Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3784

Appeals MA18-349 and MA18-350

City of Greater Sudbury

June 10, 2019

Summary: The City of Greater Sudbury issued a single decision in response to two access requests that it received under the *Municipal Freedom of Information and Protection of Privacy Act*. The city's decision was to refuse to process the requests on the basis they were frivolous or vexatious pursuant to section 4(1)(b) of the *Act*. The adjudicator finds that the requests are not frivolous or vexatious and orders the city to issue access decisions responding to both of them.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, RSO 1990, c M56, as amended, sections 4(1)(b) and 20.1(1); and section 5.1 of Regulation 823.

Orders Considered: Orders M-906 and MO-1168-I.

OVERVIEW:

[1] The City of Greater Sudbury (the city) received two access to information requests under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The first request was for access to:

> […] all "legal fees" paid for Labour and Employment matters (not limited to retainer. Arbitrations, Proceedings, Negotiations, Settlements) from October 2013 to March 31, 2018. This should include [two named law firms].

[2] The second access request was for access to the current employment contracts for three named individuals holding the positions of General Manager, Solicitor, and Deputy City Solicitor.

[3] The city issued a single decision stating that both requests were denied on the basis that they were frivolous and vexatious under section 20.1 of the *Act.* In support of this decision, the city indicated that the appellant has made a number of complaints and initiated proceedings against the city and city employees, which were not successful, and that there is currently a Divisional Court application involving the appellant and the city. The city stated that in light of this and the appellant's pattern of conduct, it has determined that the requests were made in bad faith and for a purpose other than obtaining access.

[4] The requester appealed the city's decision, thereby becoming the appellant in the two appeals. Appeal MA18-349 was opened to address the city's decision regarding the request for access to information about legal fees, and Appeal MA18-350 was opened to address the city's decision regarding the request for access to current employment contracts.

[5] A mediator was assigned to both appeals; however, a mediated resolution between the parties was not reached and the appeals were moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry under the *Act*.

[6] Given the overlapping issues in Appeals MA18-349 and MA18-350, I decided to conduct a joint inquiry. I began my inquiry by inviting the city to provide written representations explaining why the appellant's requests were frivolous or vexatious under the *Act*. The city's representations were shared with the appellant, who provided representations for my consideration. I then invited reply and sur-reply representations from the parties.

[7] In this order, I find that the city has not established that the requests are frivolous or vexatious. The city is ordered to issue access decisions responding to both requests.

DISCUSSION:

Are the appellant's requests frivolous or vexatious within the meaning of section 4(1)(b)?

[8] The sole issue to be determined in this appeal is whether the appellant's requests are frivolous or vexatious.

[9] Section 4(1)(b) reads:

> Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless,

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

[10] Section 20.1 of the *Act* states:

> A head who refuses to give access to a record or a part of a record because the head is of the opinion that the request for access is frivolous or vexatious, shall state in the notice given under section 19,
>
> > (a) that the request is refused because the head is of the opinion that the request is frivolous or vexatious;
> >
> > (b) the reasons for which the head is of the opinion that the request is frivolous or vexatious; and
> >
> > (c) that the person who made the request may appeal to the Commissioner under subsection 39 (1) for a review of the decision.

[11] Section 4(1)(b) provides institutions with a summary mechanism to deal with frivolous or vexatious requests. This discretionary power can have serious implications on the ability of a requester to obtain information under the *Act*, and therefore it should not be exercised lightly.[1]

[12] An institution has the burden of proof to substantiate its decision to declare a request to be frivolous or vexatious.[2] Where a request is found to be frivolous or vexatious, this office will uphold the institution's decision. In addition, this office may impose conditions such as limiting the number of active requests and appeals the appellant may have in relation to the particular institution.[3]

Grounds for a frivolous or vexatious claim

[13] Section 5.1 of Regulation 823 under the *Act* elaborates on the meaning of the terms "frivolous" and "vexatious":

> A head of an institution that receives a request for access to a record or personal information shall conclude that the request is frivolous or vexatious if,
>
> > (a) the head is of the opinion on reasonable grounds that the request is part of a pattern of conduct that amounts to an abuse of the right of access or would interfere with the operations of the institution; or

[1] Order M-850.
[2] Order M-850.
[3] Order MO-1782.

> (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.

[14] The city takes the position that the appellant's requests are frivolous or vexatious based on both of the grounds set out in section 5.1 of Regulation 823. On this basis, the city requests that the appeals be dismissed and the appellant be limited to one active freedom of information request with the city at a time.

[15] The appellant maintains that there is no basis for limiting the number of access requests he is permitted to submit to the city. He requests an order requiring the city to issue two access decisions responding to the access requests at issue.

Pattern of conduct that amounts to an abuse of the right of access or would interfere with the operations of the city

[16] As indicated above, section 5.1(a) of Regulation 823 provides that a request is frivolous or vexatious if, among other things, it is part of a "pattern of conduct that amounts to an abuse of the right of access or would interfere with the operations of the institution." Previous orders have explored the meaning of the phrase "pattern of conduct." For example, in Order M-859, 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).

[17] To determine whether an appellant's request forms part of a pattern of conduct that amounts to an "abuse of the right of access," a number of factors can be considered.[4] In the circumstances of these appeals, I will consider the cumulative effect of the number, timing, nature, and scope of the appellant's requests.

[18] To determine whether an appellant's request forms part of a pattern of conduct that would "interfere with the operations of the city," the city must establish that the appellant's conduct obstructs or hinders the range or effectiveness of the city's activities.[5] Interference is a relative concept that must be judged on the basis of the circumstances a particular institution faces. For example, it may take less of a pattern of conduct to interfere with the operations of a small municipality than with the operations of a large provincial government ministry, and the evidentiary onus on the institution would vary accordingly.[6]

Representations

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

The city's representations

[19] The city maintains that the appellant has engaged in a pattern of conduct over the past eight years that amounts to an abuse of process. In support of this position, the city describes various complaints and other proceedings that the appellant has initiated involving the city since 2011, when his employment with the city was terminated. The city maintains that the appellant has filed 19 freedom of information requests, four privacy complaints with this office, three Human Rights Tribunal applications, one action in Small Claims Court, and various other complaints under the city's workplace harassment policy, among other matters.

[20] The city maintains that the cumulative effect of the appellant's conduct over the past eight years must be considered. The city submits that in each instance, it has been required to dedicate money and other resources to handle the matter, which has interfered with its operations.

[21] With regard to the multiple freedom of information requests in particular, the city explains that of the 19 requests, two are at issue in these appeals. The city explains that a total of 15 access requests were submitted in the appellant's name. Four other requests were submitted under other names; however, the city believes that they are connected to the appellant. The city explains its reasons for this belief, which include, for example, that the requests were formatted in a similar fashion to the appellant's requests and contained similar contact information. The city also notes that all 19 requests were of a similar nature, seeking information about individuals and departments that the appellant has been involved with and, purportedly, aggrieved by.

The appellant's representations

[22] The appellant maintains that this office is precluded from "investigating" the other proceedings mentioned in the city's representations, such as the small claims court action and human rights complaints, as they are outside of the IPC's jurisdiction and are not related to the operation or administration of the *Act*. He submits that the grounds for finding that a request is frivolous or vexatious under section 5.1 of Regulation 823 is based only on whether the request itself is part of a pattern of conduct described in the Regulation. The finding cannot be made based on the fact that the appellant has involved the city in other, unrelated, proceedings. The appellant maintains that the city's representations in this regard are "a nuisance and an attempt to distract the inquiry and nothing more."

[23] The appellant also objects to the city's interpretation of his past freedom of information requests. First, he submits that the city provided no objective evidence to connect him with the access requests submitted by other individuals. He maintains that the city's position on this point is speculative and based on individuals' opinions. Accordingly, he maintains that he has only submitted 16 access requests over the span

of eight years, thereby averaging two requests per year.[7] The appellant maintains that this volume of requests cannot be said to be frivolous or vexatious within the meaning of the *Act*.

[24] In support of his position, the appellant refers me to Order MO-1548, in which Adjudicator Donald Hale declined to find that an appellant's 16 access requests, which were submitted over four years, were frivolous or vexatious. The appellant also refers me to Order MO-2390, in which Adjudicator Bernard Morrow declined to find that an appellant's 21 access requests, some of which were multi-part, and all of which were submitted in one year, were frivolous or vexatious.

[25] The appellant also maintains that the requests at issue are not excessively broad, overly detailed, or repetitive of requests he has submitted in the past. He states that the city has failed to demonstrate how all of his requests are generally "similar in nature," nor has it established how and why the requests have interfered with the city's operations.

The city's reply

[26] The city maintains that I should consider its earlier submissions regarding the various other proceedings involving the appellant. The city explains that it included this information to provide me with a complete understanding of the relationship that exists between the parties. The city also submits that the past proceedings illustrate a pattern of conduct that amounts to harassment and an abuse of process.

[27] In addition, the city objects to the appellant's assertion that the city did not explain how and why it determined that his access requests are of a similar nature. The city refers me to its earlier submissions, where it explained that the appellant's requests "have been generally similar in nature, targeting those people and departments which [the appellant] has had involvement with, and who he believes to be aggrieved by." The city notes that the appellant has submitted previous requests regarding the city's legal expenses and employment contracts.

The appellant's sur-reply

[28] In his sur-reply representations, the appellant urges me to dismiss a number of the city's reply arguments. For example, he continues to maintain that this office has no jurisdiction to "inquire" into the other proceedings between him and the city. He also maintains that while his requests may be connected, none of them are identical.

Analysis

[29] Based on the circumstances of this appeal, I am not satisfied that the evidence supplied by the city has established, on reasonable grounds, that a pattern of conduct

[7] I note the discrepancy between the city's submission that the appellant submitted 15 requests in his name and the appellant's submission that he submitted 16 requests; however, the difference of one request over eight years is not material for my analysis.

as contemplated by section 5.1(a) of Regulation 823 exists with respect to the two requests at issue. Moreover, even if a pattern of conduct were found to exist, I do not accept that the city has established that the pattern amounts to an abuse of the right of access or that it obstructs or would interfere with the city's operations.

[30] As set out above, a "pattern of conduct" requires recurring incidents of related or similar requests on the part of the requester. The parties submit that the appellant is connected with anywhere from 15 to 19 access requests that the city has received over the past eight years. In addition to the number and alleged similarity of the access requests, the city also relies on the other proceedings that it and the appellant have been involved in since 2011.

[31] Previous orders of this office have determined that the abuse of the right of access described by section 5.1(a) of Regulation 823 refers only to the access process under the *Act*, and is not intended to include proceedings in other forums.[8] Accordingly, while I acknowledge that the city has likely dedicated a substantial amount of time and resources to proceedings involving the appellant over the years, the only proceedings I will consider for the purposes of my analysis are those arising under the *Act*.

[32] In my view, neither the number nor the timing of the appellant's access requests is excessive. I find that the city has not provided sufficient evidence to support a conclusion that an average of (approximately) two requests a year amounts to an "abuse of the right of access" as set out in section 5.1(a) of Regulation 823.

[33] With regard to the nature and scope of the requests, the city submits that the requests at issue are substantially similar to other requests previously filed by the appellant. In my view, that is not entirely accurate. From my review of them, while previous requests may have sought access to employment contracts and legal fees, the individuals and time periods covered by those requests and the records that would be responsive are different from those that could be expected to be responsive to the requests at issue in these appeals. I note that the appellant has requested the employment contract of one individual more than once; however, that individual has changed positions since the previous request, and therefore the information responsive to the current request would not be duplicative. Similarly, the appellant has previously requested the employment contract of the city solicitor; however, the individual who occupies that role has changed since the prior request, and therefore, once again, the information responsive to the current request would not be the same. I do not accept that simply because the appellant's requests target certain individuals, positions, or departments, they are similar to the point that they amount to an abuse of the access process.

[34] In addition, I am satisfied that the appellant's requests are not excessively broad or overly detailed. Under section 1(a) of the *Act*, the public has a right of access to information under the control of institutions with exemptions from this right being limited and specific. From my review of the appellant's requests, it is clear that he is

[8] Orders M-906, M-1066, M-1071, MO-1519 and P-1534.

seeking access to the employment contracts of three named individuals and the legal fees spent on a particular kind of legal matter over a five and a half year period. In my view, neither of these requests can be described as being unusually detailed or broad. If anything, the detail provided in the requests may prove helpful in the processing of the requests by allowing the city to target its search for responsive records.

[35] Given the circumstances of these appeals, I do not consider the nature and scope of the requests at issue, taken together with the similar nature of previous requests, sufficient to establish a pattern of conduct that can be described as an abuse of the appellant's right of access under the *Act*.

[36] I am also not satisfied that the city has demonstrated that the appellant's requests at issue here would obstruct or hinder the range or effectiveness of the city's operations. While the city's representations suggest that this is the case, it has failed to adequately explain how its operations would be obstructed or their effectiveness hindered as a result of processing the appellant's requests. A bald assertion that the city would be required to dedicate money and other resources to handle the matters, without more information, is insufficient for concluding that a request meets the threshold of frivolous or vexatious under section 5.1(a) of Regulation 823. Accordingly, I am unable to conclude that this ground for finding that the requests are frivolous or vexatious has been satisfied.

[37] Therefore, I find that the city has not established that the requests before me demonstrate a pattern of conduct that amounts to an abuse of the right of access or would interfere with the operations of the city under section 5.1(a) of Regulation 823.

Bad faith or for an improper purpose

[38] Section 5.1(b) of Regulation 823 sets out the second ground for establishing that a request is frivolous or vexatious. Under section 5.1(b), an institution must establish that a request was made in bad faith or for a purpose other than to obtain access.

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

> The opposite of "good faith", generally implying or involving actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfil some duty or other contractual obligation, not prompted by an honest mistake as to one's rights, but by some interested or sinister motive. ... "bad faith" is not simply bad judgement or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity; it is different from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with furtive design or ill will.[9]

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

[9] Order M-850.

motivated not by a desire to obtain access, but by some other objective.[10]

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

Representations

The city's representations

[42] With respect to the appellant's requests being made "in bad faith of for reasons other than to obtain access," the city refers me to a website that it believes is maintained by or, at the very least, connected to the appellant. This belief stems from the fact that the website contains information about the appellant's complaints and includes copies of documents that the appellant has obtained through various freedom of information requests and appeals. The city suggests that the appellant uses the freedom of information process to generate content for the website, which it says is rife with false allegations and other inflammatory and untrue statements about both the city and its staff. The city submits that the intent of the website is to challenge the city's integrity and harass city staff.

[43] In addition, the city submits that the appellant has posted "doctored" documents on the website without indicating that they have been modified in any way. The city argues that this is demonstrative of the bad faith behind the appellant's requests. The city also expresses its concern that the appellant will modify materials he receives through the requests at issue in these appeals to suit his purposes and support his false allegations.

[44] The city also maintains that the motive behind the appellant's multiple freedom of information requests is not to obtain access, but for a more "sinister" retaliatory purpose. The city believes that the appellant is seeking retribution for, among other things, his termination from his position with the city, which is why his requests always target the same the individual employees and departments.

The appellant's representations

[45] The appellant maintains that the city has failed to establish that his requests are for a purpose other than to obtain access. He submits that the city has not provided any direct evidence linking him with the website that the city refers to in its representations. Rather, the city's position is an "inflammatory allegation" that the city has made based on opinions and beliefs. The appellant suggests that while he may have obtained copies of the documents that appear on the website through the freedom of information process, city staff could just as easily have leaked those documents. The appellant makes multiple allegations of the city relying on hearsay evidence, which the appellant submits is inadmissible.

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[10] Order M-850.
[11] Order M-850.

[46] The appellant also submits that the city has failed to establish that his requests were made in bad faith, as it has not established how and why the requests constitute harassment of the city and its employees. In support of his position, the appellant refers to Order M-850, in which former Assistant Commissioner Mitchinson offered the interpretation of the meaning of the term "bad faith" that is already set out above.

[47] The appellant submits that this interpretation sets a high threshold for determining that a request has been made in bad faith. Accordingly, he says that the city's opinions, assumptions, and beliefs are insufficient evidence to support this allegation. The appellant also points to Order MO-2390, in which Adjudicator Morrow stated that an institution's belief that an appellant is engaged in conduct designed to abuse the access system is not sufficient to prove bad faith.

[48] In addition, the appellant notes that in Order M-860, Adjudicator John Higgins said that seeking information from an institution to subsequently file a complaint against that institution does not mean that a request was submitted in bad faith; rather, "the purpose would be to obtain access and use the information in connection with a complaint." He also refers to Order M-906, in which Adjudicator Higgins stated, "to find that a request is 'for a purpose other than to obtain access' […] on the basis that the requester may use the information to oppose actions taken by an institution would be completely contrary to the spirit of the *Act*." On this basis, the appellant maintains that his requests are entirely within the purposes of the *Act*.

The city's reply

[49] The city notes that the appellant's position on the inadmissibility of hearsay evidence is incorrect. The city refers to Orders PO-2242 and MO-3404, which clearly state that hearsay evidence is admissible in IPC proceedings, and that adjudicators accord that evidence proper weight.

[50] The city urges me to consider its earlier submissions regarding the various other proceedings involving the appellant, as they explain the relationship between the parties and justify its position that the appellant is acting in bad faith and out of retaliation.

[51] The city objects to the appellant's submissions regarding the website that the city believes the appellant operates. The city provided affidavits from its staff affirming that they did not leak the documents that appear on the website. The city submits that these affidavits were provided by the only city employees who could have accessed the documents in question, which leaves the appellant as the only potential source of the information.[12] The city also maintains that the language and style of the appellant's submissions is similar to that found on the website, which the city submits increases the likelihood that he is involved.

[12] The city also notes that this office has copies of the documents in question, but the city does not believe that anyone in this office would have supplied those documents to the website's operator.

The appellant's sur-reply

[52] In response, the appellant continues to maintain that hearsay evidence is inadmissible in this inquiry. He provides an overview of the governing legal principles regarding hearsay evidence. He also discussed the admissibility of documents obtained from online resources and Canadian's constitutionally protected right to freedom of expression. I have taken these submissions into account, but have determined that it is not necessary to summarize them here.

[53] The appellant also submits that the city's affidavit evidence does not support the city's position that his requests are frivolous or vexatious, nor do the affidavits support the conclusion that the appellant is the owner of the site. He maintains that the city is not qualified to provide evidence regarding the similarity of the "language style" used in his representations and on the website. Accordingly, he submits that these submissions should be dismissed.

Analysis

[54] I begin by addressing the appellant's arguments regarding the admissibility of hearsay evidence. It is well established that hearsay evidence is generally admissible in tribunal proceedings,[13] so long as the adjudicator remains aware of the "inherent unreliability"[14] of such evidence and accords it the appropriate weight.[15] Accordingly, I am satisfied that even if the city's representations contain hearsay evidence, they are admissible in the context of this inquiry.

[55] Considering the evidence before me, I find that I do not have sufficient evidence to conclude that the appellant's requests were made in bad faith or for a purpose other than to obtain access.

[56] As set out above, this office has interpreted "bad faith" as implying "the conscious doing of a wrong because of dishonest purpose or moral obliquity." Bad faith is different from negligence "in that it contemplates a state of mind affirmatively operating with furtive design or ill will."[16]

[57] Section 5.1(b) also allows for requests to be deemed frivolous or vexatious if they were submitted for a "purpose other than to obtain access." This term has been described as requiring an improper objective above and beyond a collateral intention to use the information in some legitimate manner.[17] Previous orders have found that an intention by the requester to take issue with a decision made by an institution, or to take action against an institution, is not sufficient to support a finding that the request

[13] Orders PO-2242 and MO-3404.
[14] *Dayday v. MacEwan*, (1987) 62 O.R. (2d) 588 (Dist. Ct.).
[15] *Krabi et al. v. Ministry of Housing* (1982), 39 O.R. (2d) 691 (Div. Ct.).
[16] Order M-850.
[17] Order MO-1924.

is "frivolous or vexatious."[18]

[58] The city maintains that the appellant's requests are driven by a "sinister" desire to retaliate against the city and the departments and individuals with whom he has interacted, and to generate content for a website, which the city says contains numerous false allegations and other inflammatory and untrue statements about the city and its staff. The city points to the appellant's termination in 2011 and the various proceedings between it and the appellant since then as a justification for its position that the appellant is acting in a retaliatory manner and for a purpose other than to obtain access.

[59] I acknowledge that there has been tension and numerous challenging interactions between the parties over the years; however, in my view, the evidence provided by the city does not establish that the appellant consciously exercised his access rights for a dishonest purpose or with furtive design or ill will. Even if I were to accept the city's position that the appellant maintains or is otherwise connected to the website and its "inflammatory" stories and "false allegations," this would not be sufficient for the purpose of engaging section 5.1(b) of Regulation 823.

[60] In Order MO-1168-I, Adjudicator Laurel Cropley observed that there is nothing in the *Act* that delineates what a requester can and cannot do with information once access has been granted to it.[19] In addition, as noted by the appellant, the adjudicator in Order M-906 held that finding a request to be "for a purpose other than to obtain access" based on the fact that the requester may use the information to oppose actions taken by an institution would be "completely contrary to the spirit of the *Act*."[20]

[61] In my view, generating online content using information obtained through the city's access to information process, whether inflammatory and untrue or not, does not constitute an illegitimate purpose under the *Act*. The fact that the appellant may use the information gleaned from his access requests in a manner that opposes or is detrimental to the city does not mean that his reasons for using the access scheme are for a purpose other than to obtain access.[21] Accordingly, I am not persuaded that the appellant's requests were submitted in bad faith or for a purpose other than to obtain access.

[62] I recognize that the city may wish to put an end to what it views as an online disinformation campaign. However, in my view, the appropriate remedy for addressing this disparaging online content is in the civil realm,[22] beyond the jurisdiction of this office.

[63] Therefore, for the reasons outlined above, I find that the city has not established that the requests at issue meet the requirements for finding that they are frivolous or

[18] Orders MO-1168-I and MO-2390.
[19] See also Order M-1154.
[20] Order M-906.
[21] Order MO-2390.
[22] Order MO-3049.

vexatious under section 5.1(b) of Regulation 823 and for the purpose of section 4(1)(b) of the *Act.*

Conclusion

[64] The tests under section 5.1 of Regulation 823 set a high threshold that, in my view, has not been met in the circumstances of these appeals. I find, based on the analysis above, that the city has not established reasonable grounds for finding that the requests at issue are frivolous or vexatious within the meaning of section 4(1)(b) of the *Act*. As a result, I will order the city to issue access decisions responding to both requests.

[65] I have found that in the circumstances of these appeals, the requests are not frivolous or vexatious for the purposes of the *Act*. However, this decision does not preclude the city from making a future decision that a request received from the appellant is frivolous or vexatious, if the city reasonably believes that the grounds set out in section 5.1(a) or (b) or Regulation 823 are met.

ORDER:

1. I do not uphold the city's decision that the requests are frivolous or vexatious.

2. I order the city to issue access decisions in response to both requests in accordance with the *Act*, without relying on the frivolous or vexatious provisions of the *Act*. For the purposes of section 19, 22, and 23 of the *Act*, the date of this order shall be deemed to be the date of the request.

Original Signed By: June 10, 2019
Jaime Cardy
Adjudicator