Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4035

Appeal PA19-00138

Windsor Regional Hospital

March 5, 2020

Summary: The Windsor Regional Hospital issued a decision refusing to process a request that it received under the *Freedom of Information and Protection of Privacy Act* on the basis that the request was frivolous or vexatious pursuant to section 10(1)(b) of the *Act*. The adjudicator finds that the request is not frivolous or vexatious, and orders the hospital to issue an access decision responding to the request.

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 and Investigation Reports Considered: Orders 81, MO-1168-I, and M-1071.

OVERVIEW:

[1] The Windsor Regional Hospital (the hospital) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to:

> All emails (inbox, sent, all email subfolders, deleted for the following individuals' emails etc.) from January 1, 2010 until January 28, 2019: [17 named individuals]

[2] The hospital issued a decision refusing to process the request on the basis that it is frivolous or vexatious under section 10(1)(b) of the *Act*.

[3] The requester, now the appellant, appealed the hospital's decision to this office.

[4] A mediated resolution was not achieved, and the file was transferred to the adjudication stage where an adjudicator conducts an inquiry under the *Act*. During my inquiry, I invited and received representations from the parties, which were shared in accordance with *Practice Direction Number 7* and the IPC's *Code of Procedure*.[1]

[5] For the reasons that follow, I find that the hospital has not established that the appellant's request is frivolous or vexatious. Therefore, I order the hospital to issue an access decision responding to the request.

DISCUSSION:

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

[6] The sole issue to be determined in this appeal is whether the appellant's request is 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,
>
> > the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

[7] This section provides institutions with a summary mechanism to deal with frivolous or vexatious requests. This discretionary power should not be exercised lightly, as it can have serious implications on the ability of a requester to obtain information under the *Act*.[2] The hospital has the burden of proof to substantiate its decision to declare the request frivolous or vexatious.[3]

[8] 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.[4]

---

[1] The hospital's representations also address the various exemptions, exclusions, and fees that the hospital submits are likely to apply if it were to process the appellant's request. Given that that the only issue before me is whether the request is frivolous or vexatious, I have not summarized these representations in this order.
[2] Order M-850.
[3] Order M-850.
[4] Order MO-1782.

Grounds for a frivolous or vexatious claim

[9] 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.

[10] The hospital takes the position that all of the grounds described in sections 5.1(a) and (b) are satisfied in this case.

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

[11] Section 5.1(a) of Regulation 460 provides that a request is frivolous or vexatious 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-850, 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).

[12] 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, such as the cumulative effect of the number, nature, scope, purpose, and timing of the request.[5]

[13] To find that the appellant's request forms part of a pattern of conduct that would interfere with the operations of the hospital, I must be satisfied that the appellant's conduct obstructs or hinders the range or effectiveness of the hospital's activities.[6] Interference is a relative concept that must be judged on the basis of the circumstances

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

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 hospital's representations[8]

[14] The hospital provided some background information regarding the relationship between the parties to better explain its determination that the appellant's request is frivolous or vexatious. In particular, the hospital says that the appellant's relationship with the hospital, its administration, and its physicians has been "strained" for many years.

[15] The hospital explains that prior to this appeal, the appellant had requested a hearing before the hospital's Board of Directions (the board hearing) regarding a recommendation that it received from the hospital's Medical Advisory Committee (MAC). The MAC recommended that the board deny the appellant's application for reappointment to the hospital's professional staff. When the board decided to implement the MAC's recommendation, the appellant appealed that decision to the Health Professions Appeal and Review Board (HPARB).

[16] In addition to the above-mentioned board hearing and HPARB appeal, the hospital advises that the appellant also commenced a civil action and lodged several complaints regarding other physicians with the College of Physicians and Surgeons of Ontario (CPSO). The hospital says that there is considerable overlap between the defendants in the civil action and the individuals named in the CPSO complaints on one hand, and the individuals named in the appellant's request on the other. The hospital advises that when the CPSO's Inquiries, Complaints and Reports Committee determined that it would not take any action on the appellant's complaints, the appellant appealed that decision to HPARB as well.

[17] With respect to the frivolous or vexatious grounds under section 5.1(a) of Regulation 460, the hospital maintains that there are reasonable grounds to conclude that the appellant's request forms part of a pattern of conduct. In support of its position, the hospital submits that during the board hearing, the appellant made several requests for records that would be captured by the request at issue in this appeal. The hospital maintains that the MAC responded to those requests by filing eight binders of records in advance of the board heading. The hospital maintains that "many of [the documents in the binders are] emails that would be captured by the request."

[18] As evidence that this pattern of conduct amounts to an abuse of the right of

---

[7] Order M-850.

[8] In addition to what is summarized in this section, the hospital also provided representations under section 5.1(a) regarding the intent of the appellant's request. I summarize and consider these submissions in the section of this order addressing section 5.1(b) of Regulation 460.

access, the hospital maintains that the request, which relates to 17 individuals and covers almost a decade, is excessively broad.[9] While the hospital acknowledges that the appellant has only submitted one request under the Act, it says that it is not possible to determine the number of records that would be captured by the request, because of its broad scope.

[19] According to the hospital, the appellant made his request during a "lull" in the civil action and HPARB appeal. The hospital explains that during this time, the appellant would not have had any other means of obtaining disclosure. While the hospital acknowledges that a request coinciding with other legal proceedings may be inconsequential on its own, it submits that it is a significant consideration when combined with the other factors relevant in this case.

[20] In the hospital's view, the appellant's alleged pattern of conduct has also interfered with its operations. The hospital maintains that the proceedings relating to the appellant's privileges (i.e. the board hearing and HPARB appeal) have consumed a considerable portion of its financial and staff resources, which, it says, is disproportionate to the relatively small size of the program with which the appellant was formerly associated. According to the hospital, managing and responding to the appellant's various proceedings and requests has hindered its ability to effectively manage its other programs.

The appellant's representations

[21] The appellant explains that the timeframe of his request (January 1, 2010 to January 28, 2019) is relevant to his statement of claim and his grounds for appeal to HPARB, and that access to the requested records is "vital to confirming bad faith as well as other allegations against them" (presumably, the individuals named in his request). To substantiate this position, the appellant provided a copy of his statement of claim against the hospital and his appeal of the board decision to HPARB.

[22] The appellant maintains that the hospital should have nothing to hide as the emails are "supposed to be public record." He also says that he should have access to the requested records as a matter of fairness, because the hospital had admitted to going through all of his emails.

Analysis and findings

[23] For the following reasons, I find that the evidence does not establish that the request at issue in this appeal demonstrates a pattern of conduct on the appellant's part that would amount to an abuse of his right of access or interfere with the hospital's operations under section 5.1(a) of Regulation 460.

---

[9] The hospital's representations say that the request relates to 15 individuals; however, I have changed that figure to accord with the actual number of individuals specified in the appellant's request.

[24] Section 5.1(a) of the regulation provides that a request is frivolous or vexatious 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." It must first be shown that there is a "pattern of conduct," which, as mentioned above, 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).[10] The cumulative nature and effect of a requester's behaviour may also guide the determination of the existence of a "pattern of conduct."

[25] Previous orders of this office have determined that the abuse of the right of access described by the regulation refers only to the access process under the *Act*, and is not intended to include proceedings in other forums.[11] I acknowledge that the hospital had likely dedicated substantial resources to the various proceedings involving the appellant during the months or years leading up to his request; however, the only proceeding that is considered for the purpose of my analysis under section 5.1(a) is this appeal, which, based on the evidence before me, is the only proceeding arising under the *Act*.[12]

[26] Having regard to the number, scope, nature, and timing of the appellant's request, I am not persuaded that the cumulative effect of the appellant's conduct amounts to an abuse of the appellant's right of access. As acknowledged by the hospital, the appellant has only made one request under the *Act*. While the request, which covers the period of almost a decade and relates to 17 individuals, is broad in nature, a broad request on its own does not amount to an abuse of the right of access. In my view, the fact that the appellant has provided specific parameters, including inclusion dates, the type of records that he seeks access to (emails), and the names of individuals whose emails he is interested in, should assist the hospital in locating responsive records.

[27] The hospital maintains that through the board hearing process, the appellant has sought and obtained records that would be responsive to the request at issue. As part of its submissions, the hospital provided a chart tracking the requests that it received from the appellant during its board hearing process, as well as the MAC's responses. Based on my review of that chart, I note that a number of the individuals named in the appellant's request under the *Act* were not specifically mentioned in any of the appellant's other requests, or in the MAC's responses. Therefore, there is no evidence before me to suggest that those individuals' email records would have already been disclosed to the appellant. In addition, I note that the chart is only updated to April 26, 2018, which is nine months short of the end date of the appellant's request under the *Act*. Conceivably, there are at least some records covered by the request that would not have been produced by the MAC.

---

[10] Order M-850.

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

[12] The totality of the appellant's various proceedings may be relevant to whether his access request was made "for a purpose other than to gain access" under section 5.1(b), which I consider below.

[28] More importantly, however, is the fact that the appellant having obtained, or being able to obtain, access to the requested records through other means is not a bar to having a request processed in the usual manner under the *Act*, nor is it a basis for finding that a request is frivolous or vexatious.[13]

[29] I am also not persuaded that the timing of the request suggests an abuse of the right of access, as contemplated by section 5.1(a) of Regulation 460. In my view, the fact that the appellant made his request following the conclusion of the board hearing and CPSO complaints, and prior to his HPARB appeals, suggests that he has assessed the evidence that he has already amassed and determined what additional documentation he may require to support his position on the issues before HPARB.

[30] Accordingly, having considered the number, nature, scope, and timing of the appellant's request, I am not satisfied that the hospital's evidence has established a pattern of conduct that amounts to an abuse of the right of access.

[31] I am also not satisfied that the hospital has demonstrated that the appellant's request would obstruct or hinder the range or effectiveness of its operations. There are a number of mechanisms under the *Act* that provide relief for an institution burdened by a potentially onerous request.[14] For example, the time to respond to a request can be extended under section 27(1) of the *Act*, and fees can be charged for access to records under section 57(1) and Regulation 460. In addition, 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 hospital maintains that diverting financial resources and personnel to process the appellant's request would hinder its operations, including its ability to effectively manage other larger program areas. However, these are the types of burdens that the *Act* and regulation specifically provide relief for, as mentioned above. It is open to the hospital to rely on these relief provisions, as well as other relief measures described in this office's jurisprudence, in responding to the appellant's request. Accordingly, I am not satisfied that the hospital has demonstrated that the appellant's request would hinder or interfere with its operations.

[33] Therefore, I find that the hospital has not established that the request demonstrates a pattern of conduct that amounts to an abuse of the right of access or that would interfere with the hospital's operations as contemplated by section 5.1(a) of Regulation 460. Next, I will consider the grounds for finding that a request is frivolous or vexatious under section 5.1(b).

---

[13] Orders MO-1427 and PO-4013.
[14] Order M-1701.

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 this is the case, 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]

<u>The hospital's representations</u>

[37] The hospital maintains that it has reasonable grounds to believe that the appellant has "some illegitimate objective in seeking access under FIPPA."

[38] According to the hospital, several of the individuals named in the request include defendants in the appellant's civil action, witnesses that were called during the board hearing, and respondents to the appellant's CPSO complaints. Considering the poor relationships that exist between the appellant and the majority of the named individuals, the hospital expresses its concern that the request was made in bad faith with the intent to harass or intimidate the named individuals in advance of the appeals resulting from his various other proceedings.

[39] In addition, although there was no stated purpose for the request, the hospital maintains that it is "necessary and appropriate" to draw inferences based on the appellant's behaviour. The hospital says that these inferences lead to the conclusion that the request is part of a "fishing expedition" for information that can be used in his other proceedings. For example, the hospital suggests that the request is the appellant's attempt to bolster his claim of bad faith in his civil action.

---

[15] Order M-850.
[16] Order M-850.
[17] Order M-850.

The appellant's representations

[40] As summarized above, the appellant maintains that the requested records are "vital" to substantiating his position in his other proceedings.

Analysis and findings

[41] For the following reasons, I find that the evidence does not establish that the request at issue in this appeal was made in bad faith or for an improper purpose under section 5.1(b) of Regulation 460.

[42] As set out above, this office has interpreted "bad faith" as implying "the conscious doing of a wrong because of dishonest purpose or moral obliquity." Bad faith is different from negligence "in that it contemplates a state of mind affirmatively operating with furtive design or ill will."[18]

[43] Section 5.1(b) also allows for requests to be deemed frivolous or vexatious if they were submitted for a "purpose other than to obtain access." This term has been described as requiring an improper objective above and beyond a collateral intention to use the information in some legitimate manner.[19] 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."[20]

[44] The hospital claims that the appellant's request is a "fishing expedition" made during a lull in his other proceedings, when he would not otherwise be able to obtain disclosures from the hospital. Although the appellant's request does not state his motivation, the hospital imputes his intention to harass or intimidate the named individuals. The appellant's position is that he requires the requested records in order to confirm his allegations against the named individuals in his other proceedings.

[45] I acknowledge that the relationships between the parties, and between the appellant and the individuals named in his request, are strained; however, in my view, the hospital's evidence does not establish that the appellant consciously exercised his access rights under the *Act* for a dishonest purpose or with furtive design or ill will.

[46] On the evidence, I am not persuaded that the appellant has a purpose other than to obtain access. The fact that the appellant may use the requested records to "bolster his claims of bad faith in the civil action" does not support a finding that the request is frivolous or vexatious as contemplated by section 5.1(b) of the regulation. In Order MO- 1168-I, Adjudicator Laurel Cropley observed that there is nothing in the *Act* that delineates what a requester can and cannot do with information once access has

---

[18] Order M-850.
[19] Order MO-1924.
[20] Orders MO-1168-I and MO-2390.

been granted to it.[21] In other words, the potential use of documents obtained under the *Act* to support arguments in other proceedings does not, in and of itself, constitute an illegitimate purpose under the *Act*.[22]

[47] I am also not persuaded by the evidence that the appellant has deliberately engaged his access rights under the *Act* in an effort to burden the hospital, or to harass and intimidate the named individuals.

[48] As a result, I find that the hospital has failed to establish that the appellant's access request meets the requirements for finding that it is frivolous or vexatious under section 5.1(b) of Regulation 460.

Conclusion

[49] 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 hospital has not established reasonable grounds for finding that the request at issue is frivolous or vexatious within the meaning of section 10(1)(b) of the *Act*. As a result, I will order the hospital to issue an access decision responding to the request.

ORDER:

1. I do not uphold the hospital's decision that the request is frivolous or vexatious.

2. I order the hospital to issue an access decision in response to the appellant's request 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 request.

Original Signed By: March 5, 2020

Jaime Cardy
Adjudicator

---

[21] See also Order M-1154.

[22] See also Order MO-1924.