

# Frivolous and Vexatious Requests

Understanding When FOI Requests Cross the Line

# Frivolous and Vexatious Requests

Navigating Ontario's Limits on Access and Abuse

## Learning Objectives

- Distinguish “Frivolous” and “Vexatious”
- Understand the indications that allow institutions to refuse a request
- Apply IPCO decisions to real-world scenarios
- How to respond to requestors



# Frivolous and Vexatious Requests

Navigating Ontario's Limits on Access and Abuse

## Agenda

- Statutory framework under FIPPA, MFIPPA and General Regulations 460 / 823
- The Four Ways a Request can be Frivolous or Vexatious
- Notice Requirements & Best Practices
- Conclusions & Takeaways
- Additional Resources
- Questions



# Statutory Framework

# Statutory Framework

PART I  
FREEDOM OF INFORMATION  
ACCESS TO RECORDS

**Right of access**

4 (1) 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,

- (a) the record or the part of the record falls within one of the exemptions under sections 6 to 15; or
- (b) the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

- **FIPPA s.10(1)** and **MFIPPA s.4(1)** set out the public's "Right of Access" to records
- But such right is immediately limited by parts (a) and (b)
- Part (a) brings in all of the traditional exemptions
- Part (b) states there is no right of access if **"the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious."**
  - This is a fundamental limitation



# Statutory Framework

## RULE 2.1 FRIVOLOUS, VEXATIOUS OR ABUSIVE PROCEEDINGS

### Stay or Dismissal of Proceedings

#### *Court May Stay, Dismiss*

**2.1.01** (1) The court may make an order staying or dismissing a proceeding that appears on its face to be frivolous or vexatious or otherwise an abuse of the process of the court. O. Reg. 322/24, s. 1.

#### *Summary Determination*

(2) The court may make a determination under subrule (1) in a summary manner, subject to the procedures set out in this rule. O. Reg. 322/24, s. 1.

#### *On Own Initiative or On Request*

(3) An order under subrule (1) may be made by the court on its own initiative or on the request of a party to the proceeding under subrule (4). O. Reg. 322/24, s. 1.

#### *How to Request*

(4) A party may seek an order under subrule (1) by serving a request in Form 2.1A on every other party and filing it with proof of service. O. Reg. 322/24, s. 1.

#### *Registrar May Notify Court*

(5) If, in the registrar's opinion, there is reason to believe that a proceeding may be frivolous or vexatious or otherwise an abuse of the process of the court, the registrar may, in the absence of a request under subrule (4), notify the court. O. Reg. 322/24, s. 1.

#### *Notice to Parties*

(6) If, on review of a request under subrule (4) or on its own initiative, the court determines that it may be appropriate to make an order under subrule (1), the court shall direct the registrar to give notice to the parties in Form 2.1B that the proceeding may be stayed or dismissed. O. Reg. 322/24, s. 1.

- Yet there's no definitions in the Acts for "frivolous" or "vexatious"
- These words are both common-law concepts imported from civil court procedure (which has a much longer history than FOI!)
  - Under Ontario's *Rules of Civil Procedure*, the Court may stay or dismiss a proceeding or a motion if it appears to be "frivolous or vexatious" or otherwise an abuse of process

# Statutory Framework

**FRIVOLOUS.** An answer or plea is called "frivolous" when it is clearly insufficient on its face, and does not controvert the material points of the opposite pleading, and is presumably interposed for mere purposes of delay or to embarrass the plaintiff. *Erwin v. Lowery*, 64 N. C. 321; *Strong v. Sproul*, 53 N. Y. 490; *Gray v. Gidliere*, 4 Strob. (S. C.) 442; *Peacock v. Williams* (C. C.) 110 Fed. 916.

**VEXATIOUS.** A proceeding is said to be vexatious when the party bringing it is not acting *bona fide*, and merely wishes to annoy or embarrass his opponent, or when it is not calculated to lead to any practical result. Such a proceeding is often described as "frivolous and vexatious," and the court may stay it on that ground. Sweet.

Black's Law Dictionary, 2<sup>nd</sup> Ed. (1910)

- Though the words "frivolous" and "vexatious" are commonly seen together, each has its own meaning.
- A "**frivolous**" request is one made not for a genuine need (such as obtaining helpful information), but rather for some other, frivolous purpose.
- A "**vexatious**" request, on the other hand, is a request that is intended merely to create frustration or annoyance.

# Statutory Framework

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(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. O. Reg. 21/96, s. 1.

- The regulations under FIPPA and MFIPPA clarify how these terms apply to FOI requests:
  - **FIPPA, Regulation 460 (General), s.5.1**
  - **MFIPPA, Regulation 823 (General), s.5.1**
- (Helpfully, the section numbers and relevant wording are identical in both regulations)



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- Section 5.1 is split into two parts (a and b), but sets out four distinct criteria:
- (a) is there a **pattern of conduct** which:
  - Amounts to an abuse of the right of access?
  - Would interfere with the operations of the institution?
- (b) **was the request itself made:**
  - In bad faith?
  - For a purpose other than to obtain access?

The Four Ways a Request  
can be  
Frivolous or Vexatious

# Pattern of Conduct

- A single request may appear reasonable on its face
- But context matters — including the requester's past interactions with the institution
- Institutions can consider their history and interactions with the requester and their previous FOI requests

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- A pattern of conduct may amount to an abuse of the right of access
- Various criteria to be considered:
  - **Number of requests:** *Is the number excessive by reasonable standards?*
  - **Nature and scope of the requests:** *Are the requests overly broad and varied in scope or unusually detailed? Are they identical or similar to previous requests?*

## PoC pt.1: Abuse of the right of access

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# PoC pt.1: Abuse of the right of access

- **Purpose of the requests:** Are the requests intended to accomplish some objective other than to gain access to the requested information? For example, are they made for “nuisance” value, or is the requester’s aim to harass the institution or to break or burden the system?
- **Timing of the requests:** Is the timing of the requests connected to the occurrence of some other related event, such as court proceedings?
- (Sept. 2023 IPCO Interpretation Bulletin, citing Orders M-618, M-850 and MO-1782)

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## PoC pt.1: Abuse of the right of access

- “In determining whether a pattern of conduct exists, the focus should be on the cumulative nature and effect of a requester’s behaviour.”
- “In many cases, ascertaining a requester’s purpose requires the drawing of inferences from their behaviour because **a requester seldom admits to a purpose other than to obtain access.**”
- (September 2023 IPCO Interpretation Bulletin)

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## PoC pt.2: Interference with Operations

- A pattern of conduct can also simply be overwhelming for the institution
- **No need to prove intent to harass or abuse** in this case — only that the requester's conduct would disrupt operations
- **Even valid requests can be refused** if the volume or pattern causes operational interference
- Applies especially where the requester submits dozens of requests or more

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- A pattern of conduct may impose delays responding to other FOI requesters
- “[I]t 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” (September 2023 IPCO Interpretation Bulletin)
- **Smaller institutions** without FOI-dedicated staff **may have stronger grounds**
- Larger institutions can still make the case, but must provide more compelling evidence

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# The Two Patterns of Conduct Compared

## **Abuse of Right of Access**

- Repeated harassing requests
- Very similar or overlapping requests
- Unclear whether the requests serve any purpose, especially when considered together
- Suspicious timing:
  - E.G., after someone's spouse is arrested, they start filing numerous requests about expense claims and catering costs

## **Interference with Operations**

- Many requests arriving over a relatively short period
- Generally, each request would be legitimate on its own
- The total volume (e.g., the number of requests and the level of detail) renders the requests frivolous/vexatious, not their content
- Smaller institutions are more susceptible

# Bad Faith

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- Now, we're into part (b), where we consider a single request all by itself
- Because we don't have the benefit of a pattern of conduct, the request has to be comparatively worse **on its own** (than typical frivolous/vexatious requests making up a pattern of conduct)



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- The IPCO has adopted the following definition of “Bad Faith”:

*“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. (cont’d on next slide)*

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*‘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.”*

*(Order M-850, Citing Black’s Law Dictionary, 6<sup>th</sup> Ed.)*

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- Any time we're required to establish someone's state of mind, we're facing a very high bar
- "Bad faith" might apply if you can establish the requestor intended:
  - merely to put the institution through extra work (where the requestor doesn't really care about receiving the information requested)
  - to annoy certain employees of the institution, or
  - to ask for information that the requestor knows does not exist or knows he has no legal right to obtain.

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- In *Order M-850*, the requestor took the position that there was “nothing wrong with testing or examining the boundaries of the Act or **having fun in filing requests.**”
- The IPCO found this indicated the request was filed in **bad faith.**

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- Statements from the requestor could be helpful here
  - E.G., “the police have made my life miserable, now it’s my turn to make their lives miserable” would be suggestive of bad faith
- That said, it is a very high bar to meet.
- IPCO does not want you to **assume** bad faith



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Here are some things that IPCO has found insufficient to indicate bad faith:

- That the requestor may have lacked “clean hands” in dealing with the institution (they had obtained confidential information from an employee)
- That the requestor might want to use the information in a manner which is “disadvantageous to the institution”

(From *Interim Order MO-1168-I*)

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More things that IPCO found insufficient to indicate bad faith:

- That the requestor was seeking an earlier draft of a report which was known to contain errors (*Order MO-1377*)
- That the requestor has been vocal about future litigation against the institution (*Order MO-3278*)

**Legitimate adversarial behaviour isn't "Bad Faith"**

# Purpose other than to Obtain Access

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- The reason access to information requests exist is to allow requestors to access information
- Therefore, institutions shouldn't have to respond to requests **made for a purpose other than to obtain access** to records

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- Possible frivolous or vexatious “other” reasons could include:
  - To make the institution or a specific employee work harder
  - For the amusement of the requestor
  - To bring attention or notoriety to the requestor or their pet cause
  - To “get back” at or “hurt” the institution, or to “teach them a lesson”

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- Possible frivolous or vexatious “other” reasons could include:
  - To test or probe an institution’s record-keeping practices (MO-4646)
  - To ask for information that the requestor knows does not exist, and has been told does not exist (MO-4553)



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- However, a request made to obtain access for another legitimate purpose is not, on that basis alone, frivolous or vexatious
- For example, if a requestor intends to publish a record (*Order MO-3049*), or use it in litigation (*PO-2648*), or to file a complaint (*M-860*), or to challenge an assessment (*P-1311*) these are all valid reasons to obtain access

# Notice Requirements and Best Practices

# Notice Requirements

If an institution deems a request frivolous or vexatious, it must provide **written notice to the requestor providing reasons for the decision** and letting them know of their **right to appeal** the decision to the IPCO.

Once the letter has been sent, the file can be closed, subject to the possibility of the requestor filing an appeal.

Tuesday, May 20, 2025

Mary MacLemore  
111 Franklin Blvd  
Windsor, Ontario  
N8W 3T6

Dear Miss MacLemore:

**Re: Request is Frivolous and/or Vexatious (FOI File Number: 2025-04)**

Your request is for the following information:

*I am looking for any records which show purchases of plastic partitions by your institution in 2020, 2021 or 2022.*

I am writing to inform you that we are unable to process your request as we have concluded that the request is frivolous and/or vexatious.

We have determined that the request is part of a pattern of conduct that amounts to an abuse of the right of access. Additionally, we believe that the request is being made in bad faith or for a purpose other than to obtain access.

The person responsible for making this determination is Joe Smith, Clerk.

You may request the Information and Privacy Commissioner to review this decision within thirty days from the date of this letter. You can do so by filing an appeal online at [www.ipc.on.ca](http://www.ipc.on.ca). The appeal fee is **\$25.00** (for general record requests) or **\$10.00** (for personal information requests). Alternatively, appeals can still be mailed with a cheque or money order payable to "Minister of Finance" to: Registrar, Information and Privacy Commissioner of Ontario, 2 Bloor Street East, Suite 1400, Toronto, ON, M4W 1A8.

If you decide to request a review of this decision, please provide the Commissioner's office with the following:

- The file number listed at the beginning of this letter.
- A copy of this decision letter.
- A copy of your request that you sent to this institution.

# Notice Requirements

Typically, the written notice will mention:

- A pattern of conduct amounting to an abuse of the right of access
- A pattern of conduct that would interfere with the operation of the institution, and/or
- That the request was submitted “in bad faith or for a purpose other than to obtain access”

(The final two reasons are hard to distinguish and are typically conflated in the letter – no need to cite just “one or the other” here.)

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# Notice Requirements

- **Defective notices can undermine otherwise solid cases!**
  - See “Are Your Written Notices Defective?” article and *Order MO-3570 (Township of Carling)*
  - IPCO found the institution’s correspondence did not follow guidance
  - The township lost the appeal and was ordered to issue new correspondence which complied with the guidance
  - The township’s assertion that the requests were frivolous or vexatious also failed for lack of evidence and sufficient details

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# Being Prepared for Appeals

The requestor **can appeal** the institution's decision to declare a request frivolous or vexatious

Therefore, **institutions should maintain detailed records of their interactions with the requestor**, including:

- How many requests the requestor has filed
- The complexity of the requests
- The frequency of the requests
- Whether the requests appear to be filed in response to surrounding events
- The requestor's conduct in relation to the institution and its staff



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# Appeal Remedies

If the IPCO agrees with the institution, it may uphold the determination that the request was frivolous or vexatious and the institution will not have to process the request.

From IPCO August 2017 Fact Sheet:

Further, **IPCO may impose conditions on the requestor** such as:

- *limiting the requester to one request or appeal at any given time*
- *requiring the requester to notify the IPC and the institution if seeking to proceed with any existing appeals or requests*
- *setting a two-year time limit on pursuing any outstanding appeals*

**Potentially a very worthwhile appeal to pursue!**



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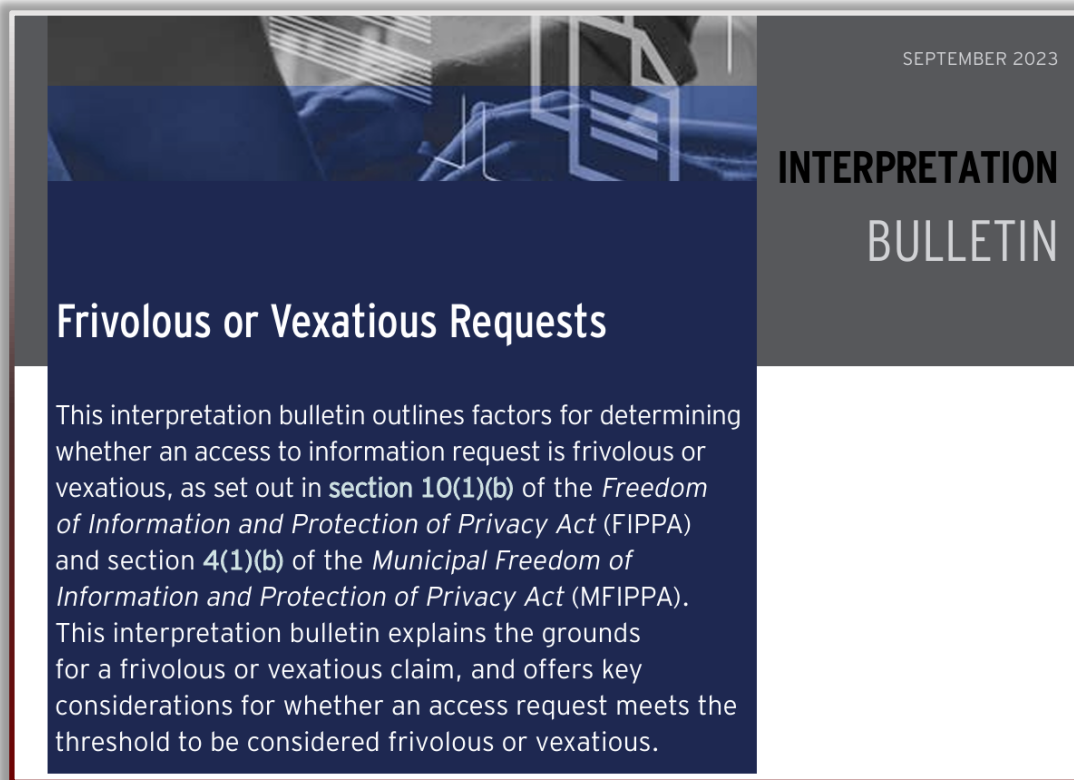
# Conclusions & Takeaways

# Conclusions & Takeaways

- Legal Ref's: **FIPPA s.10(1)(b), MFIPPA s.4(1)(b), Gen. Reg. s.5.1**
- **Four ways** to find requests frivolous or vexatious:
  - PoC amounting to an abuse of the right of access
  - PoC that would interfere with operations
  - Request made in bad faith or with a purpose other to obtain access
- Written notice required (which must meet requirements)
- Keep good notes & file history, in case there's an appeal!

# Additional Resources

# Additional Resources



- *IPCO September 2023 Interpretation Bulletin*
- *IPCO August 2017 Access Fact Sheet*
- David Goodis: *Annotated Ontario Freedom of Information and Protection of Privacy Acts*
- FOI Assist Knowledge Base Articles (free online):
  - “When is an FOI request frivolous or vexatious?”
  - “Are Your Written Notices Defective?”
- FOI Assist software

Questions?



# Questions!

- Are personal information requests treated differently?
- Isn't there a lot of overlap between "Bad Faith" and "A Purpose Other Than To Obtain Access?"
- What have FOI professionals been seeing?

Thank you!

Justin Petrillo  
justin@foiassist.ca  
foiassist.ca

