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

ORDER M-860

Appeal M_9600148

Metropolitan Toronto Police Services Board

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NATURE OF THE APPEAL:

The appellant made a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) to the Metropolitan Toronto Police Services Board (the Police) for copies of all correspondence between the appellant and the Chief of Police as well as records relating to any follow up action taken. The Police responded by stating that the request was being refused because it is frivolous or vexatious.

The appellant filed an appeal of this decision.

After receiving the appeal, this office sent a Notice of Inquiry to the Police. This notice indicated that the Police have the preliminary onus of establishing that the request in question is either frivolous and/or vexatious, and that the rules of procedural fairness require that the appellant be able to adequately respond to the case put forward by the institution.

In this situation, once the Notice of Inquiry has been sent to the institution and the institution's representations are received, a decision maker from this office has two options. If he or she feels that the institution has not provided evidence of a reasonable basis for concluding that the request is frivolous and/or vexatious, and therefore has not discharged its "preliminary" onus, then the institution will be ordered to provide the requester with a decision based on the substantive provisions of the Act. If, on the other hand, the decision maker feels that the institution has provided some evidence of a reasonable basis for concluding that the request is frivolous and/or vexatious, then it is necessary to contact the appellant and provide him or her with an opportunity to respond to this evidence and to submit representations.

In this case, once the representations of the Police were received, this office provided the appellant with information about the Police's case, and the opportunity to make representations. However, the appellant did not submit representations.

It is important to note that a decision to contact the appellant does not automatically mean that, in the absence of representations from the appellant, a finding will be made in favour of the Police. This is because the preliminary burden on the institution will be discharged if there is any evidence which could suggest that the request may be frivolous or vexatious. Once the appellant has been contacted, the decision maker will consider all the evidence and decide whether, on the balance of probabilities, the evidence supports a finding that the request is frivolous or vexatious.

If the request is found to be frivolous or vexatious, then the appeal must be dismissed; if not, then the appellant is entitled to receive a substantive decision under the Act.

DISCUSSION:

Several provisions of the Act and Regulation are relevant to the issue of whether the request is frivolous or vexatious. The provisions of the Act relating to "frivolous or vexatious" requests were added by the Savings and Restructuring Act, 1996. Regulation 823, made under the Act, was amended shortly thereafter to add the provision reproduced below. These provisions read as follows:

Section 4(1) 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, ...
>
> > (b) 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.

I will organize my analysis of whether the request is frivolous or vexatious in reference to the two subsections of section 5.1 of the Regulation.

Section 5.1(a)

In their representations, the Police indicate that this request is the tenth one they have received from the appellant. On this basis, the Police argue that the request is "part of a pattern of conduct that amounts to an abuse of the right of access".

The requests have been submitted over a period of approximately one year. The following list summarizes the subject matter of these requests:

- copies of all correspondence between the appellant and the Chief of Police as well as records relating to any follow up action taken, if any (the current request)
- complete file re an investigation instigated by the appellant, conducted by the Public Complaints Investigation Bureau of the Police
- extracts of a Police Complaints Commission (PCC) inquiry
- complete notes of PCC inquiry into the appellant's arrest in May 1995 (apparently different from the PCC inquiry referred to in the previous bullet point)
- all records "of" the appellant since his arrival in Canada in 1987
- complete inquiry notes regarding the appellant's arrest in May 1995
- complete notes of the police inquiry into the arrest of the appellant in September 1988
- request to Ministry of Attorney General for copy of the entire PCC complaint investigation file; this request was partially transferred to the Police under section 25(2) of the provincial Freedom of Information and Protection of Privacy Act due to greater interest
- complaints and inquiry file relating to alleged theft perpetrated on the appellant
- copy of a complaint and police report and results of investigation relating to three named individuals.

In Order M-850, former Assistant Commissioner Tom Mitchinson commented on the meaning of "pattern of conduct" as follows:

> [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).

The meaning of "abuse of the right of access" was also discussed by former Assistant Commissioner Mitchinson in Order M-850. He commented on this as follows:

> In determining what constitutes "an abuse of the right of access", I feel that the criteria established by Commissioner Tom Wright in Order M-618 [decided before the "frivolous or vexatious" amendments were added to the Act by the Savings and Restructuring Act, 1996] are a valuable starting point. Commissioner Wright found that the appellant in that case (who is not the same person as the appellant in this case) was abusing processes established under the Act.

> The Commissioner described in detail the factual basis for the finding that the appellant had engaged in a course of conduct which constituted an abuse of process. The Commissioner found that an excessive volume of requests and appeals, combined with four other factors, justified a conclusion that the appellant in that case had abused the access process. The four other factors were:
>
> 1. the varied nature and broad scope of the requests;
>
> 2. the appearance that they were submitted for their "nuisance" value;
>
> 3. increased requests and appeals following the initiation of court proceedings by the institution;
>
> 4. the requester's working in concert with another requester whose publicly stated aim is to harass government and to break or burden the system.
>
> Another source of assistance for interpreting the words "abuse of the right of access" is the case law dealing with the term "abuse of process".
> ...
>
> To summarize, the abuse of process cases provide several examples of the meaning of "abuse" in the legal context, including:
>
> - proceedings instituted without any reasonable ground;
> - proceedings whose purpose is not legitimate, but is rather designed to harass, or to accomplish some other objective unrelated to the process being used;
> - situations where a process is used more than once, for the purpose of revisiting an issue which has been previously addressed.
>
> In my view, although this is not intended to be an exhaustive list, these are examples of the type of conduct which would amount to "an abuse of the right of access" for the purposes of section 5.1(a).

In analysing the contention of the Police that this request is part of a pattern of conduct which amounts to an abuse of the right of access, I will be considering the relationship between **this request** and those previously submitted. The fact that previous requests may overlap with each other will not, on its own, establish that **this request** is part of such a pattern.

In this case, I can only see a possible overlap between the current request and one of the previous ones (i.e. the request which refers to all records "of" the appellant since his arrival in Canada). The current request is fairly specific, seeking access to letters from the appellant to the Chief, and records relating to any follow up action taken with respect to them. The earlier request is much broader. In this situation, I find that these two requests are too different for me to find that the access process has been used more than once to revisit an issue previously addressed.

The Police also submit that the appellant's purpose in making his requests relates to his frequent allegations that he has been mistreated by police officers. While this argument is primarily directed at section 5.1(b) of the Regulation, it could also be relevant to the issue of ulterior purposes in terms of abuse of process. However, based on the information provided to me, I am unable to conclude that these allegations indicate an intention to harass, or any other illegitimate purpose. Nor am I satisfied that the request was submitted to accomplish an "objective unrelated to the process being used" (i.e. access under the Act) even if the purpose behind the request was to obtain evidence in support of the appellant's allegations. It is perfectly proper, and not "unrelated to the process being used", for requesters to seek access in order to make use of a record for their own purposes once access is obtained. Therefore, I find that this particular submission does not justify a finding that the request is part of a pattern of conduct amounting to an abuse of process.

Nor, in my view, does the evidence before me establish that any of the other criteria mentioned above as indicia of abuse have been met in the circumstances of this appeal. The Police have not made any other arguments with respect to the "abuse of the right of access" provisions of section 5.1(a), nor have they argued that the pattern of conduct would interfere with their operations.

Accordingly, I have concluded that the evidence does not support a finding that the standards for "frivolous or vexatious" in section 5.1(a) of the Regulation have been established in this case.

Section 5.1(b)

As noted above, the Police have argued that, based on the allegations of the appellant about misconduct by police officers, his access requests are for a purpose other than to obtain access within the meaning of section 5.1(b). Based on the wording of that section, I must determine whether **this** request is made for a purpose other than to obtain access, although as stated in Order M-850, a pattern of conduct may be a relevant factor in making that determination. For this reason, I have considered all the requests referred to by the Police in deciding this issue.

In my view, it is possible for a piece of correspondence to have more than one legitimate purpose: i.e. to request access to certain records **and** at the same time register a complaint. Moreover, 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. Under the circumstances, neither the representations of the Police, nor the copies of the requests which have been provided to me, satisfy me that the requests were for a purpose other than to obtain access within the meaning of section 5.1(b), and I find that the Police have not established such a purpose with respect to any of these requests including the current one.

The Police also argue that the request was made in bad faith within the meaning of section 5.1(b). In Order M-850, former Assistant Commissioner Mitchinson adopted the following definition of this term from Black's Law Dictionary (6th ed.):

> 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 fulfill 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.** [emphasis added]

He further indicated that, in his view, the part of this definition which is highlighted in bold type is most useful in interpreting this section. I agree.

In my view, the Police have not demonstrated any "conscious doing of a wrong" by the appellant in connection with his allegations or requests, nor any "dishonest purpose or moral obliquity". I find that this aspect of section 5.1(b) has not been established.

In summary, in my view, the evidence does not support a finding that the standards for "frivolous or vexatious" in section 5.1(b) of the Regulation have been established in this case.

Conclusions

Since I have found that the evidence does not bring the request within the standards established by section 5.1 of the Regulation, regarding which requests are to be considered "frivolous or vexatious", I find that the request is not frivolous or vexatious within the meaning of the Act.

Nevertheless, there may be some overlap between the responsive records in this case and those previously dealt with by the Police in responding to the appellant's access requests. Since the appellant has submitted a number of previous requests, in my view, this situation resembles the one I commented on in Order M-717, where I stated:

> In my view, in the particular circumstances of this case, the Board is not required to give access to the previously disclosed records for a second time. I find that, with respect to these records, the Board has already fulfilled its obligations under the Act by its previous disclosure.

Similarly, in this case, where the Police have made an access decision, in the context of a previous request by the appellant, concerning a record or records which are also responsive to the current request, I will not order them to do so again. Therefore, my order that the Police respond to the request will not oblige them to reconsider records previously dealt with.

In closing, I note that, in their representations, the Police indicate that if this request is found to be frivolous or vexatious, they would not automatically deny future requests by the appellant on this basis. In my view, this position is entirely consistent with the wording of the relevant provisions of the Act. Similarly, my decision that this request is **not** frivolous or vexatious does not mean that future requests by the appellant will necessarily produce the same result. This must be decided on a case-by-case basis.

ORDER:

1. I do not uphold the Police's decision that the request is frivolous or vexatious.

2. Subject to Provision 3, I order the Police to make an access decision in response to the appellant's request, in accordance with the requirements of sections 19, 21 and 22 of the Act, as applicable, treating the date of this order as the date of the request, and to send me a copy of the decision letter (c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1) when it is sent to the appellant.

3. Provision 2 of this order does not require the Police to make an access decision regarding any records which were included in previous access decisions relating to requests by the appellant. Such records need only be listed in the decision letter or an appendix, with an indication that the record was dealt with previously, and a notation of whether access was granted or not in the previous decision.

Original signed by: November 15, 1996
John Higgins
Inquiry Officer