Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER MO-1548

Appeal MA-010286-1, MA-010306-1 and MA-010363-1

Regional Municipality of Niagara

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NATURE OF THE APPEAL:

The Regional Municipality of Niagara (the Region) received four requests for access to information under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) from a single requester. The requester and the Region are opposing litigants in a civil action brought by the requester over the award of two construction projects in 1998. The requests sought access to the following:

- **Request 2001-04 (Appeal Number MA-010186-2)** - all records in connection with the Region's application for a permit from the Ministry of the Environment for approval to proceed with a tender for a particular biosolids storage facility.

- **Request 2001-13 (Appeal Number MA-010286-1) -** information relating to complaints made by the Region to the Law Society of Upper Canada about a named individual.

- **Request 2001-08 (Appeal Number MA-010306-1) -** all records related to a construction schedule pertaining to a contract awarded by the Region to a named company.

- **Request 2001-15 (Appeal Number MA-010363-1) -** all records of payments made to a named law firm and any other law firm in connection with a specific civil action, a copy of the judgment in this action, a copy of the settlement documents and a copy of the cheque used in making the settlement payment.

In each case, after originally denying access to responsive records under one of the exemptions in the *Act*, or issuing a fee estimate in accordance with section 45(3) of the *Act*, the Region claimed the application of the frivolous or vexatious provision in section 4(1)(b) of the *Act*.

The requester, now the appellant, appealed the Region's decisions. As mediation of the appeals was not possible, the matters were moved on to the adjudication stage of the process. A Notice of Inquiry was provided to the Region, who made submissions in response. The Region's representations were shared with the appellant along with a copy of the Notice of Inquiry. The appellant's submissions were also shared with the Region, who then made further representations by way of reply. On May 3, 2002, the appellant confirmed that he had withdrawn his appeal with respect to Request 2001-04, which gave rise to Appeal Number PA-010186-2. I will not be addressing the issues raised in that appeal further, accordingly.

DISCUSSION:

ARE THE REQUESTS FRIVOLOUS OR VEXATIOUS WITHIN THE MEANING OF SECTION 4(1)(b)?

Introduction

Several provisions of the *Act* and Regulations are relevant to the issue of whether the request is frivolous or vexatious. These provisions read as follows:

Section 4(1)(b) of the *Act*:

> 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 20.1(1) of the *Act*:

> 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.

Section 5.1 of Regulation 823:

> 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.

In Order M-850, Assistant Commissioner Mitchinson stated:

> In January 1996, the Legislature amended section 4 of the *Act*, thereby providing institutions with a summary mechanism to deal with requests which the institution views as frivolous or vexatious. These legislative provisions confer a significant discretionary power on institutions which can have serious implications on the ability of a requester to obtain information under the *Act*. In my view, this power should not be exercised lightly.
>
> …

> Section 42 of the *Act* places a burden on institutions to demonstrate the application of exemptions. It does not offer specific guidance on the burden of proof regarding decisions that a request is frivolous or vexatious. However, the general law is that the burden of proving an assertion falls on the party making the assertion. On this basis, I find that an institution invoking section 4(1)(b) of the *Act* has the burden of proof.

Section 5.1(a)

Pattern of Conduct

The Region's Submissions

The Region takes the position that the requests made by the appellant under the *Act* fit within the test enunciated by Assistant Commissioner Tom Mitchinson in Order M-850 as the appellant's conduct consists of "recurring incidents of related or similar requests on the part of the requestor". The Region relies on my decision in Order PO-1872 in which I found a pattern of conduct amounting to an abuse of process on the part of a requester who had made some 23 requests to a provincial ministry over a period of 22 months. I found that by submitting an excessive number of requests for similar types of information despite having already been granted access to the responsive records, the appellant in that case had demonstrated a pattern of conduct amounting to an abuse of process under section 5(1)(a).

In the present appeals, the Region indicates that the appellant submitted a total of 16 "formal requests" since the commencement of his legal action against the Region. In addition to the formal requests, the Region states that oftentimes, the appellant's initial request would give rise to more questions and amendments to the request which would require further response from it. The Region also points out that the requests "have been made within a very short period of time." Between October 30, 1998 and November 23, 1998, the appellant submitted three requests; between May 25, 2001 and July 25, 2001, he made six requests. In addition the Regions submits that all of the requests are related and that three of the requests currently under appeal are "duplicative".

The Appellant's Submissions

The appellant confirms that he has indeed made 16 requests under the *Act* to the Region for various types of information. He points out that only three of those requests were made in 1998, two in 1999, one in 2000, seven in 2001 and three to date in 2002. The appellant indicates that he did not appeal the Region's decisions not to disclose records responsive to any of his requests in 1998 or 1999. He then goes on to describe the reasons behind the requests which he has made, some of which appear to relate to his on-going litigation with the Region while others do not.

Findings

Included with the Region's representations was a detailed review of the status of each of the appellant's requests and, in several cases, the subsequent appeals which resulted from the decisions which it issued. In my view, the appellant's actions in filing requests for information do not constitute a "pattern of conduct" within the meaning of section 5.1 of Regulation 823. While the records responsive to several of the requests may be overlapping, the requests seek discrete information relating to various construction projects undertaken by the Region, including those in which the appellant tendered a bid, legal proceedings in which the Region was involved and its legal expenses, the process by which it retained outside counsel, complaints made by counsel to the Law Society of Upper Canada about the appellant's solicitor and the Region's agreement with a named supplier. The requests are varied and cover a wide range of subject matters relating to matters of interest to the appellant.

In Order M-850, Assistant Commissioner Mitchinson defined the term "pattern of conduct". He stated that, for such a pattern to exist, one must find "recurring incidents of related or similar requests on the part of the requester (or with which the requester is connected in some material way)". He also pointed out that, in determining whether a pattern of conduct has been established, the time over which the behaviour occurs is a relevant consideration. I agree with this approach and adopt it for the purposes of my order.

Specifically, I find that the Region has failed to establish that in the present situation there exists the requisite "recurring incidents of related or similar requests". While there exists some relation between the requests submitted by the appellant, I find that they are sufficiently distinct and are not closely related or duplicative as was the case in Order MO-1872. As the Region has not satisfied me that there exists the requisite pattern of conduct under section 5.1(a), it is not necessary for me to determine whether the appellant's conduct amounts to an abuse of process or that it would interfere with the operations of the Region.

Section 5.1(b)

Bad Faith

The Region's Submissions

The Region also submits that the requests fall within section 5.1(b) as the requests were made in bad faith, as well as for a purpose other than to obtain access. The Region relies on the reasoning of Assistant Commissioner Mitchinson in Order M-664 where he defined the scope of the term "bad faith" as follows:

> . . . 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 ubiquity; it is different from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with further design or ill will.

The Region also relies on the appellant's own letters to it and to this office as evidence that he is "attempting to use the process to intimidate and threaten the Region." It goes on to quote from correspondence received from the appellant in which he uses language which the Region construes as "threatening" personal liability against its Freedom of Information and Protection of Privacy Co-ordinator (the FOIC) for the disclosure of the appellant's identity. The Region also refers to correspondence from the appellant in which he alleges bad faith and misconduct on the part of the Region and states that "Our relationship with you will likely continue for an indefinite number of years, let's make the best we can of it."

The Appellant's Submissions

The appellant argues that the requests were made to assist him in the on-going litigation with the Region and may disclose "improprieties with the expenditure of public funds; and show other improprieties in the conduct of people who hold public positions of trust."

Findings

Under section 5.1(b), a request will be defined as "frivolous" or "vexatious" where the head of an institution is of the opinion, on reasonable grounds, that the request is made in bad faith or that it was made for a purpose other than to obtain access. There are no further requirements to be met. In particular, no "pattern of conduct" is required.

In Order MO-1168-I, Adjudicator Laurel Cropley made the following findings with respect to a determination of whether a request was made in bad faith. She found that:

> In Order M-864, former Assistant Commissioner Glasberg found that, in the situation where the appellant used information to assist his wife with her legal proceeding against the institution, the access request was filed for legitimate reasons. Having found that the objects of the appellant's requests were genuine and that they were not designed to harass the Board, he concluded:
>
> > I find that the appellant filed his access requests for a legitimate, as opposed to a dishonest, purpose and that he was not operating with an obvious secret design or ill will.
>
> With these comments in mind, I have considered the Board's representations. I will begin by saying that I am not persuaded that the Board has demonstrated that the appellant's request was made in "bad faith". The *Act* provides a legislated scheme for the public to seek access to government held information. In doing so, the *Act* establishes the procedures by which a party may submit a request for access and the manner in which a party may seek review of a decision of the head. It is the responsibility of the head and then the Commissioner's office to apply the provisions of the *Act* in responding to issues relating to an access request. In my view, the fact that there is some history between the Board and the appellant, or that records may, after examination, be found to fall outside the ambit of the *Act*, or that the appellant may have obtained access to some confidential information outside of the access process, in and of itself is an insufficient basis for a finding

> that the appellant's request was made in bad faith. The question to ask is whether the appellant had some illegitimate objective in seeking access under the *Act*. I am not persuaded that because the appellant may not have "clean hands" in its dealings with the Board, that its reasons for requesting access to the records are not genuine.
>
> In a similar vein, there is nothing in the *Act* which delineates what a requester can and cannot do with information once access has been granted to it (see: Order M-1154). In fact, there are a number of exemptions (such as section 10(1), for example) which recognize that disclosure to the public could reasonably be expected to result in some kind of harm. In orders dealing with section 14(1) of the *Act*, this office has acknowledged that disclosure of personal information to individuals other than the individual to whom the information relates under the *Act* is, effectively, disclosure to the world, and this is a consideration to be taken into account in determining whether the exemption applies. In my view, the fact that the appellant may decide to use the information obtained in a manner which is disadvantageous to the Board does not mean that its reasons in using the access scheme were not legitimate.
>
> It appears from the nature of the request and the history between the Board and the appellant, that the appellant was not satisfied with the explanation for non-renewal of its contract with the newly amalgamated Board, and that it is seeking access to records relating to the Board's decision. I am satisfied that the appellant is seeking the information for genuine reasons, even though those reasons may be against the Board's interests. Therefore, I find that the Board has not provided me with sufficient evidence to establish that it had reasonable ground for believing that the appellant's access request was made in bad faith. Therefore, the Board cannot rely on this part of section 5.1(b) of the regulation to decline to process the appellant's access request.

While I agree that the language used by the appellant in his correspondence with the Region was often intemperate, I cannot agree that this evidence is sufficient to demonstrate that his requests have been made for some dishonest or illegitimate purpose. As was the case in MO-1168-I, the requests from the appellant were made for a genuine purpose. The appellant was, and continues to be, involved in litigation with the Region and many of his requests are motivated by a desire to reap some advantage in that proceeding by making use of the access provisions under the *Act*. Another motive for seeking access under the *Act* appears to entail an examination by the appellant into the legitimacy of certain policies and procedures which the Region has followed in the tendering of its contracts. Finally, the appellant is of the view that the Region's counsel has acted inappropriately in its dealing with his solicitor and is interested in obtaining access to other records which may tend to substantiate his views. I cannot agree that these purposes are either illegitimate or dishonest, however disadvantageous they may appear to the Region.

I find that the Region has failed to establish that the requests made by the appellant were made in bad faith for the purposes of section 5.1(b).

Made for a Purpose Other Than to Obtain Access

The Region's Submissions

Again, the Region relies on the correspondence sent by the appellant to its FOIC to demonstrate that the purpose in making the requests was not limited to obtaining access under the *Act*. It submits that:

> Its [the appellant] threats to bring actions for damages and its statement that the Region will be receiving requests "indefinitely" indicate the use of these requests for their "nuisance value". In addition, the requests are designed to give [the appellant] support for its claims of "bad faith" in its civil action against the Region. In this regard, [the appellant] is not simply attempting to access information from the Region that might be used in the litigation, it is attempting to use its interaction with the Region in the access process itself to create evidence for use in the civil lawsuit. This is evident in its reference in one letter to using an interaction with [the FOIC] as evidence of bad faith in another forum. In addition, [the appellant] has compiled a supplementary affidavit of documents in the civil action which includes selected correspondence with the Region in these MFIPPA matters.
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> The Region acknowledges that the fact that the requester intends to use the information obtained through the access process in litigation against the institution cannot, in and of itself, server as a reason to find a request "frivolous and vexatious"(Order MO-1427, MO-1488). However, it is submitted that such evidence may be examined as part of the overall context for the request when there is also other evidence that the requests are frivolous and vexatious. In particular, some consideration should be given to the purpose of the access request when there is additional evidence that the requester has sought to harass or otherwise abuse the process.
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> While [the appellant] is technically seeking "access" to the records, to ignore any of the broader purposes for which such records are sought risks reading the protections in section 5.1(b) out of the *Act*. Simply put, any requester can make the argument that it has made its request for the purpose of gaining access, in the sense that it wants to have the documents or to see them. Very rarely will an institution be able to show that there is absolutely no purpose related to access. However, in many cases obtaining access to the records may be a means to an end which is completely unrelated to the goals of the *Act*, namely greater public accountability and which in fact an abuse of the system. In such cases, evidence of these broader purposes should be considered.
>
> Furthermore, it is submitted that an MFIPPA request should not be examined in a contextual vacuum when there is clear evidence that the requester itself has put other civil actions in issue. In such cases, it cannot be ignored that there is an established procedure under Ontario's *Rules of Civil Procedure* for litigants to

> obtain those documents that are relevant to the issues at trial. [The appellant] has chosen not to challenge the Region's decision not to produce the records it now seeks through that process. It is submitted that the *Act* should not be abused, to give litigants access to records that they could not have obtained had they sued a private body rather than a municipality.

The Region goes on to distinguish the facts of the present appeal from those extant in the decisions which gave rise to Orders MO-1427 and MO-1488. It further relies on the fact that the appellant made 16 separate requests following the institution of its civil action and that it is of the view that the appellant indicates that he requires the information contained in the records for the purpose of pursuing his litigation against the Region. The Region again points out that it has fulfilled all of its obligations for disclosure under the *Court of Justice Act* (the *CJA)*.

Findings

In Order MO-1168-I, Adjudicator Cropley found that:

> In my view, the fact that once access is obtained, the appellant intends to use the document for a particular purpose, for example to take issue with the Board's decision-making or to bring action against the Board, does not mean that the request is "for a purpose other than to obtain access" within the meaning of section 5.1(b) of the Regulation.
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> In Order M-860, former Inquiry Officer John Higgins noted:
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> > ... if the appellant's purpose in making requests under the *Act* is to obtain information to assist him in subsequently filing a complaint against members of the Police, in my view this does not indicate that the request was for a purpose other than to obtain access; rather, the purpose would be to obtain access **and** use the information in connection with a complaint.
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> In Order M-906, former Inquiry Officer Higgins observed that:
>
> > ... to find that a request is "for a purpose other than to obtain access" and thus "frivolous or vexatious" 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, which exists in part as an accountability mechanism in relation to government organizations.
>
> I agree completely with these comments. I am satisfied that the request was made for the purpose of obtaining access. Moreover, I find that this purpose is not contradicted by the possibility that the appellant may also intend to use the documents against the Board once access is granted. Therefore, I find that the

> Board cannot rely on this part of section 5.1(b) of the regulation to decline to process the appellant's access request.

In Order MO-1488, Adjudicator Cropley was faced with a very similar situation to that in the present case. The appellant in that appeal was seeking access to records which, in his view, would further a legal action which he had commenced against the institution. Adjudicator Cropley found that:

> I am satisfied that the requests were made for the purpose of obtaining access. Moreover, I find that this purpose is not contradicted by the possibility that the appellant may also intend to use the documents against the City once access is granted. Similarly, this purpose is not contradicted by the fact that he may not be able to tender the information as evidence in his Small Claims Court action.

I adopt this reasoning for the purpose of the present appeal. I find that the fact that the appellant in this matter may choose to make use of the documents which he obtains as a result of his requests under the *Act* to further his litigation against the Region is not determinative in demonstrating that the request was made for a purpose other than to obtain access.

With respect to the Region's arguments that the disclosure provisions under the *CJA* operate to create a separate and distinct mechanism for obtaining access to information when parties are involved in litigation, this question has been addressed in a number of previous orders, including MO-1488 where Adjudicator Cropley held that:

> On a related note, previous orders of this office have found that the *Act* establishes a regime and process for obtaining access to records which is separate and distinct from the discovery or disclosure mechanisms related to court actions (Orders 48, P-609, PO-1688, M-982, M-1109, MO-1192 and MO-1477), as noted by Adjudicator Liang in Order MO-1427:
>
> > The District asserts that the appellant already has "all of the documentation", and further, that it will be produced a second time as part of the litigation between the parties.
> > …
> >
> > [E]ven if it is true that many of the documents will eventually be produced as part of the litigation between the parties, this is no bar to having a request dealt with in the usual manner under the *Act*, and is not a basis for finding the request "frivolous or vexatious". The scheme under the *Act* for obtaining access to records in the hands of government institutions exists separately from discovery processes associated with civil actions: see, for example, Order PO-1688.
>
> In my view, this separation exists with respect to issues relating to the admissibility of evidence in a court action generally. On this basis, the appellant

> is entirely within his rights to request information from the City, regardless of whether it is subject to disclosure, or ultimately determined to be inadmissible in the court action.
>
> Moreover, it is important to point out that Section 1 of the *Act* provides a general right of access to records under the control of institutions, including the City. It does not limit that right to a specific purpose, nor does it require a requester to justify or even identify the reason for making a request (see: Order MO-1477).

I adopt the reasoning set forth above and dismiss the Region's arguments that the appellant is somehow precluded from making a request under the *Act* for information which may be related to the subject matter of litigation involving himself and the institution.

Conclusion

I find that the criteria in sections 5.1(a) and (b) of Regulation 823 have not been satisfied and that there exists a reasonable basis for finding that the requests made by the appellant were not "frivolous or vexatious" within the meaning of section 4(1)(b) of the *Act.*

ORDER:

1. I do not uphold the Region's decisions that the requests in Appeals MA-010286-1, MA-010306-1 and MA-010363-1 are frivolous or vexatious.

2. I order the Region to provide the appellant with decision letters for each of these appeals in accordance with the requirements of section 19 of the *Act*, using the date of this order as the date of the request, and without recourse to a time extension under section 20 of the *Act*

Original signed by: June 11, 2002
Donald Hale
Adjudicator