Information and Privacy Commissioner,
Ontario, Canada

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

FINAL ORDER PO-4189-F

Appeal PA19-00379

Human Rights Tribunal of Ontario

September 22, 2021

Summary: In Interim Order PO-4158-I, the adjudicator upheld the HRTO's decision to deny the appellant's access request on the grounds that it was frivolous or vexatious pursuant to section 10(1)(b) of the *Freedom of Information and Protection of Privacy Act*. She asked the HRTO to notify the IPC if it sought any further remedy, such as restrictions on the appellant's future access requests. HRTO sought a further remedy and made submissions in support of its request. In this order, the adjudicator finds that the HRTO has not established grounds for any further remedy.

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 Considered: Interim Order PO-4158-I.

OVERVIEW:

[1] In Interim Order PO-4158-I, I upheld the decision of the Human Rights Tribunal of Ontario (HRTO) to deny the appellant's access request, made under the *Freedom of Information and Protection of Privacy Act* (the *Act*) on the ground that the request was frivolous or vexatious. The narrow issue in this final order is whether I should also impose limitations on the appellant's right to make further access requests to the HRTO.

[2] The background to this matter is set out in the interim order. Briefly, the appellant had an application before the HRTO, which led to years of fraught relations between the appellant and the HRTO. The HRTO eventually held a hearing to determine

whether the appellant should be declared a vexatious litigant before the HRTO. A few days after that hearing, the appellant submitted a seven-page access request to the HRTO under the *Act* for information relating to the HRTO's operating budget and other items.

[3] The HRTO denied the appellant's request as frivolous or vexatious pursuant to section 10(1)(b) of the *Act*. The appellant appealed the HRTO's decision to the Information and Privacy Commissioner of Ontario (IPC).

[4] In Interim Order PO-4158-I, I found that the appellant's request was made in bad faith or for a purpose other than to gain access, within the meaning of section 5.1(b) of Regulation 460. Accordingly, I found that the appellant's request was frivolous or vexatious within the meaning of section 10(1)(b) of the *Act*, and I upheld the HRTO's decision to deny the access request on that basis.

[5] However, the HRTO had not requested any remedy other than an upholding of its decision to deny the appellant's access request. In my order, I directed the HRTO to advise if it seeks any further remedy, such as restrictions on the appellant's ability to file further access requests with the HRTO.

[6] The HRTO seeks a further remedy and has filed representations in support of its request. The representations were shared with the appellant, and I invited her to make representations in response. The appellant has not filed representations, but requested two extensions of time in which to do so. However, on reviewing the HRTO's representations, I am not satisfied that I should grant it any further remedy. Accordingly, it is not necessary for me to hear from the appellant on that issue.

[7] My reasons for declining to grant any further remedy follow.

DISCUSSION:

[8] The sole issue before me in this final order is whether I should impose the HRTO's requested limitations on the appellant's ability to make further access requests to the HRTO.

[9] In Interim Order PO-4158-I, I upheld the HRTO's decision to deny the appellant's access request on the ground that the request was frivolous or vexatious, as contemplated by section 10(1)(b) of the *Act*, considered with section 5.1 of Regulation 460. Section 10(1)(b) reads, in part:

> 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.

[10] This section provides institutions with a summary mechanism to deal with

frivolous or vexatious requests. This is a powerful discretionary authority and should not be exercised lightly, as it can have serious implications on the ability of a requester to obtain information under the *Act*.[1] On appeal to this office, the burden of proof was on the HRTO to provide sufficient support for its decision to declare the request frivolous or vexatious.[2]

[11] Section 5.1 of Regulation 460 of the *Act* provides that:

> 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] If an access request is found to be frivolous or vexatious, the IPC will uphold the institution's decision to deny access on that basis. In addition, it may impose conditions such as limiting the number of active requests and appeals the appellant may have in relation to a particular institution.

[13] In the inquiry that resulted in my interim order, the HRTO argued that the appellant's access request was part of a pattern of conduct amounting to an abuse of the right of access. It also argued that the pattern of conduct would interfere with its operations. The HRTO argued, further, that the appellant's access request was made in bad faith or for a purpose other than to obtain access.

[14] In addressing the HRTO's "pattern of conduct" arguments, I stated:

> In any event, it is clear that the appellant has made a number of access requests over the years for various information about the Vice-Chairs and Registrars at the HRTO, and it is arguable that the appellant has demonstrated a pattern of conduct in respect of her access requests. However, given my findings under section 5.1(b), below, I do not need to make any finding about whether the appellant's current access request forms part of a pattern of conduct, nor whether any such pattern of conduct amounts to an abuse of the right of access or would interfere with the HRTO's operations. The HRTO's submissions on the latter point, in particular, were brief, general and lacking in detail.

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

[15] I went on to find that, given the history of the appellant's application before the HRTO and the timing and content of the access request at issue, it was clear that her request was made in bad faith or for a purpose other than to obtain access. I upheld the HRTO's access decision on that basis.

HRTO's representations on a further remedy

[16] The HRTO seeks the following further remedies:

a. That the appellant be limited to one request every year for three years, with each request having only one part,

b. That the appellant have only one active request with the HRTO at all times,

c. That the appellant cannot make a new access request until an existing request, appeal or complaint has been resolved,

d. That any access request by the appellant can only relate to one subject matter and cannot include phrases like "any and all" or "not limited to",

e. That the appellant cannot contact the HRTO with respect to any access request. The HRTO will contact the requester if necessary to process the request,

f. That the appellant work with the HRTO in good faith to narrow the scope of requests where necessary, and

g. That the above limitations apply to anyone who makes requests on behalf of the appellant.

[17] In support of its request, the HRTO reiterates many of the arguments it made during the initial inquiry. It outlines in some detail the appellant's history with the HRTO, which is set out in my interim order and which I will not repeat here.

[18] The HRTO goes on to essentially repeat its earlier submission on what it views as the appellant's pattern of conduct in making access requests under the *Act.* It states that the appellant filed several access requests with the HRTO. It submits that the number of access requests filed by the appellant, their nature and scope, and the purpose of the request that was the subject of this appeal, combined with her interaction with the HRTO during the course of adjudication, demonstrate an abuse of the right of access on the appellant's part. It says that the particular access request at issue in this appeal was made for nuisance value and for the purpose of harassing and burdening the HRTO.

[19] The HRTO goes on to argue that the appellant has demonstrated conduct that interfered with its operations. It says that the appellant makes access requests in bad faith.

[20] The HRTO goes on to state (as it did in its original representations in this appeal)

that, prior to the request that was the subject matter of this appeal, the appellant filed four access requests with the HRTO:

- The first was in June 2015, while the appellant's application was still before the HRTO, when the appellant requested the name of the Vice-Chair who had, as a result of the appellant's own health issues, delayed the appellant's application before the HRTO.

- In August 2016, again while the appellant's application was before the HRTO, she sought copies of all Oaths of Allegiance and all Oaths of Office by HRTO Vice-Chairs and the HRTO Registrar. This request was denied under the labour relations exclusion in section 65(6)3 of the *Act*.

- On August 2, 2018, the appellant was granted access to her own file.

- Also on this day, the HRTO denied the appellant's request for employment information relating to a former HRTO Vice-Chair. Again, that request was denied on the basis of the employment records exclusion in the *Act* (section 65(6)). The information requested in this appeal was similar to all previously denied access requests.

[21] The HRTO also notes that in May 2018, the appellant filed a 24-page privacy complaint with the IPC, where she accused the HRTO of applying a double standard since it protected health information about Vice-Chairs but required more personal details from her with respect to her adjournment requests. The HRTO took the position that the complaint was a collateral attack on its adjudicative process. Ultimately, the appellant's complaint was closed.

[22] The HRTO states:

> Given the number of times the appellant has sought records from the HRTO and the appellant's acrimonious relationship with the HRTO evidenced, in part, by her use of the complaint process, as well as the appellant's use of the access to information system to frustrate the HRTO's operations, the HRTO takes the position that the remedies requested are justified. The scope and breadth of the appellant's requests have demonstrated bad faith that have resulted in numerous hours of work for HRTO staff.

[23] The HRTO submits that although decisions of the IPC have imposed conditions limiting access requests where the requester has demonstrated a pattern of conduct that demonstrates a frivolous and vexatious request, such a finding is not necessary for the imposition of such a remedy. It says that the appellant has an acrimonious relationship with the HRTO and is using the access to information process to express her frustration with the institution. By limiting the number of requests by individuals who have proved to be using the system to express frustration, the HRTO says, its resources are freed to process legitimate access requests that meet the purposes of

FIPPA.

Analysis and finding

[24] The HRTO has not demonstrated that any further remedies are necessary.

[25] I am not satisfied that the appellant's access requests have burdened the HRTO to such a degree that imposing limits on her future rights under the *Act* is warranted. Other than the request at issue in this appeal, the HRTO refers to four other access requests that the appellant made between 2015 and 2018. I have already upheld the HRTO's decision to deny access to records responsive to the request that I found to have been made in bad faith. Other than the access request that was before me, the HRTO has not provided evidence of what access requests, if any, the appellant made after 2018. In the circumstances, and despite the HRTO's assertion that it spent many hours on these requests, I am not convinced that four access requests in the span of three years represented such a burden to the HRTO that further restrictions on the appellant's rights are warranted.

[26] I acknowledge that the appellant has now filed a handful of access requests that relate in some way to the qualifications of HRTO Vice-Chairs. If this pattern persists, the HRTO may be able to demonstrate that the access requests amount to a pattern of conduct, resulting in either to an interference with its operations or an abuse of the right of access. However, I am not satisfied that either scenario is made out at present.

[27] I do agree with the HRTO that a pattern of conduct is not necessarily a precondition to the imposition of conditions on future access requests. In some circumstances, it might be appropriate for the IPC to impose conditions on future access requests where the institution's denial of access under section 10(1)(b) is upheld based on a finding of bad faith rather than a pattern of conduct. Here, however, the HRTO has not adequately explained why such conditions are necessary. As it stands, the HRTO denied the appellant's access request and I have upheld the denial. I leave it to the appellant to govern herself appropriately in terms of the frequency and detail of any future access requests. It goes without saying that the HRTO is not precluded from invoking section 10(1)(b) of the *Act* in response to a future access request, if the circumstances so warrant, and provided it can properly defend such a decision on appeal.

[28] In arguing that the appellant's access rights under the *Act* should be curtailed, the HRTO seems to be relying in large part on the history of improper conduct in the context of her HRTO application. However, the HRTO has its own powers to address such conduct and it invoked those powers when it declared the appellant to be a vexatious litigant and dismissed her HRTO application. The evidence of acrimony between the appellant and the HRTO in the context of the HRTO application, combined with the timing of the access request before me, was relevant for the purpose of my finding that the access request before me was made in bad faith. However, I am not persuaded that it provides a basis to curtail the appellant's future access rights under the *Act*.

[29] I also remind the HRTO of the fee and time extension provisions in the *Act*, which are designed to alleviate, to an extent, challenges institutions face in responding to access requests. The HRTO's brief reference to the "many hours" spent on the appellant's access requests is not sufficient evidence to justify imposing restrictions on the appellant's future access requests.

[30] It is well established that institutions should not exercise their discretion to deny access requests under section 10(1)(b) lightly, as this can have serious implications for access rights under the *Act*.[3] Similarly, in my view, any conditions placed on a requester's access rights under the *Act* should be carefully thought out, and grounded in the evidence. I am not satisfied based on the evidence before me that I should impose any conditions on the appellant's access rights.

ORDER:

I deny the HRTO's request for a further remedy.

Original Signed by: September 22, 2021
Gillian Shaw
Senior Adjudicator

[3] Order M-850.