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

ORDER P-1100

Appeal P_9500650

Ontario Insurance Commission

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BACKGROUND:

The appellant submitted a request under the Freedom of Information and Protection of Privacy Act (the Act) to the Ontario Insurance Commission (the OIC). The request pertains to arbitration orders issued by the OIC for the period from June 1990 to the date of the request. The information sought in respect of these orders is as follows:

(1) the number of OIC arbitration orders which have been appealed;
(2) the number of appeals from arbitration orders which have been disposed of;
(3) the number of settlement orders which have been appealed;
(4) the number of appeals from settlement orders which have been disposed of.

On behalf of the OIC, the Ministry of Finance issued a decision indicating that responsive records do not exist. This decision was appealed to the Commissioner's office, and as a result, Appeal P-9400583 was opened. I dealt with that appeal in Order P-871.

Order P-871 required the OIC:

> ... to conduct a further search for records responsive to Parts 1 and 2 of the request, as summarized at the beginning of this order, and interpreting those parts of the request as referring to **all** appeals from arbitration orders filed during the time period specified in the request, and to advise the appellant in writing of the results of this search, within thirty (30) days after the date of this order.

In response to Order P-871, the OIC advised the appellant of the number of appeals of arbitration orders received as of the date of its response (re Part 1 of the request) and the number of finalized appeals (Part 2). The OIC stated that the latter number did not include appeals which had been withdrawn or settled.

Once again, the appellant filed an appeal. This led to the opening of Appeal P-9500181. For administrative reasons, this file number has now been changed to Appeal P-9500650.

NATURE OF THE APPEAL/PRELIMINARY ISSUES:

This appeal is based on the appellant's view that the OIC should possess records which would disclose the number of arbitration appeals to the OIC which have been withdrawn or settled. The Commissioner's office sent a Notice of Inquiry to the appellant and the OIC. The Notice of Inquiry indicated that the issues to be considered are:

(1) whether the OIC's decision letter in response to Order P-871 was a proper decision letter under the Act, and
(2) whether the number of withdrawn or settled OIC arbitration appeals can be ascertained through the OIC's tracking system.

In response to the Notice of Inquiry, representations were received from both parties. The representations submitted by the OIC raised a new issue by arguing that the appeal is frivolous, vexatious and/or an abuse of process. Subsequent to the receipt of the OIC's representations, similar issues were canvassed in some detail in Order M-618, issued by

Commissioner Tom Wright. Accordingly, a copy of Order M-618 was sent to both parties to this appeal, and they were invited to submit supplementary representations. Both parties submitted supplementary representations.

The appellant objected to the fact that the OIC was permitted to argue, at a late stage in the appeals process, that the appeal is frivolous, vexatious and/or an abuse of process. In the appellant's view, this is similar to the late raising of discretionary exemptions, which is usually not permitted. In my view, an argument that an appeal is an abuse of process is not analogous to an attempt to claim a new discretionary exemption. If sustained, an argument that an appeal is an abuse of process could undermine the legitimacy of the appeal itself, whereas the question of whether a new exemption can be claimed may be characterized as a process issue **within** a properly constituted appeal. On this basis, it can be seen that the abuse of process question is of a more fundamental character, and I am therefore prepared to consider it in this case.

In Order M-618, the Commissioner considered whether, under the present wording of the statute, it would be appropriate to apply the concepts of "frivolous" and/or "vexatious" in deciding whether requests and/or appeals should be permitted to go forward. In that regard, Commissioner Wright commented as follows:

> In my view, the concepts of "frivolous" or "vexatious" do not sit comfortably with a freedom of information regime which grants an open-ended or unqualified right of access to public information of which government institutions are only the stewards.

He went on to find that a legislative amendment would be required to permit him to apply these concepts. I agree. Although such an amendment is currently being considered by the legislature, it has not been passed into law, and therefore I will not consider whether the request which led to the appeal, or the appeal itself, is "frivolous" or "vexatious".

However, in the same order (M-618), Commissioner Wright made a finding that the requester in that case had abused the access process, and imposed conditions on future requests by that individual. Therefore, in this appeal, I will consider whether the appellant has abused the access process.

The OIC's arguments in this regard relate primarily to the volume of requests it has received from the appellant, and the varied nature of those requests. The OIC also refers to litigation undertaken against it by the appellant, a number of privacy complaints submitted by the appellant to this office concerning the OIC, the number of appeals filed by the appellant from OIC access decisions, and the volume of faxes and telephone calls received from the appellant. The OIC also refers to the appellant's visits to its premises.

In Order M-618, the Commissioner stated that "I am not prepared to say that this fact of volume alone would necessarily amount to an abuse of process." Later in the order, he stated that "[t]aken together with other factors, however, the excessive volume of requests and appeals may amount to an abuse of process." The "other factors" which were found to justify a conclusion that the appellant in that case had abused the access process included:

- the varied and broad nature of the requests together with the fact that identical requests were submitted to a number of different government organizations;
- a dramatic increase in the number of requests submitted after the institution applied for an injunction based on the requests being "frivolous, vexatious and an abuse of process"; and
- the association of the requester with an individual whose stated purpose in making freedom of information requests was to "... harass government and to burden or break the system".

In my view, these factors are not the only ones which could lead to a finding of abuse of process, but they provide examples of such factors.

I also note the Commissioner's comment in Order M-618, that "[o]ther instances of abuse of process may arise in the future. However, from my experience in administering the Acts, I believe such instances would be extremely rare."

In my view, the only factors mentioned by the OIC which suggest that the appellant may be abusing the access process relate to the volume and variety of requests he has submitted to the OIC. I do not agree that the other factors mentioned by the OIC indicate that the appellant is abusing the access process.

The circumstances here are very different from those described in Order M-618. The number of requests submitted by the appellant (as referred to in the OIC's submissions) is dramatically smaller than the volume submitted by the requester in Order M-618. In addition, they were all submitted to the same institution. Moreover, the appellant is a former arbitration client of the OIC's, who has instituted a lawsuit relating to the arbitration, suggesting a possible reason for some of his requests.

For these reasons, I am not prepared, at present, to find that the appellant is abusing the access process.

DISCUSSION:

ADEQUACY OF DECISION LETTER

This question was posed in the Notice of Inquiry because it appeared that information about the number of OIC arbitration appeals which have been withdrawn or settled could be obtained by a manual review of the appeal files, and this was not referred to in the decision letter.

However, since the issuance of the Notice of Inquiry, the OIC has issued a fee estimate to the appellant for conducting such a manual review. In my view, that disposes of this issue.

WHETHER THE NUMBER OF WITHDRAWN OR SETTLED APPEALS CAN BE ASCERTAINED FROM THE OIC'S TRACKING SYSTEM

The OIC's representations indicate that the OIC's tracking system is rudimentary and has no capability to determine the number of arbitration appeals which have been withdrawn or settled.

I accept this evidence and I am satisfied that the OIC's tracking system does not reveal the number of arbitration appeals which have been withdrawn or settled.

I am satisfied that the OIC has taken reasonable steps to respond to the request and to comply with the provisions of Order P-871.

ORDER:

This appeal is denied.

Original signed by: January 17, 1996
John Higgins
Inquiry Officer