Information and Privacy Commissioner,
Ontario, Canada

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

# ORDER MO-3761

Appeal MA17-117-2

Kettle Creek Conservation Authority

April 29, 2019

**Summary**: A request was made to the Kettle Creek Conservation Authority (the authority) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to its purchasing policy with regard to the Elgin County Shoreline Management Plan (the ECSMP), and records relating to amending that policy. The authority issued a decision denying access to responsive records taking the position that the request was frivolous or vexatious pursuant to section 4(1)(b) and grouped it with eight other requests made by three appellants in total. The appellant appealed the authority's decision. In this order, the adjudicator finds that the request was not frivolous or vexatious and orders the authority 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*.

**Orders and Investigation Reports Considered:** Orders M-850, MO-1168-I, MO-1488, MO-1924, MO-3154.

## OVERVIEW:

[1] A request was made to the Kettle Creek Conservation Authority (the authority) pursuant to the *Municipal Freedom of Information and Protection of Privacy Act*, (the *Act*) for the following:

> All staff and board members' correspondence, documents, memoranda, notes related to the [authority's] purchasing policy, main board of directors' items of the same. Any and all correspondence and/or records

> relating to the purchasing policy with regard to the Elgin County Shoreline Management Plan, [named company], record of decisions to amend purchasing policy, and any applicable third party organization that would relate to the Shoreline Management Plan. Scope of dates from January 1, 2012 until date this FOI was filed on 19 October 2016.

[2] The authority responded to the requester, acknowledging receipt of the request and advising that it would be applying an extension of time, pursuant to section 20 of the *Act*. The authority advised the requester of the reasons for the application of the time extension and advised that it would issue a decision no later than February 17, 2017.

[3] On February 16, 2017, the authority responded to the requester, asking that he clarify and consider narrowing his request.

[4] On March 3, 2017, the requester appealed to this office as he had not received a decision and appeal MA17-117 was opened to address the appeal. The intake analyst issued a Notice of Inquiry, advising the authority that it was in a deemed refusal situation. Following this, the authority issued a decision denying access to the responsive records pursuant to section 4(1)(b) (frivolous or vexatious request) of the *Act*. Accordingly, MA17-117 was closed.

[5] The requester (now the appellant) appealed the authority's decision and appeal MA17-117-2 was opened.

[6] During mediation, the appellant requested that the authority enumerate its reasons for the application of section 4(1)(b) of the *Act*. The authority responded, providing reasons for its decision.

[7] As no further mediation was possible, the file was transferred to the adjudication stage where an adjudicator conducts a written inquiry under the *Act*. The parties were invited to submit representations on the issue and once received those representations were shared in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction 7*.

[8] During adjudication, the authority submitted that a total of nine broad requests were filed by three requesters, with seven of the requests being filed in one day, including the request in this appeal. The authority notes that all nine requests have been appealed by the requester's agent, who is also one of the requesters in the nine requests. The authority submits that the requesters are associated with a specified association, an organization formed as a result of the Elgin County Shoreline Management Plan (the ECSMP) adopted by the authority in 2015. The authority submits that the request at issue in this appeal, along with eight others, all submitted within a two month period represents an attempt to overburden the authority causing it to reconsider past decisions with regard to the ECSMP.

[9] In this order, I do not uphold the authority's decision that the request is frivolous

or vexatious within the meaning of section 4(1) and order the authority to issue an access decision to the appellant respecting any responsive records.

## DISCUSSION:

[10] The sole issue in this appeal is whether the appellant's request for access 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.

[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.[1]

[13] An institution has the burden of proof to substantiate its decision to declare a request to be frivolous or vexatious.[2]

### The authority's representations

[14] The authority provided detailed representations with supporting documentation to support its claim that there has been a pattern of conduct that amounts to an abuse of the right of access and that the requests made by the appellant were made in bad faith or for a purpose other than to obtain access. Although I have considered all of the

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

submissions, I will not endeavor to set them all out in this order.

[15] The authority submits that its position is further amplified when taking into account the entire pattern of conduct.

[16] The authority refers to nine separate appeals which involve three different requesters who, the authority notes, are associated with a specified association. The authority submits that of the nine requests it received, all of its decisions have been appealed by the requester's agent (who is also a requester in five of the nine requests).

[17] The authority submits that it received seven access requests on the same day from both the appellant and his agent, three of which were filed by the appellant, including the request at issue in this appeal. The authority submits that each of the requests was broad in scope requiring a significant amount of time and effort of staff.

[18] The authority submits that two of the three requesters, including the appellant, are members of a specified association, with the third requester (the appellant's representative) being aligned with that association, and are collaborating and combining their efforts to fulfill past threats against the authority so as to overwhelm and to burden the organization with requests in order to force a reconsideration of past decisions. The authority submits that the specified association is an organization formed as a result of the ECSMP that it adopted in 2015.

[19] The authority submits that several of the requests result in duplicative parameters and/or responses relating to the governance and procedures of the authority in relation to processes in developing the ECSMP which the requesters oppose.

[20] The authority submits that despite its efforts to clarify and narrow the scope of the request, the appellant has not responded in order to provide a clear and concise delineation of the information being sought and the failure to narrow the scope has resulted in an excess of 40,000 pieces of information (including documents and emails) identified as responsive to the request.

[21] The authority submits that in his request, the appellant seeks information about matters that have been previously decided by the authority and that this represents an attempt to reopen those previous decisions with regard to its shoreline plan. The authority submits that throughout their objection to the shoreline plan, the appellant, and other members of the specified association, have publicly stated through online media releases and written correspondence that if the authority does not reconsider its decision, it will be faced with further isolation and be burdened with access requests under the *Act*.

[22] The authority submits that during mediation, the appellant offered a revised and narrowed request that was subject to conditions but when the authority expressed an opinion that the revised scope would negate and replace the original request, the appellant did not respond and requested that the file be moved to adjudication. The

authority points to the two pieces of correspondence surrounding this as "key factors" that occurred during mediation that further demonstrates the pattern of conduct leading to its refusal.

[23] The authority sets out all nine requests in its representations and submits that all requests were similarly worded and were not narrowed in scope. The authority submits that the requests demonstrate recurring incidents of related or similar requests on the part of the requesters and that the requests and subsequent appeals represent an excessive volume within a concentrated period of time.

[24] The authority submits that it believes that the purpose of the request at issue in this appeal is to seek all records relating to the purchasing policy in an attempt to locate information that may support accusations of alleged misconduct in relation to the authority's purchasing policies and specifically in relation to retention of the consultant who undertook the study which is one of the requester's main objections to the ECSMP.

[25] The authority submits that the second part of the request, as it relates to the purchasing policy of the ECSMP, has already been requested and provided to the executive of the specified association prior to this formal access request. The authority submits that all records relating to the ECSMP, including the process and procedures leading up to the retention of the consultant, have been provided to the requester through the release of records in another access request and that there are no further responsive records relating to the ECSMP that would result from the processing of the request in this appeal.

[26] The authority submits that the appellant specifically requests documentation relating to its purchasing policy regarding ECSMP; however, expands this by the second part of his request to all matters relating to the purchasing policy over an extended period of time. The authority submits that this is a "fishing expedition" and an attempt to expand the original intent of a request. It submits that this was meant only to create a burden and increase costs to the authority.

[27] Finally, the authority submits that all nine requests follow a series of public objections and delegations before associated boards and councils in relation to the development of the ECSMP.

[28] The authority also argued that there exists a pattern of conduct that would interfere with the operations of government. It submits that:

- The authority is a small organization with only 12 full-time employees, three of which are administrative staff.
- These access requests were the first formal requests it has ever received.
- The receipt of nine broadly-scoped requests with seven being filed in one day was calculated and meant to overburden the authority.

- Processing the request in this appeal will result in the authority's inability to fulfill its responsibilities under the *Conservation Authorities Act* and the services it provides to others.

**The appellant's representations**

[29] The appellant also provided detailed representations in this appeal and disputes the authority's assertion that his requests are frivolous and vexatious. Although I have considered all of the representations, I will not set them out in their entirety.

[30] The appellant submits that he narrowed the scope of his request during mediation but reserved his right to pursue the full, initial request depending on the results of the narrowed scope request. However, as the authority attempted to impose conditions, the appellant elected to proceed to adjudication on the original request.

[31] The appellant submits that he was prompted to file this request after discussions with a resident of the Township of Malahide who was also a member of the specified association. The appellant submits that there was a shared concern with the authority's retaining a specified firm who did not appear to have adhered to the purchasing and procurement policies of the authority. This resident had requested the full minutes of each of the ECSMP steering committee and technical advisory committee. The appellant submits that on receipt of the minutes, they appeared to lack significant detail and contained no information of any consideration or authorization to deviate from established purchasing policies.

[32] The appellant submits that he and other members of the specified association were unsure whether further documentation existed relating to the purchasing and procurement policies and therefore the appellant was inclined to file his access request.

[33] The appellant submits that he filed three access requests on the same day, on his own behalf and for the benefit of similarly interested citizens affected by the authority's decisions and governance, who may or may not be affiliated with the specified association. The appellant confirmed that he is a member of the specified association and served as its first vice president in the past.

[34] The appellant submits that his representative is a public advocate who became known to the appellant as a result of his interest in the administrative regulations, governance practices, and meeting conduct of the authority.

[35] The appellant submits that the third requester referenced by the authority is the president of the specified association and that his request related to the "Ollie drain" which empties into the third requester's property. The appellant submits that none of the information requested by this third requester is overlapping or inter-connected in any way with the request in this appeal.

[36] The appellant submits that the authority's submission that the other eight access requests are related, overlapping, overbroad and brought to overburden the authority is

inaccurate and misguided. He submits that each of these requests is clearly distinct from one another with the purpose of each request being clear on its face: to gain access to information of interest to the individual requester and potentially the broader public. He submits that one need only look at the language of each request to see that each request is relevant to a very discrete issue and the overlap between them, if any, is minimal.

[37] The appellant denies that the specified association has ever publicly stated that it would overburden the authority with increased access requests under the *Act* if a recently adopted technical study is not rescinded.

[38] The appellant submits that the three access requests he made on October 19, 2016, have a time period of four years, which roughly coincides with the adoption of the ECSMP. He submits that he could have made a single request for all of the information, but for the ease of convenience to the authority, he decided to specify the parameters of his request in three categories.

[39] The appellant submits that even if the IPC considers the additional, unrelated requests, a total of nine requests is not excessive or abusive of the right of access and refers to several past orders to support this.[3]

[40] The appellant submits that previous orders from the IPC have found that an intention by a requester to take issue with an institution's decision is not sufficient to support a finding that a request is frivolous or vexatious.[4]

[41] The appellant submits that whether or not the initial search parameters returned 40 responsive records or 40,000, the authority has a responsibility as a public institution to ensure that its electronic information systems are designed and operated in a way that enables it to provide access to information under the *Act*.

[42] The appellant submits that the fact that there is history or animosity between an institution and a requester is an insufficient basis for a finding that a request was made in bad faith.

[43] The appellant submits that his request is not a fishing expedition; however, the appellant agrees that he is seeking access to information that may be used to challenge the conduct and decisions of the authority, if the information gives rise to any grounds to make such a challenge. The appellant submits that this office has frequently noted that an intention by a requester to take issue with a decision made by an institution is not sufficient to support a finding that a request is frivolous or vexatious.[5]

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[3] Orders MO-1782, MO-2111, MO-2289 and M-850.
[4] Orders MO-1168-I, MO-2390 and MO-3278.
[5] Orders MO-1168-I, MO-2390, MO-3278, M-860 and MO-1427.

[44] The appellant's representations were shared with the authority who provided a reply. Most of the authority's reply was already articulated in its earlier representation and will not be set out here. The authority refers to Order M-618 where former Commissioner Wright found that an excessive volume of requests, and appeals, combined with the following four factors, justifies a finding that the appellant abused the access process:

1. The varied nature of the broad scope of the requests.

2. The appearance that they were submitted for their "nuisance" value.

3. Increased requests and appeals following the initiation of court proceedings by the institution.

4. The requester working in concert with another requester whose publically stated aim is to harass government and to break or burden the system.

[45] The authority submits that the circumstances in this appeal support a finding that the appellant has abused the access process.

[46] With regard to the number of requests (nine in total as submitted by the authority), the authority refers to M-850 where former Assistant Commissioner Mitchinson noted that "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." The institution also refers to Order MO-3154 where Assistant Commissioner Liang concluded that the associated requests of that appeal, which considered only six requests over a 15 month period, had placed a considerable burden on the staff of the organization and resulted in her decision that the requests formed a pattern of conduct that interferes with the operations of the municipality.

[47] With regard to the purpose of the appellant's request, the authority submits that all of the information relating to the ECSMP, including the procurement of the consultant which relates to the authority's purchasing policy, has already been released to the appellant informally, and formally, as part of another access request submitted by him.[6] The authority points to an index of records released to the appellant in that access request where it included all records relating to the planning, process, updates and technical data of the ECSMP, including records relating to the purchasing policy for procurement of the consultant. The authority confirms that there are no further records relating to the ECSMP that would result from processing the request at issue in this appeal.

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[6] The authority refers to another access request that the appellant made on the same day as the one in this appeal.

[48] The authority submits that the significant number of responsive records resulting from its "purchasing policy generally" has no direct connection with the purpose of the request as submitted by the appellant in his representations. The authority submits that this is further evidence to its claim that the request in this appeal was submitted for other purposes than to obtain information relating to the purpose of the request.

[49] The authority submits that it was able to identify over 40,000 responsive records from a preliminary search of "machine readable" records, however, the significant amount of time expended on processing the requests is spent reviewing and applying severances under the *Act* to each record. The authority submits that an early estimate of a fee associated with processing the request would be in excess of $10,000 as a result of over 300 estimated hours of staff time. The authority submits that even if the appellant was willing to pay the 50% required to process the request, the monetary amount is to recover staff time spent on the file and would not necessarily address the interference of the institution's operations caused by processing the request.

[50] The appellant provided representations in response to the authority's reply, and mostly repeats and relies on his earlier submissions.

## Analysis and findings

### *Section 5.1(a) - Pattern of conduct that amounts to an abuse of the right of access*

[51] Previous orders of this office have found that in order to meet this criterion, the institution must demonstrate that the appellant has made recurring requests of a related or similar nature or that requests have been made of this nature that the requester is connected with in some material way.[7] In determining whether or not the "pattern of conduct" exists, the focus should be on the cumulative nature and effect of a requester's behaviour.[8]

[52] The determination of what constitutes "an abuse of the right of access" has been informed by the jurisprudence of this office and the case law dealing with that term. In the context of the *Act*, it has been associated with a high volume of requests, taken together with other factors. Generally, the following factors have been considered as relevant in determining whether a pattern of conduct amounts to an "abuse of the right of access":

- *The number of requests*

  Is the number excessive by reasonable standards?

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[7] Order M-850.
[8] Order MO-2390.

- *The 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?

- *The timing of the requests*

  Is the timing of the requests connected to the occurrence of some other related event, such as court proceedings?

- *The 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?[9]

[53] The institution's conduct also may be a relevant consideration weighing against a "frivolous or vexatious" finding. However, misconduct on the part of the institution does not necessarily negate a "frivolous or vexatious" finding.[10]

[54] It has also been recognized that 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.[11]

[55] I will consider whether the facts relevant to this appeal support a conclusion that the appellant has engaged in a pattern of conduct that amounts to an abuse of the right of access.

*Number of requests*

[56] The authority has grouped together the nine requests it received from three separate requesters, submitting that the requests are related as the individual requesters belong to a specified association and/or are collaborating and combining their efforts to fulfill past threats against the authority in order to overwhelm and to burden the organization with requests so as to force a reconsideration of past decisions. After reviewing the nine requests, I do not agree with the authority that they should be treated together. As noted by the authority, the appellant confirms that he and one of the other three requesters belong to the specified association. In examining the access request by the other requester who is also a member of the specified association, I agree with the appellant that request 2016-03 pertains to a drain that empties from that requester's property into Lake Erie and is an issue relevant solely to that requester.

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[9] Orders M-618, M-850 and MO-1782, MO-1810.
[10] Order MO-1782.
[11] Order MO-1782.

In addition, after examining the remaining eight access requests, I am of the view that the evidence supports that each request is relevant to a discrete issue and the overlap between these requests, if any, is minimal. With regard to the three requests made by the appellant on the same day, I accept the appellant's submission that although these requests could have been made as a single request, he specified the parameters of his request into three categories for the ease of convenience.

[57] Since I find that the nine requests are not related, I will only continue to discuss the three requests made by the appellant himself.

[58] As the Assistant Commissioner pointed out in Order MO-3154, past orders that found a pattern of conduct showing an "excessive number of requests" for the purpose of section 5.1(a) has typically been based on a volume of requests numbering in the dozens, hundreds or even thousands.[12] Although there is no specific standard for an excessive number of requests, I am not persuaded that three requests for information submitted on the same day is excessive by reasonable standards. Although the authority has cited Order MO-3154 to support its position, the Assistant Commissioner in that order found that six requests for information submitted over a period of sixteen months was not excessive by reasonable standards and that the number of requests, taken by itself, did not support a finding of abuse of a right of access.

[59] Accordingly, I find that the number of requests taken by itself does not support a finding of abuse of a right of access.

*Nature and scope of the requests*

[60] When examining the appellant's three requests, I find that the nature and scope of the requests does not support a conclusion that they are part of a pattern of conduct that amounts to an abuse of the right of access.

[61] As noted, the appellant submitted three requests at the same time and I accept his submission that although they could have been made as a single request, he specified the parameters of his request into three categories for the ease of convenience. While each request seeks records for a four year period, this roughly coincides with the adoption of the ECSMP. I agree with the appellant that the authority has not demonstrated that the three requests are identical or even similar to each other as they focus on different particular aspects and categories of correspondence relating to the ECSMP.

[62] The authority has indicated that after conducting a search for records responsive to one of the three of the appellant's requests (not the request in dispute in this appeal), it returned over 40,000 pages of records. It refers to Order MO-3154 where

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[12] See, for example, Orders M-850, MO-1782 and MO-2436.

the Assistant Commissioner considered broadly worded requests that resulted in more than 4,000 responsive records as a pattern of conduct that amounts to the abuse of the right of access or would interfere with the operations of the institution. However, in my review of that order, I note that the Assistant Commissioner stated that, as framed, the requests in that appeal were "very broad in scope," with the appellant seeking "all records," in most of her requests, in relation to specified parcels of land, covering close to a decade or more. However, in this instance, I am not convinced that the requests are very broad in scope, again noting that the appellant specified the parameters of his request into three categories and is seeking records from around the time the ECSMP was adopted.

[63] In addition, the authority submits that it located over 40,000 pages of records responsive to the appellant's request 2016-09, which it provided to the appellant and that it interpreted that request to include records relating to the purchasing policy for procurement of the consultant. The authority confirmed that there are no further records relating to the ECSMP that would result from processing the request in this appeal. However, I note that the appellant had divided his request into three categories with his three separate requests provided to the authority on the same day. As noted by the authority, in request 2016-09, the appellant is seeking records relating to the ECSMP's planning, processes, updates, and technical data, whereas in 2016-08 (the request in this appeal) he is seeking records relating to the authority's purchasing policy in general and relating to the ECSMP. Therefore, records that relate to the authority's purchasing policy would be responsive to the request in this appeal and not to request 2016-09.

[64] I find that the nature and scope of the requests does not support a conclusion that the appellant's requests are part of a pattern of conduct that amounts to an abuse of the right of access.

*Timing of the requests*

[65] The authority submits that the requests follow a series of public objections and delegations before associated boards and councils in relation to the development of the ECSMP. The authority submits that the concerns of the requesters and other members of the specified association have been heard but the authority's board resolved to maintain its positon on the adoption of the plan. The authority suggests that the appellant, and other requesters, published various online releases outlining their concerns about the ECSMP alleging that they will submit access requests to the authority "as a weapon," if the authority does not change its position.

[66] The authority included some of the online releases where it alleges that the appellant and other members of the specified association suggested that they would use the access provisions of the *Act* as a threat. After reviewing the examples, I do not agree with the authority. For example, in one release the specified association seems to be updating its readership by stating that it would "file an in-depth request for full disclosure on internal correspondence memoranda, notes, and production dates that will speak to the credibility of several representations made by key participants in the

ECSMP's development." In another letter from the appellant to a member of the board of the authority, the appellant indicated that his association would continue to put forth access requests, "to request important information which should be available to the public." In my view, these statements are not alarming or suggestive that the appellant intended to use the access provisions of the *Act* in a way counter to the *Act*'s intention.

[67] Based on the authority's submissions, I find that the timing of the request is not a factor in my consideration. The authority has indicated that the requests follow a series of public objections and delegations before associated boards and councils relating to the development of the ECSMP. The authority suggests that the efforts of the requests was to force it to change its position with regard to the ECSMP. In my view, this is not a valid reason to suggest that the timing of the requests is a factor in finding that the requests are frivolous or vexatious.

[68] Accordingly, I find that the timing of the appellant's requests is not a relevant factor to my determination on whether there has been an abuse of the right of access. In fact, given that the request came after the board indicated that it was adopting the ECSMP, after hearing the objections, is suggestive that the requests are not frivolous or vexatious and were intended to gather relevant information.

*Purpose of the request*

[69] I accept the authority's submission that one of the purposes of the request was for the appellant to seek information from the authority with regard to a decision it made that the appellant and others do not agree with. The authority itself stated in its representations that it "believes the purpose of the request is to seek all records of the Authority relating to the Purchasing Policy in an attempt to locate information that may support accusations of alleged misconduct of the Authority in relation to its purchasing policies and specifically, in relation to retention of the consultant who undertook the study which is one of the requesters main objections to the ECSMP." In my view, this is not evidence that the purpose of the request is for something other than gaining access. I find that there is insufficient evidence to support that the request was for "nuisance" value, or that it is the requester's aim to harass authority or to break or burden its system.

[70] It is apparent that there is a difficult relationship between the appellant and the authority. However, I find that I have insufficient evidence before me to support a conclusion that the appellant has no interest in the information that he seeks through the freedom of information access scheme or that he has filed the requests for the purpose of harassing the authority. From my review of the requests, they are clear and detailed and appear to target specific types of information relating to the ECSMP, an issue that is important to the appellant. Based on the evidence before me, I accept that the purpose of the appellant's requests is reasonable and that he is legitimately exercising his right of access to information held by a public institution as set out in section 4(1) of the *Act*.

[71] Accordingly, I find that the purpose of the request is not a relevant factor in my

determination on whether there has been an abuse of the right of access.

*Summary*

[72] Having considered the number of requests and their timing, the nature and scope and the appellant's purpose in filing them, I am not satisfied that the authority has provided sufficient evidence to demonstrate that there exist reasonable grounds to conclude that the request is part of a pattern of conduct that amounts to an abuse of the right of access as contemplated by section 5.1(a) of *Regulation 823*. Accordingly, I find that the authority cannot claim that the requests are frivolous or vexatious under section 4(1)(b) of the *Act* on this basis.

### *Section 5.1(a) – Pattern of conduct that would interfere with the operations of the institution*

[73] As set out above, the second part of section 5.1(a) of *Regulation 823* provides that a request is frivolous or vexatious if it is part of a pattern of conduct that would interfere with the operations of the institution.

[74] For the same reasons as those stated above, I do not accept that the request at issue, or all three if taken together, exhibit a pattern of conduct as that phrase has been interpreted by this office. However, again, in the event that a pattern of conduct were established, I will consider whether such pattern of conduct could be said to interfere with the operations of the institution. In the circumstances before me, I do not accept that the authority has provided sufficient evidence to establish, on reasonable grounds, that it would.

[75] 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.[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.[14]

[76] In addition to the summary of its representations above, the authority submits that as a result of its size, its staff have multiple roles and responsibilities throughout the organization.

[77] The authority submits that in processing the current request which has resulted in over 40,000 responsive records, with only three administrative staff, will result in the inability to fulfill its responsibilities under the *Conservation Authorities Act* and the

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[13] Order M-850.
[14] Order M-850.

services it provides to others. The authority submits that due to constant challenges and other unrelated legal processes in relation to the requesters and their agent, the authority is seeking legal advice on how to respond and deal with these individuals, including processing their requests and appeals. The authority submits that the pattern is meant to drive up costs to the authority as it invests a significant amount of time and expense preparing its representations. As an example, it submits that one of the other nine requests moved to adjudication and after investing significant amount of time and expense during the adjudication period, that appellant withdrew their appeal on the deadline date for their own representations.

[78] The authority further submits that the relief measures provided in the *Act*, such as the fee provisions, are not sufficient to assist it with mitigating interference with its operations. It suggests that the fee for this request would be in excess of $10,000 as a result of over 300 hours of estimated staff time. It submits that even if the appellant paid the 50% deposit required to process the request, that monetary amount would not necessarily address the interference to the institution's operations caused by processing a request of this size and nature.

[79] Previous orders have established that for "interference" to be found, an institution must, at minimum, provide evidence that responding to a request would "obstruct or hinder the range of effectiveness of the institution's activities."[15] However, in Order MO-1488, Adjudicator Cropley found that where an institution has allocated insufficient resources to the freedom of information access process, it may not be able to rely on limited resources as a basis for claiming interference. While institutions are not obligated to retain more staff than is required to meet its operational requirements, she stated that an institution must allocate sufficient resources to meet its freedom of information obligations. In that order she also stated:

> In my view, rather than shifting the responsibility onto appellants, the city should perhaps look to its own resources and consider whether they are sufficient to meet the needs of an institution of its size.

[80] Adjudicator Cropley's reasoning is relevant and applicable to the circumstances before me. Taking it into consideration, I find that the authority cannot reasonably rely on interference with its operations as a ground for finding that the requests at issue are frivolous or vexatious under section 4(1)(d) for the following reasons.

[81] I acknowledge that the authority has a small staff and takes the position that it cannot handle the processing of these requests. However, I note that the authority also argues that the relief provided by the *Act* such as cost recovery mechanisms would not permit it to mitigate or avoid such interference, without elaborating further. The authority's submissions on this point suggest that it is of the view that as it has

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[15] Order M-850

insufficient resources to process the requests, it is entitled to deny the appellant his right of access under section 4(1) of the *Act*. I do not accept that an institution can evade its responsibilities under the *Act* on the basis that it is insufficiently staffed to do so. The fee and time extensions provisions in the *Act* are designed to assist institutions in meeting their obligations without unduly interfering in their operations.

[82] Previous orders have established that denying a requester his right of access under the *Act* is a serious matter and that the interference complained of must not be of a nature for which the *Act* or the jurisprudence provides relief.[16] In the circumstances of this appeal, I do not accept that in submitting these three requests the appellant has engaged in a pattern of conduct that can reasonably be said to interfere with the authority's operations.

*Summary*

[83] As I am not satisfied that the authority has provided sufficient evidence to establish, on reasonable grounds, that any pattern of conduct that might exist would interfere with the operations of the institution, as contemplated by section 5.1(a) of *Regulation 823*, I find that it cannot claim section 4(1)(b) of the *Act* on this basis.

### *Section 5.1(b) – Request is made in bad faith or for a purpose other than to obtain access*

[84] Section 5.1(b) of *Regulation 823* provides that a request is frivolous or vexatious, if the head can establish on reasonable grounds that it is made in bad faith or for a purpose other than to obtain access. There are no further requirements. In both instances, the institution does not need to demonstrate a pattern of conduct.[17]

*Bad faith*

[85] The authority submits that the circumstances relating to the appellant's request when viewed as a whole and the effect that such factors have caused, represents a pattern of conduct leading to the conclusion that the requests have been submitted in bad faith and not for the purposes of the *Act*.

[86] Where a request is made in bad faith, the institution need not demonstrate a "pattern of conduct".[18]

[87] "Bad faith" has been defined as:

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[16] Order M-1071.
[17] Order M-850.
[18] Order M-850.

> 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.[19]

[88] In Order M-850, former Assistant Commissioner Mitchinson commented on the meaning of the term bad faith. He indicated that bad faith is not simply bad judgement or negligence, but rather it implies the conscious doing of a wrong because of a dishonest purpose or moral underhandedness. He went on to conclude that it is different from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with secret design or ill will. Additionally, in Interim Order MO-1168-I Adjudicator Cropley stated that in determining whether a request was made in bad faith, "[t]he question to ask is whether the appellant had some illegitimate objective in seeking access under the Act."

[89] The authority submits that the appellant's intention with regard to his request is for a purpose other than to gain access to information. I find it has not established that the appellant is seeking this particular information because of a dishonest purpose or as a result of moral underhandedness. I also do not accept that he has an illegitimate objective in seeking access to the information. The appellant clearly has some questions with respect to the ECSMP and seeks access to certain records that the authority holds. In my view, this is a legitimate reason to seek access to information held by an institution under the *Act*.

[90] Additionally, there is nothing in the *Act* which delineates what a requester can and cannot do with information once access has been granted;[20] the various exemptions were established to protect information that the legislature deemed could be withheld from the public. Previous orders have made it clear that the fact that an appellant may choose to use information disclosed under the *Act* in a manner that is disadvantageous to the institution does not mean that the reasons in using the access scheme were not legitimate.[21] Additionally, other orders have similarly concluded that once it is determined that the request was made for the purpose of obtaining access, this purpose is not contradicted by the possibility that the appellant may also intend to use the documents against the institution or to make the records public once access is

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[19] Order M-850.
[20] Order M-1154.
[21] Orders M-864, MO-1168-I, MO-1472-F.

granted.[22]

[91] Based on the evidence before me, I conclude that the appellant's request was made for legitimate reasons, specifically, for the purpose of obtaining access to the requested information. In keeping with prior orders of this office, I do not accept that the fact that the appellant may use the information that he is entitled to have disclosed to him under the *Act* to call into question the authority's actions or its staff indicates that they were submitted in bad faith. I also do not accept the fact that the appellant has previously indicated that he would use the *Act* to make access to information requests indicates that the requests were submitted in bad faith.

[92] In my view, the authority has not established, on reasonable grounds, that the appellant's request was made in bad faith as contemplated by section 5.1(b) of *Regulation 823*. Accordingly, I find that it cannot claim section 4(1)(b) of the *Act* on this basis.

*Purpose other than to obtain access*

[93] For reasons already set out in this order, the authority submits that the appellant's request was submitted to overburden it, in an attempt to coerce the board in reconsidering past decisions as it relates to the ECSMP.

[94] 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.[23] However, 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.[24]

[95] 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. He states:

> This argument necessitates a discussion of whether access requests may be for some collateral purpose over and above an 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 requests 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

[22] Orders MO-1269 and P-1534.
[23] Order M-850.
[24] Orders MO-1168-I and MO-2390.

> 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.

[96] I adopt the approach set out by former Senior Adjudicator Higgins for the purpose of this appeal.

[97] I accept, on the evidence before me, that the appellant has a legitimate and genuine interest in the responsive records. As stated above, even if the appellant intends to use the records in a manner that is disadvantageous to the institution, that is a permissible purpose for seeking access to information under the *Act*. The appellant states (and I accept) that his access request was made for the purpose of obtaining important information of interest to himself and others. As such, 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.

[98] I find that the authority has not established, on reasonable grounds, that the request is frivolous or vexatious because it was made for a purpose other than to obtain access as contemplated by section 5.1(b) of *Regulation 823*. Therefore, I find that the authority cannot deny access to the requested information under section 4(1)(b) of the *Act* on this basis.

## Conclusion

[99] The tests under section 5.1 of *Regulation 823* set thresholds that must be met in order to establish that a request is frivolous or vexatious. In my view, as set out in my reasoning above, in the circumstances of this appeal, none of those thresholds have been met. Based on the evidence before me, I find that the authority has not established on reasonable grounds that the request made by the appellant is frivolous or vexatious as that phrase has been defined in section 5.1 of *Regulation 823*. Accordingly, I find that it is not entitled to deny access to the responsive records under section 4(1)(b) of the *Act*.

## ORDER:

1. I do not uphold the authority's decision that the requests are frivolous or vexatious under the *Act*.

2. I order the authority to issue an access decision to the appellant respecting the records responsive to his request in this appeal, treating the date of this order as the date of the request.

Original Signed by: April 29, 2019

Alec Fadel
Adjudicator