Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4013

Appeal PA19-00274

McMaster University

December 9, 2019

Summary: McMaster University issued a single decision in response to two access requests that it received under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The university's decision was to refuse to process the requests on the basis that they were frivolous or vexatious under section 10(1)(b) of the *Act*. The adjudicator finds that the requests are not frivolous or vexatious, and orders the university to issue access decisions responding to both.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F31, as amended, section 10(1)(b); and section 5.1 of Regulation 460.

Orders Considered: Orders 81, M-1071, and MO-1427.

OVERVIEW:

[1] McMaster University (the university) received two requests from an individual seeking access to information under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The first was a nine-part request for all records regarding the requester, exchanged between the Faculty of Engineering, Student Accessibility Services, and a number of named individuals. The second was an eleven-part request seeking access to all records regarding the requester created by Student Accessibility Services, Student Support and Case Management, Student Affairs, the Faculty of Engineering, and a number of named individuals. The university received the second request approximately two and a half months after the first.

[2] The university issued one decision responding to both requests. The university advised that both requests were denied on the basis that they were frivolous or

vexatious under section 10(1)(b) of the *Act*. Specifically, the university's decision letter stated that the requests are:

a. part of a pattern of conduct that amounts to an abuse of the right of access and interferes with the operations of the institution;

b. made in bad faith; and

c. made for a purpose other than to obtain access to records.

[3] The requester (now the appellant) appealed the university's decision to this office.

[4] A mediated resolution was not achieved during the mediation stage of the appeal process, and the file was transferred to the adjudication stage where an adjudicator conducts an inquiry under the *Act*.

[5] I began my inquiry by inviting and receiving written representations from the university explaining its position. Upon review of the university's submissions, I determined that it was not necessary to invite the appellant's representations in response.

[6] For the reasons that follow, I find that the university has not established that the requests are frivolous or vexatious. I order the university to issue access decisions responding to both requests.

DISCUSSION:

Are the appellant's requests frivolous or vexatious within the meaning of section 10(1)(b)?

[7] The sole issue to be determined in this appeal is whether the appellant's requests are frivolous or vexatious as contemplated by section 10(1)(b) of the *Act*, which states:

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

[8] This section 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]

[9] The institution has the burden of proof to substantiate its decision to declare a request to be frivolous or vexatious.[2] Where a request is found to be frivolous or vexatious, this office will uphold the institution's decision. In addition, this office may impose conditions such as limiting the number of active requests and appeals the appellant may have in relation to a particular institution.[3]

Grounds for a frivolous or vexatious claim

[10] Section 5.1 of Regulation 460 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] The university takes the position that all of the grounds described in sections 5.1(a) and (b) are satisfied in this case. On this basis, the university requests that this appeal be dismissed, the appellant be precluded from submitting any further access requests in relation to the subject matter of the two requests, and that he be precluded from submitting any further access requests until the other proceedings referred to in the university's submissions[4] are concluded.

Pattern of conduct that amounts to an abuse of the right of access or would interfere with the operations of the city

[12] Section 5.1(a) of Regulation 823 provides that a request is frivolous or vexatious

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[1] Order M-850.
[2] Order M-850.
[3] Order MO-1782.
[4] See paragraph 17 for a description of these other matters.

if it 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." Previous orders have explored the meaning of the phrase "pattern of conduct." In Order M-859, for example, former Assistant Commissioner Tom Mitchinson 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).

[13] To determine whether an appellant's request forms part of a pattern of conduct that amounts to an "abuse of the right of access," a number of factors can be considered.[5] In the circumstances of these appeals, I will consider the cumulative effect of the number, timing, nature, and scope of the appellant's requests.

[14] To find that the appellant's requests form part of a pattern of conduct that would "interfere with the operations" of the university, I must be satisfied that the appellant's conduct obstructs or hinders the range or effectiveness of the university's activities.[6] 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]

The university's representations

[15] The university acknowledges that submitting two access requests does not, on its own, constitute a "pattern of conduct" that warrants the requests being deemed frivolous or vexatious under the *Act*. However, the university submits that the cumulative nature of the appellant's behaviour must be considered. Having regard to the totality of the appellant's behaviour, the university maintains that there is a pattern of conduct as required under section 5.1(a) of Regulation 460.

[16] In support of its position, the university summarizes its relationship with the appellant in its submissions, which include affidavit evidence sworn by the university's Hearings, Policy and Privacy Manager. The university explains that the appellant had a history of requesting accommodation from its Student Accessibility Services (SAS). Of particular note, in March 2019, the SAS issued a decision denying the appellant's request for reassessment of an Accommodation Plan. The university submits that the appellant's "concerning conduct" escalated after the decision. For example, the university submits that despite being advised of the available avenues for contesting the

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

SAS decision, the appellant proceeded to "pressure and harass" faculty members and staff in order to obtain the requested accommodation. The university explains that this behaviour ultimately led the university to "enact an Involuntary Withdrawal on compassionate grounds" under its *Code of Student Rights and Responsibilities*, and declare the appellant a "*persona non grata*."[8]

[17] As further evidence of the appellant's alleged pattern of conduct, the university notes that in addition to the two requests at issue in this appeal, the appellant made a third request under the *Act*.[9] The third request was submitted about two months after the second request, for a total of three requests over the course of approximately five months. The university also submits that the appellant has a history of raising baseless accusations of bias and other improper conduct against members of its community. To illustrate this, the university refers to the following proceedings that the appellant has initiated involving the university or its members:

- five separate "Form B - Formal Inquiries" with the university's Faulty of Engineering attempting to contest the SAS decision;
- a privacy complaint to the university alleging improper information sharing amongst the university's offices;
- an appeal to the university's Senate Board for Student Appeals regarding his withdrawal [withdrawal appeal], during which he "introduced *ex juris* issues" as part of his submissions, and made over "20 preliminary motions and requests";
- three or four separate complaints to the university's Equity and Inclusion Office under the university's Policy on Discrimination and Harassment [EIO complaints];[10]
- a complaint with the Ontario Human Rights Tribunal [OHRT complaint]; and
- an appeal to the University Secretariat's office regarding an exam for a course in which he was enrolled in the fall of 2018.

[18] As evidence that this pattern of conduct amounts to an abuse of the right of access, the university points to the timing of the various actions brought by the

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[8] As a result, the appellant was notified that he was not permitted on university property "at any time for any reasons," subject to limited exceptions (such as to access health care or to obtain guidance with respect to his EIO and other complaint processes). The appellant was advised that if he was found on university property, security would be notified and he would be subject to arrest under the *Trespass to Property Act*.

[9] The appellant's third access to information request is not at issue in this appeal.

[10] There is conflicting evidence before me on whether the appellant filed three or four EIO complaints; however, I am satisfied that the exact number of complaints is not material to my findings.

appellant, many of which took place within a matter of days or weeks. The university also submits that in commencing the various proceedings, the appellant disregarded advice he had received on how to contest the SAS decision. The university submits that had the appellant followed the advice, he would have received documents relevant to those proceedings, had his substantive concerns addressed, and potentially avoided being withdrawn and deemed a *persona non grata*.

[19] In addition to being an abuse of the right of access, the university also maintains that the appellant's pattern of conduct has interfered with its operations and continues to obstruct and hinder the range and effectiveness of its activities. The university submits that the appellant's conduct is intended to harass and burden the university's systems, and frustrate collaboration and communication between its various offices, such as Student Affairs, SAS, Faculty Offices, the University Secretariat, and the EIO.

[20] In support of the university's position, the Hearings, Policy and Privacy Manager (the manager) attests in an affidavit to the work required in order to respond to the appellant's requests. She explains that responding to the requests would "necessitate a search through a large number of records and would yield a large number of responsive records, such that the amount of work required […] and the cost borne by [the university] […] would be significant." The manager "conservatively" estimates that the "total financial and human resources costs" to the university would be "well in excess of $200,000." Relying on this affidavit evidence, the university maintains that the cost borne by an institution is an important consideration in determining whether a pattern of conduct would interfere with an institution's operations.

[21] In addition to causing a "significant drain on [its] resources," the manager says that the requests at issue are redundant and unnecessary, because the appellant will receive certain requested documents through his OHRT complaint, EIO complaints, and withdrawal appeal.

Analysis and findings

[22] Based on the circumstances of this appeal, I am not satisfied that the evidence supplied by the university has established, on reasonable grounds, that a pattern of conduct as contemplated by section 5.1(a) of Regulation 460 exists with respect to the two requests at issue. Moreover, even if a pattern of conduct were found to exist, I do not accept that the university has established that the pattern amounts to an abuse of the right of access or would interfere with its operations.

[23] As set out above, a "pattern of conduct" requires recurring incidents of related or similar requests on the part of the requester.[11] In support of its position that the

[11] Order M-850.

appellant has engaged in a pattern of conduct amounting to an abuse of his right of access, the university submits that the appellant has made three requests under the *Act* and engaged the university in a number of other proceedings over the past year.

[24] Previous orders of this office have determined that the abuse of the right of access described by section 5.1(a) of Regulation 823 refers only to the access process under the *Act*, and is not intended to include proceedings in other forums.[12] Therefore, while the appellant has engaged the university in multiple proceedings, both through the university's internal channels and externally by means of this appeal and complaints to other tribunals, the parallel proceedings are not determinative in a decision on whether the grounds in section 5.1(a) of Regulation 460 are established. The only proceedings that are relevant for the purposes of my analysis under section 5.1(a) are those arising under the *Act*. The totality of the appellant's various proceedings may be relevant to whether the access requests were made "for a purpose other than to gain access" under section 5.1(b), and I will refer to them in that context, below.

[25] In my view, neither the number nor the timing of the appellant's access requests is excessive. I find that the university has not provided sufficient evidence to support a conclusion that two, or even three, requests over the course of a few months constitutes a pattern of conduct amounting to an abuse of the appellant's right of access as contemplated by section 5.1(a) of Regulation 460.

[26] With regard to the nature and scope of the two requests at issue in this appeal, the university has not suggested that the requests are substantially similar to each other or to other requests that the appellant has submitted. Having reviewed the wording of the two requests, I accept that there may be some overlap in terms of the records that are responsive to each, stemming from the fact that they involve some of the same university offices and employees. However, I do not accept that simply because the appellant's requests target certain individuals or university offices, they are similar to the point that they amount to an abuse of the appellant's right of access.

[27] In addition, I am satisfied that the appellant's requests are not excessively broad or overly detailed. Under section 1(a) of the *Act*, the public has a right of access to information under the control of institutions with exemptions from this right being limited and specific. From my review of the appellant's requests, it is clear that he is seeking access to records regarding himself that were created by and exchanged between certain individuals and university offices. In my view, neither of the requests can be described as being unusually detailed or overly broad. If anything, the detail provided in the requests, such as the names of the individuals who the appellant believes may have authored or retained such records, would allow the university to target its search for responsive records.

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[12] Orders M-906, M-1066, M-1071, MO-1519 and P-1534.

[28] The university also argues that the appellant's requests are redundant and unnecessary because he will obtain certain documents through the OHRT complaint, EIO complaints, and withdrawal appeal. However, the fact that the appellant may eventually obtain the requested records through other means is not a bar to having his requests processed in the usual manner under the *Act*, nor is it a basis for finding the requests are frivolous or vexatious. As noted by Assistant Commissioner Sherry Liang in Order MO-1427, "the scheme under [the Municipal Freedom of Information and Protection of Privacy Act13 (MFIPPA)] for obtaining access to records in the hands of government institutions exists separately from discovery processes associated with civil actions." Therefore, I am not satisfied that the appellant's requests amount to an abuse of his right of access on account of the fact that he may obtain the requested records through other means.

[29] Given the circumstances of this appeal, I do not consider the nature and scope of the requests at issue to be sufficient to establish a pattern of conduct amounting to an abuse of the appellant's right of access under the *Act*.

[30] I am also not satisfied that the university has established that the appellant's requests demonstrate a pattern of conduct that would interfere with its operations. In Order M-1071, Inquiry Officer Marianne Miller noted that *MFIPPA* provides relief for the burden faced by institutions responding to onerous requests. In particular, she stated:

> There are a number of alternative measures available to relieve an institution faced with a request which may, on the surface, appear likely to interfere with its operations (Order M-906).
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> They are the fee provisions in section 45 of [*MFIPPA*] and the related provisions in the Regulation, and the interim access decision and fee estimate scheme described in Order 81. In some circumstances, a time extension under section 20(1) may also provide relief.

[31] These same provisions are available under *MFIPPA*'s provincial equivalent, the *Act,* pursuant to which the time to respond to a request can be extended under section 27(1), and fees can be charged for access to records under section 57(1) and Regulation 460. As noted in Order M-1071, with reference to Order 81, this office's jurisprudence provides additional relief mechanisms, such as allowing an institution to issue an interim access decision requiring payment of a deposit, as described in a fee estimate, before processing a request.

[32] In this appeal, the university maintains that processing the appellant's requests would require significant time and an estimated financial and human resources cost of

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[13] The municipal equivalent of the *Freedom of Information and Protection of Privacy Act*.

at least $200,000. Without commenting on the amount of the university's cost estimate, I note that relief of these types of burdens for processing requests under the *Act* are specifically contemplated in the provisions of the *Act* discussed above. It is open to the university to rely on the provisions, and other relief measures described in this office's jurisprudence, in responding to the appellant's requests.[14] Accordingly, I am not satisfied that the university has demonstrated that the appellant's requests would interfere with its operations within the meaning of section 5.1(a).

[33] Therefore, I find that the university has not established that the requests before me demonstrate a pattern of conduct that amounts to an abuse of the right of access or that would interfere with the university's operations as contemplated by section 5.1(a) of Regulation 460.

Request made in bad faith or for an improper purpose

[34] Under section 5.1(b) of Regulation 460, a request can be found to be frivolous or vexatious for the purposes of the *Act* if it was made in bad faith or for a purpose other than to obtain access. Where a request is made in bad faith or for a purpose other than to obtain access, the institution need not demonstrate a "pattern of conduct."[15]

[35] "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.[16]

[36] 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.[17]

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[14] Notably, these provisions are intended to mitigate the costs associated with processing requests under the *Act* by providing some cost recovery (Order M-1071); they are not intended to operate as a complete cost-recovery mechanism for an institution covered by the *Act*.
[15] Order M-850.
[16] Order M-850.
[17] Order M-850.

The university's representations

[37] The university maintains that the appellant's requests were submitted in bad faith or for an improper purpose. In support of this position, the university maintains that the appellant "deliberately and consciously" ignored its advice regarding the appropriate methods for contesting the SAS decision, and instead engaged in repetitive and duplicative proceedings.

[38] The university explains that it advised the appellant of his options for contesting the SAS decision. In particular, the university advised the appellant that he could contest the decision by (a) submitting a Form C Appeal to the University Senate Board for Student Appeals, (b) filing an internal complaint through the university's Equity and Inclusion Office, or (c) filing a human rights application with the Ontario Human Rights Tribunal, depending on the nature of the issues that he wanted to contest.

[39] The university maintains the appellant intentionally pursued a course of action that was designed to burden the university, rather than commencing one "concise EIO Complaint or OHRT Complaint, focusing solely on the [SAS decision] and the alleged failure of [the university] to accommodate." The university maintains that if the appellant had "properly availed himself of his rights at the outset, he would have received due process before a tribunal with jurisdiction to address his substantive concerns, together with access to documentation relevant to matters brought before that tribunal." Furthermore, the university submits that proceeding in the advised fashion would have addressed the appellant's substantive rights while also entitling him to a number of the documents that he has requested.

Analysis and findings

[40] Section 5.1(b) of Regulation 460 stipulates that a request can be found to be frivolous or vexatious where it is made in bad faith or for an improper purpose. Having considered the appellant's requests and the totality of the university's submissions, I am not persuaded that requests satisfy either of the grounds described in section 5.1(b).

[41] I acknowledge that there have been challenging interactions between the parties over the past year; however, in my view, the evidence provided by the university does not establish that the appellant consciously exercised his access rights for a dishonest purpose or with furtive design or ill will. I am also not persuaded that the appellant deliberately engaged in multiple proceedings in an effort to burden the university.

[42] Rather, in my view, the appellant appears to have availed himself of all courses of action known to him in an effort to obtain the accommodation he sought, and his efforts included seeking access to the requested records from the university. There is insufficient evidence before me upon which I could find that the appellant was motivated by furtive design or ill will as required by section 5.1(b) to establish bad faith on his part. As a result, I find that the university has failed to establish that the

appellant's access requests meet the requirements for finding that they are frivolous or vexatious under section 5.1(b) of Regulation 460.

Conclusion

[43] The tests under section 5.1 of Regulation 460 set a high threshold that, in my view, has not been met in the circumstances of this appeal. I find, based on the analysis above, that the university has not established reasonable grounds for finding that the requests at issue are frivolous or vexatious within the meaning of section 10(1)(b) of the *Act*. As a result, I will order the university to issue access decisions responding to both requests.

ORDER:

1. I do not uphold the university's decision that the requests are frivolous or vexatious.

2. I order the university to issue access decisions in response to both requests in accordance with the *Act*, without relying on the frivolous or vexatious provisions of the *Act*. For the purposes of section 26, 29, and 30 of the *Act*, the date of this order shall be deemed to be the date of the requests.

Original signed by
Jaime Cardy
Adjudicator

December 9, 2019