appeals MA14-131 and MA14-131-2, which were resolved jointly by Order MO-3288.

[18] The city submits that the appellant's latest request, which forms the basis for this appeal, is an abuse of the right of access as the city has already responded to the request on more than one occasion and this office has already made findings with respect to records that the appellant is again seeking access to.

[19] The appellant acknowledges that she has made multiple access requests. However, she states that she has a right to make a request for access to information and she is not limited to one such request. She submits that Order PO-3539, which upheld a frivolous or vexatious claim, dealt with someone making 43 requests in about a year and that she has only made four requests over a six year period in "strict accordance" with the *Act*. She submits that the purpose of her requests is to obtain records about "very serious matters" that she needs to defend herself and her property, and to obtain information to protect herself against criminal and wrongful conduct. She states that her requests are not frivolous.

[20] The appellant further submits that the city has the burden of proof to substantiate its decision that a request is frivolous or vexatious, and that the city has not satisfied that burden of proof with respect to the request at issue in this appeal.

Analysis

[21] For the reasons set out below, I find the city has not established that the request at issue is part of a "pattern of conduct that amounts to an abuse of the right of access."

[22] It is not in dispute that the appellant has submitted four requests to the city for records relating to her properties over a six-year period. In my view, neither the number nor the timing of the requests is excessive and I find the city has not provided sufficient evidence to support a conclusion that four requests over six years amount to an "abuse of the right of process" as set out in section 5.1. of Regulation 823.

[23] With respect to the nature and scope of the requests, the city submits that the request at issue is identical to the appellant's most recent prior request and substantially similar in nature and scope to the two other requests filed by the appellant. I will address the most recent of the requests first.

[24] The city repeatedly states that request A-2016-0032 is "identical in scope to the request that is at appeal." In my view, this is not entirely accurate. While I note that

[3] The city further submits that A-2014-00068 was also substantially similar to the request in this appeal as it requested access to records related to both the requester and the city's Bylaw Services department.

the wording of the request in A-2016-00032 is almost identical to the wording of the request at issue in this appeal, in request A-2016-00032 the appellant primarily requests records relating to one address, her previous address. In most parts of the request at issue, she seeks access to responsive records relating to not only her previous address but also her current address. In my view, while records responsive to the request at issue would most certainly overlap those that would have been responsive to her previous request, the request cannot be described as "identical." At best, the request at issue can only be considered substantially similar, as presumably it could generate an entirely new subset of records for the new address,[4] in addition to the set of records relating to the previous address which were previously identified as responsive to her request A-2016-0032.

[25] Additionally, in response to request A-2016-0032, the city granted partial access to the records (which it submits relate to her previous property), denying access pursuant to portions pursuant to two identified exemptions. The appellant appealed this decision and this office opened Appeal MA16-267. Subsequently however, as explained by the city in its representations, the appellant withdrew the appeal at the intake stage. I note that the appellant agreed to withdraw the appeal as she had failed to submit it within the required 30-day appeal period and the city declined to exercise its discretion to accept it beyond that date, which it was within its rights to do. In the closing letter for Appeal MA16-267, sent to the appellant and copied to the city, the Intake Analyst stated:

> I informed you that in order to reinstate your right to appeal, you must submit a new request to the city. Once you receive the city's new decision, you may resubmit an appeal to the IPC within the required 30 days. Based on the above information, you agreed to close the file.

[26] It would appear that the appellant then filed the request that is at issue before me, which is similar but not identical to, the one that gave rise to Appeal MA16-267. She filed an appeal of the city's decision with respect to her request within the 30-day appeal period as discussed during Intake.

[27] As set out above, a "pattern of conduct" requires recurring incidents of related or similar requests on the part of the requester. While the two requests are substantially similar, the appeal of the request at issue in Appeal MA16-267 was filed late and the matter was withdrawn. Subsequently, the appellant submitted the request at issue in order to establish a right of appeal of the city's decision. I do not accept that I have sufficient evidence before me to conclude the re-submission of a substantially similar, though not identical, request in these circumstances can be characterized as a pattern of conduct that amounts to an abuse of process.

[28] I acknowledge that several years earlier the appellant had requested similar information through two more generally worded requests (A-2013-000534 and A-2014-

[4] It should be noted however, that by making this statement I am not making a determination of whether or not records responsive to the new address exist.

00068) requesting records relating to herself and the city's Bylaw Services Department. Despite not having been provided with the exact wording of those requests, I accept that there is likely overlap in the responsive records. However, in my view, I have insufficient evidence to conclude that these requests, together with the subsequent two requests, form a pattern of conduct that amounts to an abuse of process.

[29] Given the particular circumstances of this appeal and the evidence before me, I do not consider the fact that the nature and scope of the request at issue, taken together with a substantially similar but not identical earlier request, and two even earlier requests that relate to the same subject matter, is sufficient to establish a pattern of conduct that can be described as an abuse of process.

[30] Therefore, I am not satisfied that, in this case, the city has provided sufficient evidence to demonstrate that the request before me demonstrates a pattern of conduct that amounts to an abuse of the appellant's right of access as set out in section 5.1 of Regulation 823 made under the *Act*.

Bad faith or a purpose other than to obtain access

[31] A second ground upon which an institution can base a finding that a request is frivolous or vexatious is if it can be established that the request was made in bad faith or for a purpose other than to obtain access.

[32] Where a request is made in bad faith, the institution need not demonstrate a "pattern of conduct."[5] Bad faith has been 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 …." [B]ad faith" is not simply bad judgement or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose of moral obliquity; it is different from the negative idea of negligence in that it contemplates a state of mind affirmatively operation with furtive design or ill will.[6]

[33] 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.[7] 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."[8] Where a request is made for a purpose other than to obtain access, the institution need not demonstrate a "pattern of

[5] Order M-850.
[6] Order M-850.
[7] Order M-850.
[8] Orders MO-1168-I and MO-2390.

conduct."[9]

Representations

[34] The city submits that the appellant's request was submitted in "bad faith" and for a purpose other than to obtain access to the records, namely, for the purpose of harassing staff and otherwise causing a nuisance. It submits that the wording of her request is lengthy, containing additional content that is of no relevance to locating the responsive records. It submits that this additional content amounts to inappropriate and accusatory language included in the request solely for the purpose of harassing city staff responsible for processing requests and locating the responsive records.

[35] The city explains that the appellant is displeased with the Ottawa By-law and Regulatory Services staff who were required to intervene at her previous property due to the accumulation of objects inside and outside her home. The city submits that the appellant has repeated inflammatory language in many of her requests, including the one at issue, and provides the following statements as examples:

- "all audio recording devices placed within either address…"
- "all photos and videos of [By-law Officer] with the appellant's underwear…."
- "all dates on which the city hacked [the appellant's] alarm system and computer…"

[36] The city also submits that her requests include allegations of improper action taken by the city, including allegations that objects of value were removed from her property. The city submits that rather than seeking access to the records, the appellant is seeking to intimidate staff into not interfering with her or her property again in the future.

[37] The city states that it recognizes the *Act* supports the purposes of a requester to seek access to records, but that this office has already confirmed it has conducted a reasonable search for records relating to the events surrounding her two properties. It submits that the request does not further any legitimate goal of the requester and reiterates that it is designed to harass staff by making inappropriate statements or levelling accusations regarding events that occurred several years ago.

[38] The city submits that when it responded to one of the appellant's earlier requests, it advised the appellant not only that it has already provided the appellant with all the records she has requested but also of the inappropriateness of the language used in some parts of her request. The city submits that it provided her with notice that the city reserved the right to deny access if there is an apparent intent to harass staff or if the request was made for bad faith or purposes other than to obtain access, and/or the request is substantially the same as a previous request. The city submits

[9] Order M-850.

that despite this comment, the appellant submitted a new request that was identical in scope to the previous requests and very similar to past requests which repeated and included additional inappropriate and accusatory language. The city submits that it appears the request at issue was submitted for the purpose of harassing staff members.

[39] The city provided with its representations a letter sent by the appellant to the city, which it submits references and builds on accusations set out in her requests and includes "lurid statements."

[40] The appellant submits that she made a first request and the city provided a few pages in response. She submits that she then made a second request and the city provided a few more pages. She submits that she made a third request and the city provided her with more than 1,000 pages of responsive records. She submits that in each instance, the city provided different documents. She states that she is not limited to one request and she is entitled to make an additional request.

[41] The appellant also submits that the adjudicator in Order MO-3288 previously said that she was satisfied there was a bylaw complaint. The appellant states that she does not wish to know the identity of the complainant, but seeks access to the text of the complaint. She states that she wants answers and wants to see records.

Analysis

[42] Considering the evidence before me, I find that I do not have sufficient evidence to conclude that the appellant's request is either in bad faith or for a purpose other than to obtain access.

[43] Applying the definition of bad faith set out above, in my opinion, the evidence provided by the city in support of bad faith on the part of the appellant does not establish that the appellant consciously exercised her access rights in submitting another request for a dishonest purpose or with a sinister motive based on furtive design or ill will. In my view, the appellant wished to exercise her right of access (which she was precluded from pursuing previously having failed to appeal the city's decision during the legislated appeal period) for the purpose of obtaining access to the responsive records.

[44] For a request to be made for a purpose other than to obtain access, it must be found that the requester is motivated not by a desire to obtain access, but by some other objective.[10] In Order MO-1924, former Senior Adjudicator John Higgins provided extensive comments on when a request may be found to have a purpose other than to obtain access. Commenting on the institution's argument that the objective of the request was to obtain information for the purpose of litigation, he stated:

[10] Order M-850.

> This argument necessitates a discussion of whether access requests may be for some collateral purpose over and above and abstract desire to obtain information. Clearly, such purposes are permissible. Access to information legislation exists to ensure government accountability and to facilitate democracy (see *Dagg v. Canada (Minister of Finance),* 1997 CanLII 358 (SCC). This could lead to request for information that would assist a journalist in writing an article or a student in writing an essay. The *Act* itself, by providing a right of access to one's own personal information (section 36(1)) and a right to request correction of inaccuracy is a legitimate purpose. Similarly, requesters may also seek information to assist them in a dispute with the institution, or to publicize what they consider to be inappropriate or problematic decisions or processes undertaken by institutions.
>
> To find that these reasons for making a request are "a purpose other than to obtain access" would contradict the fundamental principles underlying the *Act*, stated in section 1, that "information should be available to the public" and that individuals should have a "right of access to information about themselves." In order to qualify as a "purpose other than to obtain access," in my view, the request would need to have an improper objective above and beyond a collateral intention to use the information in some legitimate manner.

[45] I adopt the approach set out by former Senior Adjudicator Higgins for the purpose of this appeal. I am prepared to accept, on the evidence before me, that the appellant has a legitimate and genuine interest in the information at issue. I acknowledge that in her request, she has used language that is somewhat inflammatory and abrasive and which could be seen as an attempt to provoke city staff. However, I find that despite this, the city has not provided sufficient evidence to support a finding that the appellant's request was made for a purpose other than to obtain access. In the circumstances before me, I am not satisfied on reasonable grounds that the appellant filed the request for a purpose other than to obtain access to the requested records and I find that the threshold has not been established.

Conclusion

[46] The tests under section 5.1 of Regulation 823 set a high threshold that, in my view, has not been met in the circumstances of this appeal. Based on my analysis set out above, I find that the city has not established reasonable grounds for finding that the request at issue before me is frivolous or vexatious within the meaning of section 4(1)(b) of the *Act*. As a result, I will order the city to issue an access decision.

[47] I have found that in the present circumstances and given the evidence before me, it has not been established that the request at issue meets the grounds for it to be considered frivolous or vexatious within the meaning of section 4(1)(b). However, I acknowledge the substantial similarity between the request that is before me and the one immediately preceding it. The city is reminded that should the appellant submit a

further request of substantially similar nature and scope and the city believes that the circumstances surrounding that request support a finding that it is frivolous or vexatious, it is not precluded from making a decision on that basis.

ORDER:

I do not uphold the city's decision that the request is frivolous or vexatious and order it to issue a decision in accordance with the *Act*. For the purposes of section 19, 22 and 23 of the *Act*, the date of this order shall be deemed to be the date of the request.

Original Signed By
Catherine Corban
Adjudicator

June 12, 2018