

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-3771

Appeal MA17-721-2

City of Hamilton

May 24, 2019

**Summary:** The City of Hamilton (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to all records related to the processing of a specified previous freedom of information request made by the appellant. The appellant noted the types of records sought and the manner in which he would like to receive them. The city issued a decision denying access on the basis that the appellant's request was frivolous or vexatious and the appellant appealed that decision. Although the city bears the burden of proof to substantiate its decision to declare a request to be frivolous or vexatious, it provided no representations in the course of adjudication to support its position. In this order, the adjudicator does not uphold the city's decision and orders it to make an access decision, without relying on the frivolous or vexatious provisions of the *Act*.

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

### BACKGROUND:

[1] The City of Hamilton (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act* or *MFIPPA*) for access to all records related to the processing of a specified previous freedom of information request made by the requester. The requester noted the types of records sought and the manner in which he would like to receive them.

[2] The city acknowledged receipt of the request and subsequently issued a time extension pursuant to section 20 of the *Act*. As the city failed to issue a decision within the indicated time period, the requester (now the appellant) commenced a deemed

refusal appeal and Appeal file MA17-721 was opened to address it.

[3] The city subsequently wrote to the requester to advise him of its position that the scope of the request at issue in Appeal MA17-721 mirrors the issues raised in another of his previous requests, which was then under appeal at this office, being the subject of Appeal File MA17-541<sup>1</sup>. As set out in its letter, it advised the requester that it would await the resolution of that appeal before addressing Appeal MA17-721. However, the city ultimately issued an access decision letter taking the position that the request at issue in the appeal before me was frivolous or vexatious. Among the reasons that the city listed for its decision, it again alleged that the scope of the appellant's request mirrored the scope of the appellant's request at issue in Appeal MA17-541. As the city issued an access decision and was no longer in a deemed refusal situation, Appeal file MA17-721 was closed.

[4] The appellant appealed the city's access decision and Appeal file MA17-721-2 (the within appeal) was opened to address it.

[5] During the course of mediation, the appellant sent a letter dated October 4, 2018 to the city, advising that he wished to narrow his request. The city did not respond to the letter or to the mediator's voice message to the city regarding the appellant's position as set out in his letter. As no further mediation was possible, the appellant requested that this appeal proceed to the next stage of the process, on the sole issue of whether his request was frivolous or vexatious. The appellant also confirmed that he wishes to proceed on the basis of the narrowed request contained in his letter dated October 4, 2018.

[6] As mediation did not resolve the appeal it was moved to the adjudication stage of the appeals process where an adjudicator conducts an inquiry under the *Act*.

[7] I commenced my inquiry by sending the city a Notice of Inquiry setting out the facts and issues in the appeal. The city did not provide responding representations. I then sent a Notice of Inquiry to the appellant. The appellant provided responding representations.

[8] In this order, I do not uphold the city's decision and order it to make an access decision in accordance with the terms of the *Act* as set out in the order provision below.

## **DISCUSSION:**

[9] The sole issue in this appeal is whether the appellant's access request is frivolous or vexatious within the meaning of section 4(1)(b) of the *Act* and section 5.1 of

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<sup>1</sup> Appeal MA17-541 was placed on hold at the request of the appellant on February 5, 2019.

Regulation 823.

[10] Section 4(1)(b) of the *Act* 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.

[11] 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.

[12] 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.<sup>2</sup>

[13] An institution has the burden of proof to substantiate its decision to declare a request to be frivolous or vexatious.<sup>3</sup> The factors that could have been addressed in the city's representations were set out in the Notice of Inquiry provided to the city, which include:

- The number of the appellant's requests;
- The nature and scope of the appellant's requests;

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

<sup>3</sup> Order M-850.

- Whether the purpose of the appellant's request was intended to accomplish some objective other than to gain access;
- Whether the timing of the appellant's requests was connected to the occurrence of some other related event, such as court proceedings.<sup>4</sup>

[14] 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>

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

[15] The city was also asked to consider and provide evidence which would establish that the appellant's pattern of conduct was such that it would interfere with the operations of the institution. It did not do so.

### **Bad faith**

[16] The city was also asked to provide evidence in support of any allegation that the appellant's request was made in bad faith.

[17] "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. ... "bad faith" is not simply bad judgement 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.<sup>6</sup>

[18] The city did not address this ground.

### **Purpose other than to obtain access**

[19] Finally, the city was asked whether the request was made for a purpose other than to obtain access including whether the appellant was motivated not by a desire to obtain access, but by some other objective.<sup>7</sup>

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<sup>4</sup> Orders M-618, M-850 and MO-1782.

<sup>5</sup> Order MO-1782.

<sup>6</sup> Order M-850.

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

Again, the city did not address this ground.

### **Analysis and finding**

[20] As set out above, the city has the burden of proof to substantiate its decision to declare a request to be frivolous and vexatious.

[21] In this appeal, the city provided no representations in support of its position thereby providing me with no assistance in making my determination. For example, the city does not provide an explanation in support of its assertion in its access decision letter that the scope of the request at issue in this appeal mirrors the issues raised in the appellant's request at issue in Appeal MA17-541. In the absence of representations from the city, I find that the city has failed to provide me with sufficient evidence to support a finding that the appellant's request at issue in this appeal is frivolous or vexatious. Accordingly, I will order the city to issue an access decision on the terms set out in the order provision below.

[22] In that regard, I am not making a determination at this stage regarding disclosure of any responsive records, or granting any other relief requested by the appellant in his representations. I am simply ordering the city to make an access decision on the terms set out in the order provision below.

[23] I feel it necessary to point out that the city not only failed to establish that the appellant's request was frivolous or vexatious but also did not participate in the inquiry of the appeal. I remind the city of its obligations as an institution under the *Act* and the serious implications to a requester of an institution's frivolous or vexatious claim.

### **ORDER:**

I order the city to issue an access decision in response to the appellant's narrowed request dated October 4, 2018, without claiming that the request is frivolous or vexatious and without recourse to a time extension, in accordance with the requirements of sections 19, 21, 22 and 45 of the *Act*, as applicable, treating the date of this order as the date of the request, and to send me a copy of the decision letter when it is sent to the appellant.

Original Signed by \_\_\_\_\_  
Steven Faughnan  
Adjudicator

\_\_\_\_\_ May 24, 2019