Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-4257

Appeals MA20-00557, MA21-00213 and MA21-00214

Town of Oakville

September 28, 2022

Summary: At issue in these appeals is whether the appellant's requests to the Town of Oakville (the town) are frivolous or vexatious under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA*). In this order the adjudicator finds that the town has established that the requests are frivolous or vexatious under section 4(1)(b) of *MFIPPA*. He upholds the town's decisions to deny access on that basis and imposes conditions on current and future requests submitted by the appellant to the town, as well as conditions on appeals of the town's decisions.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, RSO 1990, c M.56, as amended, sections 1, 3(1), 4(1)(b) and 51(1); Regulation 823, section 5.1(a); *Municipal Act, 2001*, SO 2001, c 25, section 228(4); The *Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK)*, 1982, c 11.

Orders Considered: Orders M-618, M-850, MO-1168-I, MO-1841, MO-2390, MO-3154, MO-3156, MO-3293, MO-4193 and MO-4241.

Cases Considered: *Roncarelli v Duplessis*, [1959] SCR 121; *Dagg v. Canada (Minister of Finance)*, [1997] 2 SCR 403 (SCC); *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)*, 2003 SCC 8.

BACKGROUND:

[1] The appellant, a law clerk acting for plaintiffs in a class action discussed in more detail below, submitted three multi-part access to information requests to the Town of

Oakville (the town or Oakville) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act* or *MFIPPA*).

[2] The town submits that in making the requests, the appellant was acting in concert with a lawyer at another law firm also acting for the plaintiffs in the class action (the lawyer) and that the requests are generally related to the class action. In that regard, the town submits that the appellant and the lawyer have submitted numerous requests since 2019 relating to flooding, development and other topics that are raised in the class action. As will be elaborated on below, the town decided that the requests of the appellant and the lawyer are frivolous or vexatious under 4(1)(b) of the *Act*, and denied the requests on that basis.[1]

[3] The following three requests made by the appellant at issue in these appeals are addressed in this order.

Appeal MA20-00557/Request file number 2020-0067

[4] This appeal relates to a request made on August 25, 2020 for access to the following:

1. All reports, correspondence, emails, and memoranda prepared by the former Chief Administrative Officer [named individual] from January 1, 2000 [to the date of the request] with reference to flood plain mapping, flood mitigation, and flood risks.

2. All reports, correspondence, emails, and memoranda prepared by the Chief Administrative Officer [another named individual] from January 1, 2000 [to the date of the request] with reference to flood plain mapping, flood mitigation, and flood risks.

3. All reports, correspondence, emails and memoranda prepared by Mayor [named individual] from 2006 to the present with reference to flood mapping, flood mitigation and flood risks.

Appeal MA21-00213/Request file number 2020-0070

[5] This appeal relates to a request made on August 27, 2020 for access to the following information relating to 31 named individuals, businesses and entities listed in the request:

a. any E-Mail (including "sent", "inbox", "forward", "delete" and "reply") passing between mayor [named individual] and any of the individuals, entities or persons

[1] The town's decisions about requests made by the lawyer were also appealed; these are addressed in Order MO-4141.

set out in [the list] for the period from January 1, 2006 [to the date of the request].

b. any E-Mail (including "sent", "inbox", "forward", "delete' and "reply") passing between [a named Councillor] and any of the individuals, entities or persons set out in [the list] for the period from January 1, 2006 [to the date of the request].

c. any E-Mail (including "sent", "inbox", "forward", "delete" and "reply") passing between [another named Councillor] and any of the individuals, entities or persons set out in [the list] for the period from January 1, 2006 [to the date of the request].

d. any E-Mail (including "sent", "inbox", "forward", "delete" and "reply") passing between [another named Councillor] and any of the individuals, entities or persons set out in [the list] for the period from January 1, 2006 [to the date of the request].

e. any E-Mail (including "sent", "inbox", "forward", "delete" and "reply") passing between any of [3 named Councillors and the mayor] referring to any of the individuals, entities or persons set out in [the list] for the period from January 1, 2006 [to the date of the request].

Appeal MA21-00214/Request file number 2020-0072

[6] This appeal relates to a request made on September 2, 2020 for access to the following information relating to 31 named individuals, businesses and entities listed in the request:

> Any E-Mail (including "sent", "inbox", "forward", "delete" and "reply") and correspondence passing between [a named individual] and any of the individuals, entities or persons set out in [the list] for the period from January 1, 2010 to [the date of the request].

[7] The town issued decisions for each of the requests taking the position that they were frivolous or vexatious under section 4(1)(b) of the *Act* (frivolous or vexatious), and refusing the requests on that basis. In that regard, separate decision letters issued by the town with respect to each of the requests each provided as follows:

> After a detailed review of the records searched, the Corporation of the Town of Oakville ("Town") will not be responding to the above request pursuant to Section 4(1)(b) and 20.1 of the *Act* and s. 5.1 of Regulation 823, as the Town considers this request to be frivolous and vexatious. This request is part of a pattern of conduct which amounts to an abuse of the right of access, interferes with the operations of the Town, and has been made in bad faith.

> You have placed 10 requests with 87 parts since August 26, 2020, made shortly after your office commenced a class action that appears related to these requests. The above request in particular, is excessively broad and will unreasonably burden various Town departments already with limited resources.

[8] The appellant appealed the decisions to the Information and Privacy Commissioner of Ontario (the IPC).

[9] I decided to adjudicate the appellant's three appeals together and they are all addressed in this order.

[10] During my inquiry into these appeals, I sought and received representations from the town and the appellant. The town included in its representations an affidavit of one of its Corporate Records, Freedom of Information and Lottery Coordinators (the FOI Coordinator) in support of its position. Representations were shared in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction 7*.

[11] In his representations, the appellant challenged the authority of the Manager, Records and Information Services to sign the decision letters before me in these appeals. In response the town advised that the individual who made the decisions at issue before me had been delegated the authority necessary to perform her role in respect of access to information requests by virtue of town By-Law No. 2006-168 and Staff Report approval, in accordance with section 3(1) of *MFIPPA* and section 228(4) of the *Municipal Act, 2001*.[2]

[12] The town explained that when the decisions were made the Town Clerk was designated in writing as the "head" of the institution for the purposes of the *Act* and the Town Clerk's responsibility for processing access to information requests was in turn delegated to the town's Manager, Records and Information Services. Based on my review of the materials the town provided, I am satisfied that the authority of the town's Manager, Records and Information Services to sign the decision letters at issue in these appeals was properly delegated to and exercised by her.[3]

[13] In this order, I find that the town has established that the appellant's requests are frivolous or vexatious within the meaning of section 4(1)(b) of *MFIPPA*. I uphold the town's denial of access on the basis of section 4(1)(b) of the *Act* and I also find that this is a suitable situation to impose conditions on current and future access requests submitted by the appellant to the town, as well as conditions on any appeals from the town's decisions.

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[2] S.O. 2001, c. 25.
[3] Order MO-2663-I.

DISCUSSION:

Are the requests frivolous or vexatious under *MFIPPA*?

[14] The frivolous or vexatious provisions in *MFIPPA* provide institutions with a summary mechanism to deal with frivolous or vexatious requests. This power can have serious implications to a requester's ability to obtain information under *MFIPPA*, and therefore it should not be exercised lightly.[4] Orders under *MFIPPA* and its provincial equivalent, the *Freedom of Information and Protection of Privacy Act* (*FIPPA*), have also stated that an institution has the burden of proof to substantiate its decision that a request is frivolous or vexatious.[5]

Grounds for a frivolous or vexatious claim under *MFIPPA*

[15] Section 4(1)(b) of *MFIPPA* 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.

[16] Section 5.1 of Regulation 823 under the *Act* elaborates on the meaning of the phrase "frivolous or 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.

[17] In other words, under *MFIPPA*, the head of an institution is required to conclude that a request for access is frivolous or vexatious if he or she is of the opinion on reasonable grounds that it fits into one or more of the following categories:

- it is part of a pattern of conduct that,
    - amounts to an abuse of the right of access, or

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[4] Order M-850.
[5] See, for example, Order M-850.

    - would interfere with the operations of the institution, or

- it is made in bad faith, or
- it is made for a purpose other than to obtain access.

[18] The town claims that the appellant's requests are frivolous or vexatious under *MFIPPA* because they are part of a pattern of conduct that amounts to an abuse of the right of access and that processing the requests would interfere with the town's operations. The town's representations also suggest that it believes that the appellant's purpose for making the requests is other than to obtain access and that they may have been submitted in bad faith.

[19] In the discussion that follows, I explain why I have concluded that the appellant's access requests are part of a pattern of conduct that amounts to an abuse of the right of access. For that reason, his access requests are frivolous or vexatious and I uphold the town's decisions to deny them on that basis. It is therefore not necessary for me to consider the other reasons the town argues that the requests are frivolous or vexatious.

The town's representations

[20] The town says that the requests at issue are related to an ongoing proposed class action against it. This class action[6] alleges that the town (and associated defendants including the town's mayor) improperly granted development approvals which increased flooding or flood risks for members of the class within the town. The town points out that the appellant is a law clerk in a law firm acting for the class. The town submits that the high volume of requests has overburdened the town and that the number of requests, even if only the ones made by the appellant are considered (as opposed to considered in concert with those made by the lawyer I refer to above), has been excessive by reasonable standards.

[21] The town submits that the appellant has submitted numerous requests since 2019 relating to flooding, development and other topics that are raised in the class action. In support of this submission, the town provided a chart that set out the various requests it received from the appellant. The town explains that since 2019, the appellant has submitted 57 requests totalling 262 parts, all of which pertain to flooding, development, or other topics raised in the class action. The town adds that over the same time period, the lawyer referred to above has submitted 26 requests totalling 91 parts, all of which pertain to flooding, development, or other topics raised in the class action. The town states that since July 2019, the appellant and the lawyer collectively submitted 83 requests totalling 353 parts which pertain to topics raised in the class action. The town adds that it has responded in good faith to 69 of the 83 requests.

[6] The town attached a copy of the statement of claim as an exhibit to the affidavit of the FOI Coordinator.

[22] The town submits that the circumstances in this appeal are similar to those at issue in Order MO-1841, in which many of the requests made to the Regional Municipality of Peel by a requester[7] were "broad, asking for 'all' records covering a number of transactions or issues", with one record covering a period of twenty years and others covering the "email accounts for the entire staff of the Region". In that order, the adjudicator held the requests to constitute a pattern of conduct amounting to an abuse of the right of access. The town also relies on Order MO-3293, in which the adjudicator held that the requests submitted were "very broad in their scope and nature" as the requester had sought "all" records in electronic and paper format relating to multiple individuals and involving multiple search terms, over relatively expansive time periods. The adjudicator upheld the institution's denial of access.

[23] In his affidavit, the FOI Coordinator provides the following examples of the town's conduct to support the town's assertion that prior to its decisions to rely on *MFIPPA's* frivolous and vexatious provisions, it responded in good faith to the vast majority of requests submitted by the appellant and the lawyer:

a. requesting clarification from the appellant and the lawyer and providing Notice of Extension letters where necessary;

b. issuing fee estimates for requests estimated to result in fees of $100.00 or more;

c. engaging the third-party notice framework as needed;

d. issuing decision letters including fees to be paid for the release of responsive records where the estimated fee was less than $100.00;

e. releasing all non-exempt records and releasing responsive records with exempted information severed where possible; and,

f. communicating to the appellant and the lawyer via email and by telephone to answer questions about active requests, fees, etc.

[24] The town also relies on Order M-618, where in drawing the conclusion that two requesters had acted in concert to overburden various police services, the adjudicator considered, among other factors, the requesters' "similar modus operandi", the fact that they formally worked together, the association of the two individuals in the media, and the similarity of their requests. In its representations in the appeals before me, the town listed a number of factors, including the following, that it submits support the inference that the appellant, who works for a law firm acting for the plaintiffs in the class action and the lawyer, who also represents the plaintiffs in the class action, are acting in concert:

[7] Not the appellant.

- The requests submitted by the appellant and the lawyer have sought similar or overlapping information and have used nearly identical wording;

- The appellant and the lawyer know each other and have been linked on social media.

[25] Addressing more specifically how the collective requests of the appellant and the lawyer form part of a pattern of conduct that amounts to an abuse of the right of access, the town provides the following examples:

- There are 59 requests totalling 259 parts that seek records spanning back a long period of time, such as emails from 2000, 2004 or 2006 to present;[8]

- There are 16 requests totalling 245 parts that are very broad yet detailed in their wording with respect to the types of records sought, for instance, requesting "all records, E-mails or writings etc." from a specified year to date which "are relating to - or passing between" numerous named persons, entities and their representatives;

- 12 of the requests totalling 239 parts seek "any Email (including "sent, "inbox", "forward", "delete" and "reply")" or "all E-mails, correspondence and discussions" passing between numerous named individuals, entities or persons over a specified time period, with some requests further specifying the types of searches which must be conducted by the town;

- Several requests are duplicative or repetitive with respect to the information sought, or request information which could have already been disclosed had the fees for the release of records responsive to 36 of the processed requests been paid.

[26] In his affidavit, the town's FOI Coordinator provides the following examples of duplication and overlap of the appellant's requests, two of which are at issue in these appeals:

a. Request No. 2019-0067 made by the lawyer seeks various records relating to the Bronte Green Property Development Proposal which would also have been captured by Request No. 2019-0078, brought by the lawyer and overlaps with the information requested in Request No. 2019-0083, brought by the appellant;

b. Request No. 2020-0066 (Part 2), made by the appellant, seeks development applications and decisions, etc. from 2006 to [the date of the request] which involve or reference certain named parties, and overlap with the records requested in Request No. 2019-0082 (Part 2), also brought by the appellant;

[8] Being January 12, 2022, the date of the town's first representations.

c. Request No. 2020-0070, made by the appellant, seeks emails between [the Mayor, an individual and Oakville Green] which appear to be captured in Request No. 2020-0073 brought by the lawyer; and,

d. Request No. 2020-0160, made by the appellant, seeks the Sheldon Creek Water Management Study which was also requested in Request No. 2021-0037 by the lawyer.

[27] The town adds that approximately 488 hours have been spent searching for, reviewing, and severing records responsive to the processed requests, all while the town still has to respond to requests submitted by other requesters. Relying on Order MO-3156, it submits that to allocate so many of its resources to respond to the appellant and the lawyer is unreasonable.

[28] With respect to the increasing volume of access requests that the town has received from the appellant and the lawyer, the town's FOI Coordinator explains in their affidavit that:

> In 2019, the town received 140 [access to information] requests overall, 11 of which were from [the appellant and the lawyer]. In 2020, the town received 170 [access to information] requests overall, 60 of which were from [the appellant and the lawyer]. In 2021, the town received 134 [access to information] requests overall, 13 of which were from [the appellant and the lawyer]. Thus far into 2022, as of the date of this affidavit [February 16, 2022], the town has not yet received any [access to information] requests from [the appellant or the lawyer].
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> In 2019, 7.9% of [access to information] requests received by the town were submitted by [the appellant and the lawyer]. In 2020, that percentage grew to 35.3%. In 2021, 9.7% of requests received by the town were from [the appellant and the lawyer]. These percentage calculations are based on the number of [access to information] requests received by the town rather than the number of parts of the [access to information] requests received. As many of the requests submitted by [the appellant and the lawyer] include many parts, I believe these percentages only provide a conservative estimate of how much of the town's [access to information] processing work has been attributable to [the appellant and the lawyer].

[29] The town relies on the IPC's decision in Order MO-3154, in which it was held that six broad requests submitted over a 16-month period, involving thousands of records, placed a considerable burden on the Municipality of South Huron's staff and that the three requests at issue in that appeal were frivolous or vexatious.

[30] The town explains that it has limited staffing resources available for responding

to access to information requests:

> … Prior to September of 2021, the town had only one Corporate Records and Freedom of Information Coordinator, with limited access to administrative assistance, who was responsible for overseeing the [access to information] request response process. This includes communicating with town departments in conducting searches for responsive records, instructing IT staff on conducting email searches, reviewing and severing all responsive records, and communicating with requesters as needed. As of September 2021, the town hired an additional Corporate Records, Freedom of Information and Lottery Coordinator to provide support with the processing of [access to information] requests. However, the restructuring of the relevant job positions means the two individuals who now process [access to information] requests also have additional non-[access to information] related responsibilities related to town lotteries.

[31] The town submits that its operations have already been interfered with as a result of the high-volume requests submitted by the appellant and the lawyer from 2019 to the date of its first representations,[9] which pertain to flooding, development, and other topics raised in the Class Action, as follows:

a. Searches conducted in respect of the answered requests resulted in thousands of responsive records that required review and severance before they could be disclosed to the appellant and the lawyer;

b. The town's Freedom of Information staff spent approximately 488 hours on tasks related to the access to information requests submitted by the appellant and the lawyer from 2019 to present, including reviewing and severing records, communicating with them in person and via telephone/email, and drafting decision letters and other correspondence;

c. Town staff were overwhelmed with the high volume of requests received, particularly in 2020, such that external reviewers were hired to assist with the review and severance of responsive records;

d. The town's external reviewers spent at least 195 hours in reviewing and severing responsive records, not accounting for the hundreds of hours spent indexing the responsive records;

e. Town staff other than the Corporate Records, Freedom of Information and Lottery Coordinators, including the town's IT staff and representatives from various town departments, have been disrupted each time search requests were sent out in relation to the requests brought by the appellant and the lawyer.

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[9] Being January 12, 2022.

[32] The town adds that despite the time and resources it expended in preparing records responsive to the processed requests, the appellant and the lawyer have not yet paid for or indicated an intention to pay for the release of responsive records in respect of 36 of the 69 requests that the town processed. Furthermore, they continued to submit additional requests to the town despite not having paid the outstanding balance for the release of several sets of responsive records relating to prior requests.

The appellant's representations

[33] The appellant's representations discuss the purposes of access to information legislation, jurisprudence regarding how statutory decision-making powers must be exercised in good faith, how he is entitled to relief under the Canadian *Charter of Rights and Freedoms*[10]and finally, why the requests at issue in the appeals before me are not frivolous or vexatious.

[34] The appellant characterizes his three requests at issue before me as follows:

> Appeal MA20-00557 [Request file number 2020-0067]: Request for access to all reports, correspondence, emails, and memoranda prepared by two named officials (one former and one current) of the town and the mayor for specified periods regarding flood plain mapping, flood mitigation, and flood risks – this is a request for internal correspondence of Oakville's employees and elected officials with respect to the public safety issues. There is nothing frivolous about public safety.
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> Appeal MA21-00213 [Request file number 2020-0070]: Request for access to any email passing between the mayor or three named councilors and anyone from a list of individuals and businesses for a specified period of time – this is a request for information as to whether proper internal operations of the town were used in deciding to approve building projects for billion-dollar construction companies, where one of the councilors named has a known relationship with these companies.
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> Appeal MA21-00214 [Request file number 2020-0072]: Request for access to any email or correspondence between a named individual and anyone from a list of individuals and business for a specified period of time – again, this request deals with the nature of dealings between Oakville and these billion-dollar construction companies where development projects were approved, to get information as to whether proper operations were followed, and to hold politicians accountable to the public.

[35] Referring to the purposes of the act as set out in section 1 of *MFFIPA*,[11] the

[10] The *Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK)*, 1982, c 11.

[11] Section 1 of *MFIPPA* provides that: The purposes of this Act are, (a) to provide a right of access to information under the control of institutions in accordance with the principles that, (i) information should

dissenting comments by LaForest J. of the Supreme Court of Canada regarding the purpose of access to information legislation in *Dagg v. Canada (Minister of Finance)*[12] and those of Gonthier J. for the majority in *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)*,[13] the appellant submits that when it comes to access to information legislation, it is the nature of the information itself that is relevant rather than the purpose or nature of the request. Referring to the wording in paragraph 32 of Gonthier J's decision, which dealt with the Federal *Access to Information Act*,[14] he adds that every Canadian citizen and permanent resident, which includes the appellant,

> Has a right to and shall, on request, to be given access to any record under the control of a government institution. This right is not qualified; the Access Act does not confer on the heads of government institutions the power to take into account the identity of the applicant or the purposes underlying the request.

[36] Furthermore, referencing the decision of the Supreme Court of Canada in *Roncarelli v Duplessis*, [15] which established that discretion must be exercised in good faith and with relevant consideration to the granting of that discretion, the appellant submits that whoever formed the opinion that his requests were frivolous or vexatious did so on subjective and unreasonable grounds, such as his identity, employment status and political affiliations and beliefs, thereby exercising their discretion in bad faith.

[37] His opinion is that the town simply does not want to supply information that would make Oakville politicians accountable to the public. The appellant alleges that there is no valid basis for the town's refusal to process the requests at issue in these appeals and that accordingly:

> … an inference should be made that the records are adverse, or damaging to Oakville and its elected representatives, which apparently is the primary motive which necessitated the hijacking of the *MFIPPA* process by Oakville to achieve its ends and thwart transparency and accountability on such important public interest matters.

[38] He asserts that because the information he seeks may inculpate the town or its officials it should not remain hidden if it involves any public interest risks or improper conduct.

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be available to the public, (ii) necessary exemptions from the right of access should be limited and specific, and (iii) decisions on the disclosure of information should be reviewed independently of the institution controlling the information; and (b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.

[12] [1997] 2 SCR 403 at paragraph 61.

[13] 2003 SCC 8.

[14] RSC 1985, c A-1.

[15] [1959] SCR 121.

[39] With respect to the relevance of his identity he submits that:

> … Who I am should have no bearing on Oakville's decision to deny my requests for information. Oakville insinuates that my requests are not proper based on my occupation as a law clerk at [a law firm]. I am being targeted in this denial of information on the basis that I have been active in critiquing municipal politics in the past, via Twitter. I am also being targeted by Oakville on the basis that I have a personal connection to a former Oakville Mayoral Candidate, [the lawyer]. Neither my employment status nor political opinions and affiliations should be considered by [the town] in refusing to respond to my request for access to information. …

[40] With respect to the relevance of his political affiliations and beliefs he submits that:

> Because I have been targeted by Oakville in their refusals based on my political views, in refusing these requests, Oakville has seemingly also denied me of my *Charter* protected equality rights, as protected in Section 15(1) of the *Canadian Charter of Canadian Freedoms*, under the *Constitution Act, 1982*. Unilateral and unfounded municipal conduct, cannot be affirmed by the IPC.
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> My requests for access to information were non-partisan, but by bringing up my political views in their decision to refuse my request, Oakville has made these *MFIPPA* records requests partisan. Oakville completely omits to disclose to the IPC whether it has previously released similar, related, or identical records to those I sought to other requesters. That demonstrates the bias of Oakville.
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> Based on the representations of Oakville, their decision to deny my requests was due to the fact that I work at a firm that sued Oakville, and because they know that I have been critical of Oakville politics in the past, as part of free speech and fair comment on Town policies or actions. These are not reasonable grounds to deny access to information or thwart transparency and accountability of municipal operations and its representatives. They are in fact irrelevant and improper considerations.

[41] He also submits that his employment status should not be considered when denying his requests for access to information:

> … Just because Oakville as well as its Mayor are defendants to a [specified class action] - does not mean that Oakville can unilaterally disregard the *MFIPPA*, or no longer needs to comply with providing residents with access to information, with respect to public interest matters. What Oakville by its unilateral and spurious conduct to date demonstrates, is

> that any means used, justify the ends of its personal interests, in placing barriers to both transparency and accountability of municipal operational decision-making.

[42] The appellant submits that if his occupational status, political affiliations, frequency/timing of requests, and purported purpose of the requests were considered by the town to deny his requests, then this would result in a situation where if he were to ask for this information, it would be denied, but if someone else was to ask for the exact same information, then it would be provided. He points to the determinations of Gonthier J. for the majority of the Supreme Court of Canada in *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)*, where he wrote at paragraph 33:

> In my opinion, it is impossible to justify an approach that results in two people requesting the same information from the same federal institution obtaining different responses. Such an interpretation leads to an inequitable result… A particular class of information either is or is not personal information. The purpose or motive of the request is wholly irrelevant. The strategy used by the person filing a request cannot modify the nature of the requested information.

[43] The appellant submits that according to the highest court in Canada, neither the identity of the requester nor the purpose of their request are to be considered when governments are requested to provide access to information. He adds that in this case, his identity and purpose of the requests were seemingly the only factors considered in refusing to respond to his request for access to information. The appellant states that only the Ontario legislature could establish that the identity of a requester is a relevant requirement in an access to information request which has the effect, he says, of breaching a requester's privacy interests. He submits that "[t]o date, the legislature has not followed this path, nor should the IPC."

[44] Turning to the access requests at issue in these appeals the appellant submits that they are not overly broad, as they are specific with respect to time, scope, and place, and that while these requests are similar, none of them are duplicative. The appellant adds that all of the requests are with respect to public interest matters, as they deal with issues of public safety (flood risks) and disclosure of the requested records would enable the public to hold politicians accountable in their dealings with development contractors. The appellant submits that the appeals before me should address only the town's access decisions and that other litigation involving the town is not relevant. The appellant also references Orders MO-1168-I and MO-2390, which provide 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 enough to support a finding that the request is frivolous or vexatious.

[45] The appellant also challenges the manner in which the town has characterized

the requests. He submits that:

> Oakville has grossly inflated the actual number of *MFIPPA* records requests - by unilaterally separating in one instance a single request into "39" requests.[16] The chart of requests provided by Oakville distorts the factual matrix, underlying the alleged "frivolous and vexatious" unilateral determination. Therefore, in fact I have made only 20 *MFIPPA* requests since 2019, not 57.

[46] He submits that although he has made a number of requests to the town, they do not amount to an abuse of process:

> … While some of my requests were similar, none of my requests were duplicative, and none of my requests offended the *MFIPPA.* My requests were not "fishing expeditions," as all of my requests were specific with respect to time, scope and place. [Footnote omitted] I have a right to access this information. On my requests, I indicated that the purpose of my requests is to get access to information. There is no evidence that the purpose behind my requests are otherwise, other than the affidavit of [the town's FOI Coordinator], who was not cross-examined on his affidavit, and states that it is his subjective belief that my request was for some other, improper purpose.

[47] The appellant also denies that the requests were submitted to the town in bad faith. He submits that if either party is guilty of bad faith, it would be the town:

> … as they are trying to avoid responding to proper requests for information, in order to protect Oakville politicians from accountability by the public. Oakville's bad faith becomes apparent when one looks at the relief sought on this appeal.
>
> In the relief sought in Oakville's representations, Oakville is not only requesting that their decision to refuse to respond to my requests for information is upheld, but are also seeking that an entire class of people, including myself, [the lawyer], or anyone from [the appellant's employer, a law firm] be restricted in making requests, even though the majority of individuals who are also employed at [the appellant's employer] are not a party to this appeal, and have not made any requests for information themselves. By seeking this relief, it becomes clear that the purpose of refusing my access to information requests was not because they were frivolous or vexatious, but that Oakville is trying to protect its politicians

[16] The appellant provides the following example: "a single records request for 39 Town flood related studies was in fact made on November 5, 2020 as the records sought were specifically set out in the 2008 Town Wide Flood Study, released by the Town, which should have been easily locatable for release to any requester."

> from being held accountable by the public, possibly with the ulterior motive of reducing any potential liability stemming from a class action, which is not reasonable.

[48] The appellant also asserts that the town improperly subverted the access to information process by "demanding the initial payment for a request and then turned around and refused to appropriately respond to the request claiming that the request was frivolous and vexatious." The appellant submits that this occurred in relation to the appeals before me and in relation to other access to information requests. The appellant states that he has paid for all his requests for which he obtained the requested records. He adds that:

> … Oakville has seemingly forgotten to mention that in several instances, the fee estimate to provide the records sought was outrageous resulting in determining that I would not proceed with the request.

[49] Regarding the allegation that he and the lawyer are acting in concert the appellant submitted during the course of adjudication that:

> [The] premise that individuals are acting "in concert" is prejudicial, irrelevant and simply wrong. Each [*MFFIPA*] request is separate - to be considered on its specific merits as set out in the request. The institution is introducing "other factors" to deny access to records - on the basis of its' opinion - not fact. What is relevant and paramount is whether the responsive records exist - within the scope of the [*MFFIPA*] request. The IPC is focusing on the sufficiency of the ostensible denial of access - but implicitly accepting a false premise. There is no basis in fact or in law for a "frivolous or vexatious" or similar defense, on the part of the institution. Rather, the institution is acting "in concert" with the other named defendants in improperly denying access to [*MFFIPA*] records that in fact exist, to further their own economic and legal interests.

[50] The appellant also alleges that the town is acting inconsistently by processing other requests that postdate the ones at issue before me, and disclosing records, but taking the position that the requests at issue in Appeals MA21-00213 and MA21-00214 are frivolous or vexatious. The appellant submits that:

> … This is puzzling and completely undermines their argument as they have on other recent occasions, located, and released responsive records in *MFIPPA* Requests 2020-0101 and 2020-0104. This belies the real nature of Oakville's denials - which are themselves frivolous and vexatious and ought to be dismissed in their entirety by the IPC.

[51] With respect to the allegation that his requests interfere with the town's operations the appellant submits that the town has a population of near a quarter

million residents, making it one of the larger municipalities in Ontario:

> … This is not an instance of a remote small town that is incapable of processing my requests. Oakville submits that my requests made up 10% of the requests received last year. This percentage does not suggest that Oakville would be hindered in the effectiveness of the institution's activities, because 90% of all requests received by Oakville in the past year have been from other requesters.

The town's reply representations

[52] The town takes the position that in accordance with the existing IPC jurisprudence, the identity, motives, employment and political affiliations of the appellant were relevant factors in its determination that the requests at issue in these appeals were frivolous or vexatious.

[53] The town adds that the identity of the requester has indeed been contemplated by the Ontario legislature as an inherently relevant factor in the frivolous or vexatious analysis, as evidenced by section 5.1(a) of Regulation 823 under the *Act*:

> For instance, deciding whether a request is part of a "pattern of conduct" requires an institution to consider the requester's identity and prior conduct including, inter alia, previous [access to information] requests submitted to the institution.

[54] The town takes the position that the appellant's employment with a law firm is relevant in the circumstances, given that:

a. the appellant has used the law firm letterhead and his work email address to communicate with town staff about his access to information requests;

b. the law firm where he works represents a proposed class of plaintiffs advancing a class action against the town;

c. the 57 requests totaling 262 parts submitted by the appellant since 2019 pertain to topics raised in the class action;

d. through his employment, the appellant is linked to the lawyer who is also on record for the proposed class, and who has been acting in concert with the appellant to inundate the town with access to information requests pertaining to topics raised in the class action; and,

e. the existence of the ongoing class action is relevant to the town's use of the frivolous or vexatious exemption.

[55] Finally, the town submits that the appellant's involvement in town politics, his

affiliation with a past mayoral candidate and his vocal criticism of the town are relevant to factors considered by the IPC in determining whether requests are frivolous or vexatious, including considering the purpose and bad faith nature of the requests and whether the appellant and the lawyer were acting in concert to inundate the town with access to information requests pertaining to the class action.

[56] The town submits that the appellant's representations are notably silent on several key points, including the following:

a. the appellant does not deny that he has submitted to the town 57 access to information request requests with 262 parts from 2019 to January 12, 2022,[17] though he has disputed the characterization of the number of the requests;

b. the appellant does not deny that the access to information requests he submitted to the town since 2019 pertain to flooding, development, or other topics raised in the class action.

[57] The town adds that all fees charged to the appellant regarding his processed requests were calculated in accordance with the prescribed fees outlined in the *Act* and Regulation 823. The town points out that at no time has the appellant contested the fees charged (either to town staff or on appeal to the IPC in respect of fee estimates) or formally abandoned a request in relation to fees charged. The town further states that while the appellant did pay the mandatory $5.00 request fee for the requests processed by the town, he did not pay the applicable fees to obtain records responsive to several of his processed access to information requests.

[58] The town acknowledges that one of the appellant's requests, which is not at issue in this appeal, although it does inform my analysis, was separated into parts because the appellant sought 39 distinct reports/records requiring independent searches. However, relying on Order MO-4193,[18] the town submits that the number of the appellant's requests since 2019 is excessive by reasonable standards, regardless of how they are counted.

[59] The town submits that the appellant's assertions regarding the ability of the town to process all the requests submitted by the appellant and the lawyer "underplays the sheer volume" of requests submitted to the town by the appellant and the lawyer since 2019.

[60] The town refers to the wording of the requests at issue in these appeals to demonstrate that they are excessively broad and/or unusually detailed, submitting that:

[17] Being the date of the town's first representations.
[18] The town refers to paragraphs 58 to 61 of the order in support of its submission.

a. Request No. 2020-0067 requires a search for various types of records in both physical and digital form created over a 20+ year timespan by three different staff members;

b. Request No. 2020-0070 requires numerous email and keyword searches, fails to provide email addresses for the individuals referenced, and requires an exhaustive search of over 14 years of records; and,

c. Request No. 2020-0072 requires numerous email and keyword searches, fails to provide email addresses for the individuals referenced, and requires an exhaustive search of over 10 years of records.

[61] The town denies that it refused to respond to the requests at issue in these appeals in bad faith and for the purpose of concealment or protecting politicians from accountability. The town reiterates that it responded indiscriminately to the appellant's requests, facilitating the appellant's right of access until his repeated requests were deemed to be frivolous or vexatious.

[62] The town denies having unfairly discriminated against the appellant or being unfairly biased against him. Further, the town denies that the appellant has met his onus in proving that the town has discriminated against him on the basis of any protected *Charter* ground. It adds that defending the constitutionality of *MFIPPA* itself would be beyond the scope of the within appeals.[19]

[63] The town submits that *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)* is distinguishable because it was made in contextually different circumstances and in respect of the federal access to information regime, which did not contain a frivolous or vexatious provision at the time that the decision was made.

[64] Finally, the town submits that the relief it seeks is appropriate in light of the significant volume of access to information requests submitted by the appellant and the lawyer and that similar relief (i.e. limiting an appellant's agent from submitting additional requests) has been granted in other IPC decisions.[20]

Appellant's sur-reply

[65] The appellant asserts that although the town took the position that the requests at issue in these appeals were frivolous and vexatious, in the course of the adjudication of the appeals before me, the town processed an additional access to information request made by the appellant and granted access to the responsive information. He writes:

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[19] I note that the appellant has not, for example, served and filed a Notice of Constitutional Question challenging the constitutionality of section 4(1)(b) of the *Act*.
[20] The town refers to Order M-947 in support of this submission.

> I am perplexed how my requests under appeal have been denied, but through a different department at the Town of Oakville my request was processed and therefore not found frivolous and vexatious.

Analysis and finding

[66] I will first address the appellant's arguments that his *Charter* rights have been contravened.

[67] Although the appellant refers to the *Charter* he does not allege that any relevant *MFIPPA* provisions violate the *Charter*, did not provide a Notice of Constitutional Question, and did not make any argument to the effect that interpretation of section 4(1)(b) or any other provision of the *Act* or regulations in accordance with *Charter* values leads to a finding in his favour in these appeals. Accordingly, I am not satisfied that the appellant has established a *Charter* breach, nor am I satisfied that he has established that *Charter* values did not inform administrative discretionary decision making in the circumstances of this appeal.

Analysis and finding on a pattern of conduct that amounts to an abuse of the right of access

[68] For the following reasons, I find that the three access requests at issue in the appeal before me form part of a pattern of conduct that amounts to an abuse of the right of access. On that basis, I uphold the town's decision to deny the access request in accordance with section 4(1)(b) of the *Act*. I make this find in consideration of the appellant's request alone and I therefore do not need to make any finding in respect of the town's assertion that the appellant and the lawyer acted in concert.

[69] Although the appellant argues that his personal characteristics are irrelevant, the wording of the *Act* and the jurisprudence of the IPC are clear that, in considering whether a request is frivolous and vexatious, the identify and some of the characteristics of a requester, including their behaviour and motives can be relevant considerations in determining whether a request is frivolous or vexatious.

[70] The first part of section 5.1(a) of Regulation 823 under *MFIPPA* sets out that one way that a request can be determined to be frivolous or vexatious is if the institution establishes reasonable grounds for concluding that the request forms part of a pattern of conduct that amounts to an abuse of the right of access. What constitutes "reasonable grounds" requires an examination of the specific facts of each case.[21]

"Pattern of conduct"

[71] A pattern of conduct must be found to exist, prior to determining whether that pattern of conduct amounts to either an abuse of the right of access or would interfere

[21] Order MO-3292.

with the operations of the institution.

[72] Previous IPC orders under *MFIPPA* have addressed the meaning of the phrase "pattern of conduct." For example, in Order M-850, former Assistant Commissioner Tom Mitchinson stated:

> [I]n my view, a "pattern of conduct" requires recurring incidents of related or similar requests on the part of the requester (or with which the requester is connected in some material way).

[73] The former Assistant Commissioner also pointed out that, in determining whether a pattern of conduct has been established, the period over which the behaviour occurs is a relevant consideration. The reasoning in Order M-850 has been considered in many subsequent orders issued by the IPC, which have also established that the cumulative nature and effect of a requester's behaviour may be relevant in the determination of the existence of a "pattern of conduct".[22]

Pattern of conduct that amounts to "an abuse of the right of access"

[74] Once it has been established that a request forms part of a pattern of conduct, it must be determined whether that pattern of conduct amounts to "an abuse of the right of access." In making that determination, institutions may consider a number of factors, including the cumulative effect of the number, nature, scope, purpose and timing of the requests.[23] 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.[24]

[75] Previous orders have also stated that the focus should be on the cumulative nature and effect of a requester's behaviour because, in many cases, ascertaining a requester's purpose requires the drawing of inferences from his or her behaviour.[25]

[76] The IPC may also consider an institution's conduct when reviewing a "frivolous or vexatious" finding. However, an institution's misconduct does not necessarily mean that it was wrong in concluding that the request was "frivolous or vexatious."[26]

Pattern of conduct

[77] I begin the analysis by noting that the town often assigned separate request numbers to a request by subdividing parts that were either listed by number or letter. That said, in my view, the evidence demonstrates that the appellant has made recurring related or similar requests which recently have been related to the topics raised in the

[22] Order MO-2390.
[23] Orders M-618, M-850 and MO-1782.
[24] Order MO-1782.
[25] Order MO-1782.
[26] Order MO-1782.

class action, and that the access requests before me form part of that pattern of conduct.

[78] Although the requests may not be identical, because they pertain to different information, individuals and/or different time frames, the type of information that he seeks in most of his requests is related to the issues raised in the class action.

[79] Given these circumstances, I find that the appellant's requests form part of a pattern of conduct as contemplated by section 5.1(a) of Regulation 823.

[80] As I have found that the requests form part of a pattern of conduct, I will now consider whether that pattern of conduct amounts to an abuse of the right of access.

Pattern of conduct that amounts to "an abuse of the right of access"

[81] The town explains that since 2019*,* the appellant has submitted 57 requests totalling 262 parts, all of which pertain to flooding, development, or other topics raised in the class action. I find the number of requests made by the appellant alone, even if considered to be made up of multi-part single requests, is excessive by reasonable standards. In reaching this conclusion, I have also considered the cumulative effect of all the requests that have been made by the appellant. I find that the sum total of the appellant's requests, however counted, is sufficiently high to be considered a factor weighing heavily in favour of a finding that a pattern of conduct exists that amounts to an abuse of the right of access. I say this while acknowledging that an appellant is not prevented from making an access request to obtain information relating to litigation.[27]

[82] Furthermore, the nature and scope of many of the requests are excessively broad and unusually detailed. In addition, many of the appellant's requests constitute recurring incidents of related or similar access requests on the part of the appellant. In that regard, although the requests may not be identical, because they pertain to different information, individuals and/or different time frames, the type of information that he seeks in all of his requests is substantially similar or, at the very least, related to the issues raised in the class action.

[83] In these circumstances, I find that I have been provided sufficient evidence to conclude that the nature and scope of the appellant's requests are excessively broad or have the cumulative effect of being excessively broad by reasonable standards.

[84] Another factor that has been considered in previous IPC orders is the purpose of an individual's access requests and specifically whether the requests are intended to accomplish some other objective other than to gain access to records. The town submits that the appellant's purpose for making his requests is other than to obtain access and that this is a factor in favour of finding that the requests are part of a pattern of conduct amounting to an abuse of the right of access. The appellant

[27] See in this regard section 51(1) of the *Act*.

disagrees.

[85] I am not entirely convinced that the appellant is attempting to burden the system with his access requests, including the requests that are at issue here. In my view, he is attempting to obtain information relating to the class action litigation or is attempting to hold the mayor and town councillors accountable by scrutinizing various requested records. In the circumstances of this appeal, however, I find that it is irrelevant whether the appellant intended to burden the system because the impact of his pattern of conduct, culminating with his excessively broad and unusually detailed requests, has produced the same outcome, namely an abuse of the right of access.[28] In this regard, I have not considered the personal characteristics of the appellant in my determination, simply the impact of his conduct.

[86] I have also considered the appellant's suggestion that there has been bad faith on the part of the town in responding to his requests, and that this should be a factor in determining whether the requests are frivolous or vexatious. In my view, the appellant has made bald assertions of bad faith without providing sufficient evidence to support those assertions. I accept the town's evidence that it responded to all the requests submitted by the appellant until it determined that the number of the appellant's requests had passed the point of reasonableness. I pause to note here that the reduction in the number of requests in 2022 may have more to do with the town's determining the appellant's requests to be frivolous and vexatious rather than the appellant's voluntarily reducing the number of his requests.

[87] Finally, addressing the appellant's position in sur-reply that by processing a request he made while these appeals were pending the town undermined its position that his requests were frivolous or vexatious, it should be noted that town was at liberty to process any request it received without relying on the frivolous or vexatious provisions of the *Act*. I find that that this does not alter my determinations in any way.

[88] Accordingly, I accept that the town has provided me with sufficient evidence to establish that the appellant's requests form part of a pattern of conduct that amounts to an abuse of the right of access under section 5.1(a) of Regulation 823 under *MFIPPA*. Therefore, I find that the town has established reasonable grounds for making a finding that the appellant's requests are frivolous or vexatious and I uphold its decisions to deny them on that basis under section 4(1)(b) of *MFIPPA*.

Remedy

[89] I have found the appellant's access requests at issue in these appeals to be frivolous or vexatious, and I uphold the town's decisions to deny the access requests on that basis. I will now consider whether I should impose conditions such as limiting the

[28] See in this regard the discussion in Order MO-3763.

number of active requests and appeals the appellant may have in relation to the town.[29]

[90] I invited representations from the parties on the appropriate remedy in the event that I uphold the town's decisions at issue in these appeals. The town responded by stating that I should grant the following:

a. that the appellant shall resolve all outstanding access requests with the town by either paying the applicable fees for the release of responsive records or expressly withdrawing the outstanding requests, prior to submitting any further access to information requests to the town;

b. that he be limited to only submitting one active request, with no more than three parts, to the town at a time; and,

c. that he be limited to having one active IPC appeal in respect of the town at a time.

[91] The town also made arguments relevant to its position that the appellant and the lawyer have acted in concert. As I stated above, I have not made such a finding and in the circumstances it is not necessary to address these arguments.

[92] The appellant submits that the IPC should impose no restrictions on the appellant or the agents or representatives at the law firm where he works or the lawyer or the lawyer's law offices.

[93] In my view, given the appellant's pattern of conduct, he should be restricted from submitting an excessive number of further requests or requests that are similarly excessively broad and unusually detailed. However, in my view, it is also necessary not to foreclose the appellant's right to seek access to records under the *Act*.

[94] I have decided that a just order in the circumstances is to order that the appellant be restricted to having no more than two active requests with the town, only one of which can be for records relating to topics raised in the class action referred to above, and two active appeals with the IPC, only one of which can be for records relating to topics raised in the class action referred to above, for the next year starting from the date of this order. In addition, to prevent the appellant from submitting multi-part access requests that are similar to any that are the subject of these appeals, I will stipulate that any access requests that he submits to the town in future may only have a maximum of two parts.

[95] The appellant is to provide the town with the active requests he wishes to pursue. The balance of the requests will be deemed to be withdrawn, without prejudice to the appellant's being permitted to refile a request in accordance with the terms of this order.

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[29] Order MO-1782.

[96] Further, the appellant may only pursue two active IPC appeals, only one of which can be for records relating to topics raised in the class action referred to above, in respect of the town at any given time. All other appeals (other than the appeals that are dismissed by this order) will be placed on hold and reactivated at the discretion of the IPC Registrar. Moreover, the appellant will be asked to identify the active requests and appeal that will proceed.

[97] I am placing these limits on the appellant independently of any limits on the lawyer, which were addressed in Order MO-4241.

ORDER:

1. I uphold the town's decision to deny the access requests at issue in these appeals on the basis that they are frivolous or vexatious under section 4(1)(b) of *MFIPPA*. As a result, these appeals are dismissed, without prejudice to the appellant's right to submit new requests for information in accordance with the conditions set out in provision 2 below.

2. I impose the following conditions on the appellant's access requests to the town, and his appeals to the IPC from decisions of the town:

    a. I am limiting the appellant to two active requests, only one of which can be for records relating to topics raised in the class action referred to in this order, and two active appeals with the IPC, only one of which can be for records relating to topics raised in the class action referred to in this order, involving the town that may proceed at any given point in time, including any requests and appeals (other than the appeals that are dismissed by this order) that are outstanding as of the date of this order.

    b. If the appellant wishes any of his currently outstanding requests that exist with the town to continue to be processed, the appellant shall notify the town by October 28, 2022 and advise as to which requests he wishes to proceed. For the purposes of this provision, a multi-part request shall be considered to be multiple requests and the appellant must choose a maximum of two parts to proceed with. Any outstanding requests with the town are deemed to be abandoned, without prejudice to the appellant's right to make the same request in the future, in accordance with order provision 1.

    c. If the appellant wishes any IPC appeals (other than the appeals that are dismissed by this order) from a decision of the town to proceed to completion, the appellant shall notify the IPC Registrar by October 28, 2022 and advise as to which two appeals, only one of which can be for records relating to topics raised in the class action referred to in this

order, he wishes to proceed. The remaining appeals will be placed on hold and reactivated only when an active appeal is resolved.

d. Any access requests that the appellant submits to the town in future may only have a maximum of two parts.

3. The terms of this order shall apply to any requests and appeals made by the appellant or by an individual, organization or entity acting on his behalf or under his direction, including the appellant's law firm but excluding the lawyer who is the subject of Order MO-4241.

4. At the conclusion of one year from the date of this order, the appellant, the town and or any person or organization affected by this order, may apply to the IPC to seek to vary the terms of this order, failing which its terms shall continue in effect until such a time as a variance is sought and ordered.

Original Signed by: September 28, 2022

Steven Faughnan
Adjudicator