

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4398

Appeal MA22-00042

Town of Iroquois Falls

June 22, 2023

Summary: The Town of Iroquois Falls (the town) received an access request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records sent by two individuals to the integrity commissioner about a certain code of conduct complaint. The town claimed that the request is frivolous or vexatious under section 4(1)(b) of the *Act*. In this order, the adjudicator allows the appeal. She finds that the town has not established that the request is frivolous or vexatious, and orders the town to issue the appellant another access decision.

Statute Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 4(1)(b); R.R.O. 1990, Reg. 823, sections 5.1(a) and 5.1(b).

Orders Considered: Orders MO-2113, MO-3154, MO-3659, MO-3926, and MO-4275.

OVERVIEW:

[1] This order is about an institution's determination that a freedom of information request is frivolous or vexatious under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) on the basis that the requested information was addressed in a previous appeal to the Information and Privacy Commissioner of Ontario (IPC). I do not uphold that determination in this order.

[2] The Town of Iroquois Falls (the town) received the following request under the *Act*:

I request all documents whether sent by letter, email, digital or any format sent by [named individual] and [named individual] to the Integrity Commissioner [named individual] related to my Code of Conduct complaint (dated 2020/03/04) against councillors [named individual] and [named individual]. All investigations and reports were paid by public funds by the municipality and access for public review is appropriate.

[3] In response to the request, the town stated that it believed that this request was a “repackaging” of another request (specifying that it was the request in IPC Appeal MA21-00132, being mediated at the time), and that, therefore, this request is frivolous or vexatious.

[4] The requester (now the appellant) appealed the town’s decision to the Information and Privacy Commissioner of Ontario (IPC).

[5] The IPC appointed a mediator to explore resolution. During mediation, the town reiterated its position. The appellant disagreed, and stated that this request is different from the other. No mediated resolution could be reached, and the file moved to the adjudication stage of the appeal process, where an adjudicator may conduct an inquiry.

[6] I began a written inquiry under the *Act* on the issue of whether the request is frivolous or vexatious, under section 4(1)(b) of the *Act* and section 5.1 of Regulation 823. On my review of the town’s representations, I determined that I did not need to hear from the appellant.

[7] For the reasons that follow, I allow the appeal. Given my finding that the town did not meet its burden of proof that the request is frivolous or vexatious, I will order the town to issue the appellant another access decision (without relying on section 4(1)(b) of the *Act*).

DISCUSSION:

[8] The only issue in this appeal is whether the access request is frivolous or vexatious within the meaning of section 4(1)(b) of the *Act*, and for the reasons set out below, I find that the town has not established that it is.

Section 4(1)(b)

[9] Section 4(1)(b) of the *Act* provides institutions with a straightforward way of dealing with frivolous or vexatious requests. However, institutions should not exercise their discretion under section 4(1)(b) lightly, as this can have serious implications for access rights under the *Act*.¹

¹ Order M-850.

[10] Section 4(1)(b) says: "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." Section 5.1 of Regulation 823 under the *Act* elaborates on the meaning of the phrase "frivolous or vexatious."² Reading these sections together, under the *Act*, there are four grounds for claiming that a request is frivolous or vexatious:

- the request is part of a pattern of conduct that amounts to an abuse of the right of access,
- the request is part of a part of a pattern of conduct that would interfere with the operations of the institution,
- the request is made in bad faith, and/or
- the request is made for a purpose other than to obtain access.

[11] An institution that concludes that an access request is frivolous or vexatious has the burden of proof to justify its decision.³

Analysis/findings

[12] The town claims each of the four grounds for claiming that a request is frivolous or vexatious, listed above. I will address each of these grounds in turn, below.

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

[13] The town asserts that this ground applies for three reasons: the request is "identical or similar to previous requests" (specifically referring to the request in Appeal MA21-00132, which was resolved by Order MO-4275), that it is broad in nature, and that it was submitted for nuisance value.

Comparison to the request in Order MO-4275

[14] I accept that the two requests, here and in Order MO-4275, broadly speaking, relate to a certain code of conduct issue. However, I find that they cannot reasonably be described as the town does: "identical," "essentially identical," or even "substantially similar," to each other.

² Section 5.1 of Regulation 823 says:

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.

³ Order M-850.

[15] It is helpful to lay out the wording of these requests to see how different they are.

[16] The first request (the one in Order MO-4275) is for one specified report, delivered by the integrity commissioner at a certain town council meeting, and says:

Please provide the report delivered by Integrity Commissioner and [specified name] on October 26, 2020 Council Meeting. Please provide report in the format delivered at the meeting whether it be audio, print or any other format understandable in the English language.

[17] In contrast, the request here is not for a specific report. For ease of reference, I will set out the wording of the request in this appeal again here:

I request all documents whether sent by letter, email, digital or any format sent by [named individual] and [named individual] to the Integrity Commissioner [named individual] related to my Code of Conduct complaint (dated 2020/03/04) against councillors [named individual] and [named individual]. All investigations and reports were paid by public funds by the municipality and access for public review is appropriate.

[18] Rather than seeking a specific report delivered at a certain meeting, the above request is for documents sent by two specific individuals to the integrity commissioner related to the code of conduct complaint. The town highlights that the request in this appeal uses the word "reports," and the request in Order MO-4275 was for a report. While the request in this appeal does include the word "reports," in my view, that is not a reasonable or complete characterization of what is being requested. The context of the word "reports" is a statement about the public funding behind all investigations and reports, as an argument for access.⁴ It is preceded, however, by a request for documents sent by two specific individuals to another. I find that the town's emphasis on the sentence containing the word "reports" unreasonably ignores the substance of the request, found in the previous sentence. I find that the reference to "reports" is not a request for a specific report, unlike the request in Order MO-4275.

[19] In addition, in Order MO-4275, I made no findings about any other records related to the code of conduct complaint, so the request before me cannot reasonably be characterized as one seeking records that were already adjudicated or the subject of another access request. As a result, the town's reliance on Order MO-2113 is not helpful to it because the IPC found in that order that the information at issue was "identical" to that of previous requests.

⁴ This is not to say that anything publicly funded is appropriately accessible under the *Act*, because the *Act* contains exemptions and exclusions which may apply to a record, making a record inaccessible. I make no findings about whether the appellant has a right of access to any records (if any exist) that are responsive to the request that is the subject of the appeal resolved by this order.

[20] Therefore, I do not accept the town's arguments based on the premise that the requests are identical, "essentially identical," or even "substantially similar to" each other.

[21] Turning to the common general subject matter between the two requests (the same code of conduct), in the circumstances, I find that this is not sufficient alone (or along with other factors, such as timing), to establish that the request is part of a pattern that is an abuse of the right of access. Although the town highlights that it received two requests in the same year about this code of conduct, I find that this number and timing is not excessive by reasonable standards.

[22] The town points my attention to Order MO-3659, where the IPC found that requests that are "related or similar" to the one on appeal were suggestive of a "pattern of conduct."⁵ However, that order is not helpful to the town here because the requests under review in Order MO-3659 are not comparable in nature and scope to the two requests that the town compares in this appeal.⁶ Order MO-3659 discussed a 14-part request, where just two of those parts would have required the town to search for all records of 16 individuals, including the mayor, over a 17-year period, for any reference to certain terms or names. I am not persuaded that these circumstances are reasonably comparable to the two requests that the town is comparing here. Therefore, I do not accept that the reasoning in Order MO-3659 is relevant in this appeal, in regards to the common subject matter between the two requests that the town is comparing here.

[23] For the benefit of the town, I draw its attention to the analysis below from Order MO-3926, an appeal involving a longer history of requests than there is here, all regarding the same general subject matter (a splashpad):

. . . some requests became more focussed over time, coinciding with further disclosures made to the appellant, but this does not make them "similar" or "identical." For example, requests for information regarding bids and invoices, went from language using "any and all" (without names) to requests involving names of specific companies that were tied to the splash pad).

. . . . Because of the progressions described above, I do not find Order M-850, upon which the [institution] relies, to be of assistance to it in the circumstances. Order M-850 states that a "pattern of conduct" requires "recurring incidents of related or similar requests on the part of the appellant (or with which the appellant is connected in some material way)." While it is agreed that the appellant made all the requests and that they all relate to the same splash pad, the [institution] has not established that the appellant's requests were similar or otherwise illegitimately

⁵ The town cites paragraph 34 of Order MO-3659.

⁶ In Order MO-3926,

repeated. The fact that the requests were "related" in that all had to do with a particular splash pad is not enough to find that section 5.1(a) of the Regulation applies.⁷

The scope of this request

[24] The town argues that the request here is "unreasonably broad," but I find that it is not. The town also asserts that it already provided all known records on this matter through the appeal over the other request, but I do not accept this as relevant to scope of this request, given my finding that the requests are different to start with.

[25] In support of its position that the request is "unreasonably broad," the town notes that the request specifically asks for "all documents whether sent by letter, email, digital, or any other format" (emphasis in the town's representations). Citing Order MO-3154, the town says that the IPC has found that unnecessarily broad requests for all records can support a conclusion that the request forms a pattern of conduct amounting to an abuse of the right of access or would interfere with the operations of the institution. The town submits that the request here forms such a pattern of conduct.

[26] The town relies on Order MO-3154, but that order is not helpful to the town here. Order MO-3154 dealt with a requester's latest three requests, seeking a variety of records relating to various properties, and spanning timeframes between nine and fourteen years.⁸ In contrast to this, the request before me seeks records between certain named individuals regarding a specified code of conduct complaint. Therefore, Order MO-3154 sets out a request that cannot, in my view, reasonably be compared in breadth and level of detail to the one before me.

[27] Furthermore, while the use of the word "all" was found to contribute to the overly broad nature of the requests in Order MO-3154, I find that the use of the word

⁷ Order MO-3926, paragraphs 31 and 32.

⁸ For ease of reference, the requests that instigated the appeals resulting in Order MO-3154 were as follows:

1. Copy of all yearly submissions to Information and Privacy Commission/Ontario from 1999 – [October 21, 2013]. All records related to Exeter Community Development Fund [the Fund] from its inception to [October 21, 2013] (Fund developed with regards to sale of Exeter P.U.C.)
2. All records related to Concession 2, Part lot 18, Stephen Ward, Municipality of South Huron, from the year 2000 to [November 26, 2013].
3. All records regarding zoning changes, plan amendments, permits, property standards and MPAC for the following properties [-] all Lot 5 Lake road concession east in the former township of Stephen as well as 110 Main St. North in the Exeter Ward for the period of 2005 to [February 10, 2014].

The appellant clarified the third request in two follow-up emails, but the adjudicator found that, even after this, the request remained very broad.

“all” here does not do so. I observe that requesters often word their requests with the word “all” in requests that are the subject of IPC orders, though institutions have not claimed that the requests were frivolous or vexatious. That is understandable because a requester will rarely be in a position to identify which records an institution would have about the subject matter of the request.

The purpose of the request

[28] The town submits that the request here was made “merely for nuisance value as a way to take aim at the Town and deplete its already limited resources.”⁹ The town asserts that it has “reason to believe” that “the appellant is attempting to attack the Town through his repeated FOI [freedom of information] requests – and consequently, utilize scarce Town resources – due to his frustration with prior municipal elections.” In my view, this position is unsupported by the evidence before me, including the small number of requests made in one year (two), that were reasonably limited in scope. The town’s assertion that other individuals, along with the appellant, are trying to harass the town due to their dissatisfaction with the current municipal council is similarly insufficiently supported by the evidence put forward by the town. For example, the town did not provide specifics supporting the number of individuals and requests involved, or the nature and timing of the requests.

[29] The town, once again, points to its search efforts for the report that was the subject of Order MO-4275, but those search efforts are not relevant here in regards to a request that is for different records. The town also reiterates that it already provided all available records to the appellant through that appeal. The town also asserts that through this appeal, the appellant is trying to force the town to continue searching for records that do not exist. However, again, I do not accept this because the requests are different to start with, undermining the basis of the town’s arguments about the purpose of the request here.

[30] For these reasons, I find that the town has not sufficiently established that there are reasonable grounds to conclude that the request is part of a pattern of conduct that amounts to an abuse of the right of access.

Pattern of conduct that would interfere with the operations of the institution

[31] A pattern of conduct that would “interfere with the operations of an institution” is one that would obstruct or hinder the range of effectiveness of the institution’s activities.¹⁰

[32] Interference is a relative concept that must be judged on the circumstances

⁹ The town also argues that the purpose of the request that was the subject of Order MO-4275 was likewise made “merely for nuisance value,” but the purpose of that request is not relevant here, given my finding that it is so different from the one before me now.

¹⁰ Order M-850.

faced by the institution in question. For example, it may take less of a pattern of conduct to interfere with the operations of a small municipality than with the operations of a large provincial government ministry.¹¹ However, this does not mean that stating the town's population (or briefly describing limited resources to process access requests), as the town did here, establishes inference for the purpose of section 4(1)(b).

[33] Furthermore, in the context of its brief reference to the limitations of its resources, the town once again relies on characterization of the appellant's requests that I do not accept, such as: "identical or substantially similarly," "frequent," "overly broad and numerous," and as having "inundated" the town and "greatly exhausted its already limited resources." For the reasons already discussed, I do not accept these characterizations as reasonable in the circumstances. They are overstated and unpersuasive, on the minimal evidence before me.

[34] In addition, the town did not specify with sufficient detail how processing this request has interfered with its operations, or would do so in the future – or what those operations even are. The town asserts interference with its operations, but its assertion does not establish its claim.

[35] It is the town's legal obligation to process requests under the *Act*, even if it serves a small population and has limited resources. Despite the town's size and stated limited resources, it had tools available in the *Act*, such as fee provisions and time extensions. In the present circumstances, I note that the town chose not to rely on either of these tools.

[36] Therefore, I find that the town has not sufficiently established that there are reasonable grounds to conclude that the request would interfere with the town's operations.

Bad faith

[37] The town claims the grounds of bad faith in the alternative to the above. It does so in passing, in its representations and affidavit evidence. As this allegation was not substantiated in any way by the town, I will not address this ground of claiming that the request was frivolous or vexatious.

Purpose other than to obtain access

[38] If a request is made for a purpose other than to obtain access, the institution does not need to demonstrate a "pattern of conduct."¹²

[39] A request is made for a purpose other than to obtain access if the requester is

¹¹ Order M-850.

¹² Order M-850.

motivated not by a desire to obtain access, but by some other objective.¹³ The requester would need to have an improper objective above and beyond an intention to use the information in some legitimate manner.¹⁴ In Order MO-1924, the IPC recognized that motives such as seeking information to assist a requester in a dispute with the institution, or publicizing what a requester considers to be an institution's inappropriate or problematic decisions/processes are examples of clearly permissible motives. That is because access to information legislation *exists* to ensure government accountability and to facilitate democracy.¹⁵ In fact, to find that such reasons for making a request are "a purpose other than to obtain access" would contradict the fundamental principles underlying the *Act*,¹⁶ including the principle that "information should be available to the public."¹⁷

[40] As past IPC orders have held, it is difficult to assess whether a requester has an improper motive for an access request 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.¹⁸

[41] Applying these principles, based on the evidence before me, I am unable to conclude that the request was made for a purpose other than to obtain access. The town asserts that the appellant has a "personal issue with the current municipal council," and that it was made for "nuisance value due to his past frustrations" with municipal elections, and to use the town's already limited resources. Similar assertions were presented under another ground (pattern of conduct that amounts to an abuse of process), and as I found above, the town's assertions are insufficiently supported by the evidence. In any event, it is also worth noting that the IPC has previously 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 enough to support a finding that the request is "frivolous or vexatious."¹⁹

[42] Likewise, I do not accept a premise of the town's position, that the appellant is deliberately making "overly broad and unnecessary" requests to use the town's already limited resources, given my findings about the number and nature of the requests made about the code of conduct complaint.

[43] Therefore, I find that that the town's evidence does not sufficiently establish that there are reasonable grounds to conclude that the request was made for a purpose other than to obtain access.

¹³ Order M-850.

¹⁴ Order MO-1924.

¹⁵ Order MO-1924.

¹⁶ See section 1 of the *Act*.

¹⁷ Order MO-1924.

¹⁸ Order MO-1782.

¹⁹ Orders MO-1168-I and MO-2390.

Conclusion

[44] In conclusion, the town has not established that the request is frivolous or vexatious under any of the four grounds for doing so. Accordingly, I will order the town to issue another access decision. The town must take sufficient steps to conduct a search in response to the request and issue the appellant another access decision, without resorting to the provision of the *Act* for frivolous or vexatious requests.

ORDER:

[45] I allow the appeal. I order the town to issue the appellant an access decision in accordance with the *Act*, without recourse to the time extension provisions in the *Act*, or section 4(1)(b) of the *Act*.

[46] For the purpose of order provision 1, the date of this decision is to be treated as the date of the access request.

Original Signed By: _____

Marian Sami
Adjudicator

_____ June 22, 2023