Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4142

Appeals PA19-00509 and PA19-00550

Ryerson University

April 29, 2021

Summary: This order deals with appeals of two decision letters issued to the appellant by Ryerson University (the university), in which the university claims that the access requests are frivolous and vexatious. In this order, the adjudicator finds that the requests are not frivolous and vexatious and orders the university to issue access decisions to the appellant in response to the access requests.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 10(1)(b) and 27.1; section 5.1 of Regulation 460.

Orders and Investigation Reports Considered: Orders MO-1924, PO-3465 and PO-4035.

OVERVIEW:

[1] This order disposes of the issues raised as a result of two access decisions made by Ryerson University (the university). The requester made the access requests under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for the following records:

- the notice/termination notice that was received by a named individual;
- records relating to an alleged floor "lockdown";
- records relating to claims made by a named employee that the appellant could not access the university's property or be employed there;

- records relating to a statement made by a named employee regarding a "booking" that took place at the university; and

- records relating to the appellant signed by a named individual, including forms and waivers.

[2] In response, the university issued two decisions to the requester, advising him that his requests were frivolous and vexatious. The requester (now the appellant) appealed the university's decisions to this office, and two appeal files were opened.

[3] During the mediation of the appeals, the appellant disagreed with the university's characterization of his requests as frivolous and vexatious. The university maintained its position.

[4] The appeals then moved to the adjudication stage of the appeals process, where an adjudicator may conduct an inquiry. Representations were sought and received from the university and the appellant. In his representations, the appellant requested an in-person or virtual hearing, in which he intended to call witnesses. I proceeded with this inquiry in writing. This office's usual practice is to conduct inquiries in writing, and the appellant provided no persuasive reason why I should deviate from that practice in this case.[1]

[5] For the reasons that follow, I find that the two access requests are not frivolous and vexatious, and I order the university to issue access decisions to the appellant in response to the requests on their merit.

DISCUSSION

[6] The sole issue in these appeals is whether the appellant's access requests are frivolous and vexatious. The university's position is that the requests are frivolous and vexatious within the meaning of section 10(1)(b) of the *Act* and that its decision to deny the requests under section 27.1(1) should be upheld. In particular, the university asserts that the appellant has engaged in a pattern of conduct that amounts to an abuse of the right of access and has made the requests for a purpose other than to obtain access.

[7] In that regard, section 10(1)(b) 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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[1] See *Practice Direction 2*.

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

[8] Section 27.1(1) of the *Act* states:

> A head who refuses to give access to a record or a part of a record *because the head is of the opinion that the request for access is frivolous or vexatious*, shall state in the notice given under section 26,
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> (a) that the request is refused because *the head is of the opinion* that the request is frivolous or vexatious;
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> (b) *the reasons for which the head is of the opinion* that the request is frivolous or vexatious; and
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> (c) that the person who made the request may appeal to the Commissioner under subsection 50(1) for a review of the decision. [Emphasis added.]

[9] Section 5.1 of Regulation 460 states:

> 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,
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> (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
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> (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] Section 10(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.[2]

[11] An institution has the burden of proof to substantiate its decision that a request is frivolous or vexatious.[3] In these appeals, the university is claiming that the appellant has engaged in a pattern of conduct that amounts to an abuse of the right of access and that the appellant has made the access requests for a purpose other than to obtain

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

access.

Pattern of conduct that amounts to an abuse of the right of access – section 5.1(a) of Regulation 460.

[12] The following factors may be relevant in determining whether a pattern of conduct amounts to an "abuse of the right of access" including:

- the number of requests;
- the nature and scope of the requests;
- the purpose of the requests; and
- the timing of the requests.

[13] 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.[4] 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.[5]

[14] The focus should be on the cumulative nature and effect of a requester's behaviour.

[15] The university submits that the requests form a pattern of conduct constituting an abuse of the right of access. In particular, the university submits that the appellant has submitted 10 access requests over the past three years. In seven cases, the university denied access to the requested records because they were either excluded from the scope of the *Ac*t under section 65(6) or were exempt from disclosure under section 19(a). In one case, the records that the appellant requested were disclosed to him. The remaining two requests are the subject matter of these appeals.

[16] The university further submits that the nature and scope of the requests are either unduly broad and vague or unusually specific, and relate to subject matters over which the *Act* does not have jurisdiction. With respect to the request in Appeal PA19-00509, the appellant has requested the notice/termination letter sent to his former colleague as well as records associated with remarks allegedly made by an unidentified person from the Human Resources department. With respect to the request in Appeal PA19-00550, the appellant has requested all forms, waivers and records that mention or relate to the appellant, signed by a colleague.

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[4] Order MO-1782.
[5] Order MO-1782.

[17] The university goes on to argue that it is important to situate the requests at issue in these appeals in the context of the nature and scope of the appellant's previous requests. Regarding the timing of the requests, the university stated the following:

- the appellant had a short-term contract with the university that was not renewed;
- the appellant was subsequently arrested for criminal harassment and released with conditions in relation to his conduct toward his former manager. The criminal matter is ongoing;
- the appellant then served his former manager with a Small Claims court claim;
- the appellant then served the university with a second claim;
- the Court then consolidated all of the appellant's civil claims into one, naming the university as a defendant. The civil matter is ongoing; and
- the appellant filed complaints with the Ministry of Labour and the province's Ombudsman. Both complaints were closed.

[18] The university argues that in light of the chronology of events described above, the timing of the access requests sheds light on the appellant's motivation and conduct, weighing in favour of a finding that the requests in these appeals are frivolous and vexatious.

[19] The appellant submits that the university engaged in delay tactics in responding to the access requests, as well as during the mediation and the inquiry stages of the appeals. The appellant further submits that the university's representations consist of defamatory claims and fabrications, and that a specified university employee repeatedly interfered with the handling and processing of his access requests. In addition, the appellant argues that the university specifically advised him of the existence of certain records and then denied him access to these records by claiming that his access requests were frivolous and vexatious.

[20] I have carefully considered the representations of both parties, including the details that the university provided of the appellant's previous access requests. These requests were for the following information:

- emails relating to complaints about or to alleged misconduct of employees of a specified department of the university during a specified time period;
- three requests for personal information contained in emails between named individuals over a specified time period, including emails created by the human resources department. Each request related to different individuals;

- the annual budget of a specified department of the university over a specified time period;
- to correct the appellant's personal information in the university's computer system;
- the amount of money the university spent on legal fees to a named law firm over a specified time period; and
- the contract and retainer that the university entered into with a named law firm.

[21] A "pattern of conduct" requires recurring incidents of related or similar requests by a requester under the *Act*[6] and in this matter, no such evidence has been provided to suggest such a pattern. For example, in Order PO-4035, Adjudicator Jaime Cardy stated:

> 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:
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> > [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).

[22] As is made clear in the above, it is not enough for there to be a pattern of conduct. For the purposes of section 5.1(a), the pattern must either amount to an abuse of the right of access, or interfere with the operations of the institution. 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.[7]

[23] In my view, the appellant's current access requests, taken into consideration with his previous requests as detailed above, do not constitute a pattern of conduct that amounts to an "abuse of the right of access." I find that the number of requests is not excessive, and that the nature and scope of the two requests at issue in these appeals are not unreasonable. The university's position is that the nature and scope of the requests are either unduly broad and vague or unusually specific. Regarding the

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

requests that the university considers to be unduly broad or vague, it had an opportunity, which it did not take, to seek to clarify and/or narrow the requests with the appellant. In addition, I find that whether an access request is "unusually specific" does not, on its own, mean that it is frivolous or vexatious.

[24] Despite the number of access requests that the appellant has made to the university, I find that the university has not met the burden of proof that the appellant's ten requests over a three-year period is an excessive number by reasonable standards.

[25] Regarding the timing and purpose of the access requests, I am not satisfied that the timing of these requests is suspect. I am not satisfied that the fact that the access requests took place during a time when there were other proceedings between the parties demonstrates an abuse of the right of access. Indeed, IPC decisions have confirmed that using the *Act* to obtain information relevant to court proceedings is a permissible use of the access to information scheme.

[26] I find, therefore, that the university has not shown that the appellant's access requests amount to an abuse of the right of access within the meaning of section 5.1(a) of the regulation.

Purpose other than to obtain access – section 5.1(b) of Regulation 460.

[27] 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.[8]

[28] 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".[9] In order to qualify as a "purpose other than to obtain access", the requester would need to have an improper objective above and beyond a collateral intention to use the information in some legitimate manner.[10]

[29] Where a request is made for a purpose other than to obtain access, the institution need not demonstrate a "pattern of conduct".[11]

[30] The university submits that, based on the information it has provided, it is apparent that the appellant is using the *Act's* process to accomplish an objective distinct from and secondary to the purpose of obtaining access. In particular, the university argues that the appellant is abusing the *Act's* process to facilitate the right of access by

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[8] Order M-850.
[9] Orders MO-1168-I and MO-2390.
[10] Order MO-1924.
[11] Order M-850.

requesting information that is already available to him through the disclosure and discovery processes in the criminal and civil proceedings and to which his current and previous requests all relate. In other words, the university submits, the appellant is using the *Act* to further his litigation interests and prolong his dispute with the university and its employees, rather than simply to access information.

[31] Lastly, the university submits that since the appellant's contract with it expired, he has relentlessly written to the university, and its current or former employees initially named as defendants or as witnesses to his dispute with the university. The university states:

> [T]he appellant is using the *Act's* process for facilitating the right of access for the purpose of sustaining the persistent harassment of the University's employees and further, to deplete the University's time and resources.

[32] The appellant submits that past orders of this office have held that an appellant's intention to take action against an institution is insufficient to claim that a request is frivolous or vexatious. The appellant goes on to argue that if the university is concerned that the records that are the subject matter of these access requests will be "legally" used against it, the university should have claimed exclusions or exemptions to deny access. Further, the appellant submits that the university could have asked him for clarification of the access requests, if it was of the view that the requests were too broad.

[33] As referred to above, in Order M-850, former Assistant Commissioner Tom Mitchinson concluded that 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. In Order MO-1924, former Senior Adjudicator John Higgins addressed an institution's argument that the objective of obtaining information to further a dispute between it and the requester was not a legitimate exercise of the right of access. In rejecting that position, Senior Adjudicator Higgins stated:

> 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] 2 S.C.R. 403). 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 inaccurate personal information (section 36(2)) indicates that requesting one's personal information to ensure its accuracy is a legitimate purpose. Similarly, requesters may also seek information to assist them in a dispute with the institution, or to publicize what they consider to be inappropriate or problematic decisions or processes undertaken by institutions. To find that

> these reasons for making a request are "a purpose other than to obtain access" would contradict the fundamental principles underlying the *Act*, stated in section 1, that "information should be available to the public" and that individuals should have a "right of access to information about themselves". In order to qualify as a "purpose other than to obtain access", in my view, the requester would need to have an improper objective above and beyond a collateral intention to use the information in some legitimate manner.

[34] I agree with and adopt the approach taken in Order MO-1924. While the appellant has initiated civil litigation against the university and also made complaints to the Ministry of Labour and the office of the Ombudsman, I am not persuaded by the university that these actions taken by the appellant demonstrate an objective for his access requests, above and beyond a potential intention to use the information in his civil litigation. I have also noted the university's submissions about the appellant's alleged criminal harassment and his repeated communications with university staff. While I have carefully considered the university's position, I am not persuaded that the appellant's access requests were made in furtherance of any alleged harassment. As previous cases have noted, it is difficult to assess whether a requester has a collateral motive because requesters will seldom admit to a purpose beyond a genuine desire to obtain the information. Determining whether such a collateral purpose exists requires drawing inferences from the nature of the request and the surrounding circumstances.

[35] I also stress that my authority is based in the *Act*, and my task is to apply its provisions as written. Although some of the surrounding circumstances are troubling, if true, they are persuasive only if they serve to demonstrate that the access requests are improperly motivated.

[36] Here, based on the nature of the information requested, and all of the surrounding circumstances, I am not persuaded that the two access requests were made for a purpose other than to gain access. For ease of reference, the access requests were for the following information:

- the notice/termination notice that was received by a named individual;
- records relating to an alleged floor "lockdown";
- records relating to claims made by a named employee that the appellant could not access the university's property or be employed there;
- records relating to a statement made by a named employee regarding a "booking" that took place at the university; and
- records relating to the appellant signed by a named individual, including forms and waivers.

[37] The nature of the requests does not by itself indicate the presence of improper motives. Given their subject matter and the overall context, they may be motivated by an intention to use the information in some legitimate manner, such as the ongoing dispute with the university and the ongoing civil litigation. I find Order PO-3465 instructive in this regard. This order involves a thirteen-part access request made to Sunnybrook Hospital (the hospital), in which the hospital issued an access decision, claiming that the request was frivolous and vexatious. The appellant was a former contractor with the hospital, who provided services to it. He harassed employees of the hospital, to the point where he was charged with criminal harassment, which resulted in him entering into a peace bond prohibiting him from being within fifty metres of the employee's workplace.

[38] Adjudicator Stella Ball, in addressing whether the appellant's access request was made for a purpose other than to obtain access to the information at issue, she noted:

> While Sunnybrook refutes the appellant's allegations and characterizes his request as a further act of his malicious intention to continue burdening it, it does not provide sufficient evidence to establish that the appellant's request is not motivated by a desire to obtain access pursuant to a request; instead, it points again to the appellant's conduct towards it and a number of its employees as evidence that the purpose of his request is to continue to harass it. I find that this conduct along with the ill will that exists between the parties, do not establish that the appellant made his access request for a purpose other than to obtain access.

[39] Adjudicator Ball went on to find that the hospital had not discharged its onus to substantiate its decision that the appellant's request was frivolous or vexatious under any one of the four grounds articulated in section 5.1 of Regulation 460, and she further found that section 10(1)(b) did not apply.

[40] Applying the approach taken by Adjudicator Ball, I find that the facts in this case are not dissimilar to that in Order PO-3465. I am not persuaded by the university that the purpose of the appellant's two access requests are for a purpose other than to obtain access. Despite that fact that there is ongoing civil litigation between the appellant and the university, and notwithstanding that the appellant has been charged with criminal harassment, I find that the university has not established that the appellant has made his access request for an improper objective beyond the collateral intention to use the information in a legitimate manner, such as in civil and/or criminal litigation. If there are exemptions that properly apply in this context, it will be open to the university to claim them.

[41] I find, therefore, that the university has not established that the requests at issue are frivolous or vexatious under the *Act.*

ORDER:

1. I order the university to issue access decisions to the appellant regarding the merit of his two access requests that are the subject matter of these appeals. The university is to treat the date of this order as the date of the requests.

Original signed by: April 29, 2021

Cathy Hamilton
Adjudicator