

# WHEN DOES ACCESS BECOME FRIVOLOUS?

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Ontario's *Freedom of Information and Protection of Privacy Act*<sup>[1]</sup> ("FIPPA") and its subordinate regulations<sup>[2]</sup> permit a government institution to decline to process access to information requests on the basis that they are frivolous and vexatious. Two questions arise. First, what are the grounds for finding a frivolous or vexatious access request? Second, what is the proper remedy in relation to a frivolous and vexatious request? A recent decision of Ontario's Information and Privacy Commissioner ("IPC"), Order PO-3539, addresses these questions.

There are two "frivolous and vexatious" grounds available in the regulation. One relates to a pattern of conduct, the other relates to bad faith and improper purposes.

In Order PO-3539, the adjudicator first considered whether there was a pattern of conduct that amounts to an abuse of the right of access or would interfere with the operations of the institution. She held that an institution may consider the following factors to determine whether a pattern of conduct amounts to an "abuse of the right of access":<sup>[3]</sup>

- The number of requests: is the number excessive by reasonable standards?
- Nature and scope of the requests: are they excessive broad and varied in scope or unusually detailed? Are they identical to or similar to previous requests?
- The purpose of the requests: are the requests intended to accomplish some objective other than to gain access? For example, are they made for "nuisance" value, or is the requestor's aim to harass government or to break or burden the system?
- Timing of the requests: is the time of the requests connected to the occurrence of some other related event, such as court proceedings?

The adjudicator relied on several conclusions to hold that the requests being appealed were frivolous and vexatious: the requestor's 44 requests for access in under a year was held to be excessive by reasonable standards;<sup>[4]</sup> the requestor clustered several broad requests on one day;<sup>[5]</sup> requests involved post-request adjustments;<sup>[6]</sup> the requestor's requests commented on potential fee estimates;<sup>[7]</sup> the requestor had failed to pursue many past requests;<sup>[8]</sup> and the requestor's emails demonstrated he was using the access process to express frustration with the child welfare system in Ontario and the Ministry.<sup>[9]</sup>

The adjudicator declined to consider whether the requestor's request fell within the "bad faith" criteria, section 5.1(b) of the regulation.

The adjudicator held that where a request is found to be frivolous or vexatious, the IPC will uphold the institution's decision to decline to process the access request.<sup>[10]</sup> The adjudicator also held that the IPC may impose conditions such as limiting active requests and appeals that an requestor may have in relation to a particular institution.<sup>[11]</sup>

In PO-3539, the adjudicator held that the requestor was only permitted to submit a single access request at a time. She held that the requestor could only make a new access request once the institution had issued the final decision on the prior request. The adjudicator also noted that her decision did not limit or preclude a finding, where appropriate, that any current or future request is frivolous and vexatious.

Institutions faced with what they consider a series of abusive access requests now have a concise IPC Order by which to compare patterns of conduct by requestors. Notably, the IPC relied upon facts extraneous to the particular requests being appealed to determine that the requests were frivolous and vexatious. An institution can consider it "fair game" on appeal to include other information related to any requestor that it believes is making frivolous and vexatious requests.

by Adam D.H. Chisholm and Allison Worone

1 *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, s.10(1)(b), (2), 24(1.1), 27(1).[ps2id id='1' target='']

2 *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, s.60(1)(0.a), R.R.O. 1990, Reg. 460, s.5.1.[ps2id id='2' target='']

3 Order PO-3539 at para. 13.[ps2id id='3' target='']

4 *Ibid.* at para. 25.[ps2id id='4' target='']

5 *Ibid.* at para. 26.[ps2id id='5' target='']

6 *Ibid.* at para. 26.[ps2id id='6' target='']

7 *Ibid.* at para. 26.[ps2id id='7' target='']

8 *Ibid.* at para. 29.[ps2id id='8' target='']

9 *Ibid.* at para. 30.[ps2id id='9' target='']

10 *Ibid.* at para. 33.[ps2id id='10' target='']

<sup>11</sup> *Ibid.* at para. 33.[ps2id id="11" target=""]

### **A Cautionary Note**

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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