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

ORDER P-1311

Appeal P_9600238

Ministry of Finance

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BACKGROUND:

The appellant has had an ongoing dispute with the Ministry of Finance (the Ministry) and its predecessors concerning the assessment of his property for municipal realty tax purposes. The appellant believes that errors have been made in his assessment because of an over measurement and that, as a consequence, he has paid too much in property taxes.

He submitted a request to the Ministry under the Freedom of Information and Protection of Privacy Act (the Act), for the following records:

(1) Records confirming that the finished basement was measured;
(2) A particular Assessment Review Board (ARB) order paper;
(3) Notes taken by the Ministry's Valuation Officer of a telephone conversation with another named individual, relating to the status of the appellant's complaint about his assessment;
(4) Notations on several slips of paper, made by various assessors;
(5) Records relating to actions taken by the Valuation Officer in connection with the appellant's complaint to the Ontario Ombudsman;
(6) A directive specifying that calls concerning the appellant's disagreement with the Ministry be passed on to a named Ministry lawyer, or any other correspondence referring to this issue; and
(7) A copy of the correction of an alleged error in a letter to the Ombudsman by an Assistant Deputy Minister at the Ministry.

The Ministry responded that access was refused because "we are of the opinion that your 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 Ministry".

The appellant filed an appeal of this decision. After receiving the appeal, this office sent a Confirmation of Appeal/Notice of Inquiry to the Ministry. This notice indicated that the Ministry has 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 case, once the representations of the Ministry were received, this office provided the appellant with information about the Ministry's case, and the opportunity to make representations. After receiving this information, the appellant submitted representations to this office. I have considered all materials submitted by the parties in reaching my decision in this appeal.

DISCUSSION:

FRIVOLOUS OR VEXATIOUS REQUESTS

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 460 (the Regulation), made under the Act, was amended shortly thereafter to add the provision reproduced below.

Section 10(1)(b) of the Act specifies that every person has a right of access to a record or part of a record in the custody or under the control of an institution unless the head of an institution is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

Sections 27.1(1)(a) and (b) of the Act indicate that a head who refuses to provide access to a record because the request is frivolous or vexatious, must state this position in his or her decision letter and provide reasons to support the opinion.

Sections 5.1(a) and (b) of the Regulation provide some guidelines for defining the terms frivolous and vexatious. They prescribe that a head shall conclude that a request for a record or personal information 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.

On appeal, the ultimate burden of demonstrating that there are reasonable grounds for concluding that the request was frivolous or vexatious rests with the institution, in this case the Ministry (Orders M-850 and M-860).

The language used in the Ministry's decision letter is almost a verbatim quote of section 5.1(a) of the Regulation. In its representations, however, the Ministry states:

> The Ministry claims that this request is frivolous and vexatious under the authority of section 5.1(b) of Regulation 460 ...

I will therefore consider both parts of section 5.1 in assessing the Ministry's claim that the request is frivolous or vexatious.

The submissions of the parties are lengthy and complex. To facilitate the analysis of the submissions, I will begin by summarizing them. In my summary, I will dispose of submissions which, in my view, are either not of assistance, or not substantiated. I will then consider those which **are** relevant in my subsequent analysis, under separate headings, of whether the Ministry has made out a case under sections 5.1(a) and (b) of the Regulation.

The Ministry's Case

The Ministry's counsel begins the Ministry's representations by stating as follows:

> It is my conclusion that the Ministry made mistakes, but it made every effort to correct them available under the law. Having incorrectly assessed the property, the Ministry went to the municipality to ask them to change the assessment for prior years and to refund the taxes. The municipality would only do so for two previous years. It is very difficult to return taxes after they have been spent in a jurisdiction which literally finances itself one year at a time. Given the imprecise nature of assessments generally, wide refund policies could bring municipalities to their knees. The law provides no recourse for old mistakes.

Attached to the Ministry's submissions is a letter to the appellant from the Ontario Ombudsman. The letter indicates that the Ombudsman's investigation, in response to a complaint by the appellant, revealed "discrepancies" in the way the appellant's assessment was handled, but not any intention to harass the appellant as he had alleged.

In addition, the Ministry argues that:

> ... this request has a purpose other than to obtain access[;] that purpose is to extend the appellant's assessment complaint into yet another forum (the IPC and from there the Criminal Court) and to show another forum how the Appellant was victimized by the incorrect assessment. Needling and annoying the Ministry is his only hope at this point by wasting of the Ministry's time on an assessment matter which was *res judicata* in 1993.

In essence, these arguments appear to be aimed at suggesting that, because the Ministry is of the view that no further recourse is available to the appellant regarding his assessment, he has no right to request information concerning it, or to consider other options to redress what he considers to be legitimate grievances. With respect, I do not accept this argument. I do not agree that, even if the proper avenues for reconsidering the assessment are now exhausted, this means that the appellant's requests are necessarily frivolous or vexatious within the meaning of the Act and Regulation.

The Ministry's representations go on to review each category of records requested by the appellant, and claim that these records have (with the exception of one exempt record) either been provided to the appellant in response to an earlier request submitted by him, or are not within the Ministry's custody or control.

In my view, this argument would be relevant to the issue of whether additional records exist, but it has no bearing on whether the request is frivolous or vexatious. In terms of the latter, the issue with respect to an apparent overlap between requests is (as I will discuss below) whether the requests are repetitious, or represent an attempt to use the same process to revisit a matter previously determined. These questions are **not** answered by claiming that the responsive records with respect to both requests are the same.

In terms of the relationship between the requests, the Ministry indicates that, in his previous request, the appellant asked for "... all his property and personal information on the file". In this vein, the Ministry also states:

> The information matter was *res judicata* as of the Appellant's last Order P-1186, May 23, 1996. Once a matter has been decided it is **futile** to keep reiterating it. Once no further action can be launched, it is now **frivolous** to keep launching a barrage of complaints, questions and requests. [original emphases]

This submission does relate to the question of whether the current request is part of a repetitious pattern, which I will consider below. I note that, other than the request I have just mentioned, the Ministry does not refer to any other previous requests by the appellant.

The Ministry's counsel also submits that the purpose of the request is to harass or annoy, and cites the unfaltering suspicion of wrongdoing, as well as the various allegations of criminal or quasi-criminal offences by Ministry staff which frequently appear in the appellant's correspondence. In my view, these submissions are relevant to the issue of whether the request is part of a pattern of conduct which constitutes an abuse of the right of access under section 5.1(a) of the Regulation, and to section 5.1(b), and I will consider them in my discussion of these sections, below.

The Ministry also argues that the appellant made the request in the hope of a refusal, which would then be used to justify a charge of "Public Servant Refusing to Deliver Property" under the Criminal Code. No further argument has been submitted to support this theory, nor in my view is it supported by the evidence before me. Accordingly, I will not consider it further.

Another submission by the Ministry, to the effect that the request is "speculative", is not of assistance in deciding whether the request is frivolous or vexatious. Since requesters typically do not know in detail what records an institution will have, many requests could be described as "speculative". In my view, this is not a proper basis for deciding that a request is frivolous or vexatious.

The Appellant's Case

As I have noted previously, the appellant's submissions are lengthy and detailed. In parts of his representations, the appellant:

- disputes the Ombudsman's findings on his complaint to that office concerning the assessments;
- cites case law (by means of a newspaper article) which in his view indicates that the Ministry should be "held accountable" for supplying the Ombudsman's report to this office as part of its representations;
- contends that various Ministry employees are involved in a "cover up" and that they have breached various provisions of the Criminal Code;
- requests that this office find a Ministry official "accountable" for errors in her correspondence, which was copied to several other Ministry employees;
- claims that some of the Ministry's actions are connected to the Ministry's alleged support for Market Value Assessment;
- complains about the activities of his M.P.P.; and

- requests that this office lay a charge against a Ministry employee under section 61 of the Act.

In my view, these particular submissions do not advance the appellant's case with respect to the issue in this appeal (i.e. whether the appellant's request is "frivolous or vexatious"). In fact, combined with frequent similar comments in his request letter and his letter of appeal, the references to possible criminal liability for what appear to be administrative errors lend some credence to the view that he may intend to harass the Ministry and its staff. I will refer to this in my discussion of sections 5.1(a) and (b) of the Regulation, below. Otherwise, I find that these submissions lack any connection to the criteria set out in sections 5.1(a) and (b) of the Regulation quoted above.

Moreover, despite the appellant's apparent expectation that I will take action with respect to these submissions (which I would characterize as allegations), I am not in a position to do so. In particular, this office has no authority to review or comment on the accuracy of the Ombudsman's report in this matter, nor to determine whether provisions of the Criminal Code have been breached. If the appellant feels that his privacy has been breached because correspondence to him was copied to other Ministry employees, he could file a complaint in that regard, directed to the Compliance Department of this office. In addition, this office has no role to play in the appellant's allegations concerning his M.P.P.

If the appellant believes that a person or persons should be charged under section 61 of the Act, he could attend on a Justice of the Peace and lay an information. In doing so, he should bear in mind the limitation periods in the Provincial Offences Act, and the fact that, for laying charges under some parts of section 61, the consent of the Attorney General is required.

The appellant's submissions also go into considerable detail concerning the history of his assessment, apparently with a view to persuading me that his version of events is correct. Again, the accuracy or otherwise of the assessment figures for his property at various times, and his other objections to the way in which his assessment has been handled, are not within my authority to rule on. However, despite this, it is clear that mistakes were made along the way, as the Ministry concedes in its own representations. On this basis, the appellant contends that he has a legitimate interest in the records he has requested. In essence, he is indicating that it is legitimate for him to ask about how, and why, problems arose with respect to the assessment of his property.

In my view, the history of the matter tends to support this submission of the appellant, whether or not any corrective action can later be taken with regard to property taxes which he may have paid as a result of previous assessment figures. The legitimacy or otherwise of the request is a significant factor in this appeal, and I will consider this in the discussion of sections 5.1(a) and (b), below.

The appellant also complains about the manner in which the Ministry dealt with his previous request, including:

- attempting to charge fees for access to his personal information at a time when the Act and applicable Regulation did not permit this (which has been changed by subsequent, and inapplicable, amendments); and
- deeming that a request was "registered", for the purposes of the time limit for the Ministry's response imposed by section 26 of the Act, nearly two months after the date on which the Ministry concedes it actually received the request.

While these actions did not arise in the context of the current request, I am of the view that, in combination with the problems the appellant has had with the assessment of his property, they may explain, and thus reduce the impact of, any possible intention to harass the Ministry which could be inferred from the appellant's allegations outlined above. In addition, the appellant indicates that some specific aspects of the current request arise from information disclosed in response to his earlier request. Again, in my view, these factors are relevant to some aspects of sections 5.1(a) and (b), and I will consider them in the discussion which follows.

Section 5.1(a)

The requirements of this section would be met if the Ministry establishes reasonable grounds for concluding 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.

In Order M-850, former Assistant Commissioner Tom 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)". I agree with this approach and adopt it for the purposes of my order. In this case, the evidence before me discloses only one previous request by the appellant. Under the circumstances, I am not persuaded that this is sufficient to support a finding that the request is part of a "pattern of conduct" as interpreted in Order M-850.

However, in view of the very detailed submissions I have received, I will also consider whether, if a "pattern of conduct" encompassing the request were established, there would be an "abuse of the right of access".

In Order M-864, Assistant Commissioner Irwin Glasberg reviewed the interpretation of "abuse of the right of access" in Order M-850. The interpretation in Order M-850 was derived, in part, from comments on the related topic of "abuse of the access process" in Order M-618 (issued by Commissioner Tom Wright before the "frivolous or vexatious" amendments were added to the Act and Regulation). Order M-864 summarized the interpretations in Orders M-618 and M-850 as follows:

> Following my review of these two orders, and taking into account the wording of section 5.1(a) of the regulations, I believe that there are a number of factors that are relevant in deciding whether a pattern of conduct amounts to an abuse of the right of access. Some of these considerations are listed below:
>
> (1) The actual number of requests filed

(Are they considered excessive by reasonable standards?)

(2) The nature and scope of the requests

(For example, are they excessively broad and varied in scope or unusually detailed? Alternatively, are the requests repetitive in character or are they used to revisit an issue which has previously been addressed?)

(3) The purpose of the requests

(For example (a) have they been submitted for their "nuisance" value, (b) are they made without reasonable or legitimate grounds, and/or (c) are they intended to accomplish some objective unrelated to the access process?)

(4) The sequencing of requests

(Do the volume of requests or appeals increase following the initiation of court proceedings by the institution or the occurrence of some other related event?)

(5) The intent of the requester

(Is the requester's aim is to harass government or to break or burden the system?)

While this list is not intended to be exhaustive, these factors represent the type of considerations which could define "an abuse of the right of access" for the purposes of section 5.1(a). I would also reiterate the view, originally expressed by Commissioner Wright in Order M-618, that a high volume of requests alone would not necessarily amount to an abuse of process.

Of the factors listed above, the Ministry's arguments and the circumstances of this case indicate the need to consider the following:

(1) the possibility that the requests were submitted for their nuisance value, or with an intention to harass, or without legitimate grounds, and
(2) the possibility that the request is revisiting an issue previously decided (i.e. access is being requested to the same records a second time).

With regard to point (1), as I noted above, I am of the view that the whole history of this matter, including the appellant's assessment problems, and the way in which his previous request was handled by the Ministry, would explain, and lessen the impact of, any appearance of an intention to harass which might attach to the appellant's requests. This would apply equally to any appearance that they were submitted for their nuisance value.

Moreover, the history of this matter overwhelmingly supports the view that the appellant had a legitimate reason to ask for the requested information and in my view this would, in the circumstances, outweigh any other purpose which might be attributed.

With regard to point (2), revisiting an issue previously decided (i.e. the appellant's earlier request), I am persuaded that, whether or not additional records actually exist, there is a sufficient distinction between the earlier request, which was general in nature, and the present one which is fairly specific. This view is supported by the appellant's submission to the effect that parts of the current request arise from information disclosed to him as a result of the earlier request.

Therefore, I have concluded that the request is not part of a pattern of conduct which amounts to an abuse of the right of access.

The Ministry has not argued that the request is part of a pattern of conduct which would interfere with its operations.

Accordingly, the Ministry has failed to establish the requirements of section 5.1(a) of the Regulation.

Section 5.1(b)

The requirements of this section would be met if the Ministry establishes reasonable grounds for concluding that the request is made in bad faith or for a purpose other than to obtain access.

In Order M-850, former Assistant Commissioner Mitchinson commented on the meaning of the term "bad faith", which is a prominent component of section 5.1(b). He indicated that "bad faith" is not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral underhandedness. He went on to conclude that it is different from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with secret design or ill will.

I adopt this approach for the purposes of the present appeal.

Since the concept of bad faith in section 5.1(b) and that of "an abuse of the right of access" under section 5.1(a) overlap to some extent, the same evidence can, on occasion, be used to prove or disprove that each of these provisions apply in a particular case.

In my view, the analysis set out above with respect to whether the request was submitted for its nuisance value, or with an intention to harass, would apply here. Having considered the evidence presented, and the arguments of the parties, I am satisfied that the appellant had legitimate reasons for submitting this request, which would outweigh any possible appearance of ill will, as might be indicated by an intention to harass or create a nuisance. In addition, in my view, the evidence does not support a finding that the appellant was consciously "doing a wrong", nor any dishonest purpose, moral underhandedness or secret design.

Similarly, I am not satisfied that the appellant's request was submitted "for a purpose other than to obtain access". As I noted in Order M-860:

> ... 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.

In this case, although the request letter contains allegations about the behaviour of the Ministry and some of its employees, I am nevertheless satisfied that the request was made for the purpose of obtaining access.

Based on the foregoing analysis, I find that the Ministry has not satisfied the requirements of section 5.1(b) of the Regulation.

Conclusions

Since I have found that the evidence does not bring the request within the guidelines established by section 5.1 of the Regulation, relating to the meaning of "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 already dealt with by the Ministry in responding to the appellant's previous access request. In the circumstances of this case, where the Ministry has already made an access decision in the context of a previous request by the appellant concerning a record or records which would also respond to the current request, it would not be reasonable to order the Ministry to make a second access decision regarding such records. Therefore, my order that the Ministry respond to the request will not oblige them to reconsider records previously dealt with.

ORDER:

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

2. Subject to Provision 3, I order the Ministry to make an access decision in response to the appellant's request, in accordance with the requirements of sections 26, 28 and 29 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 Ministry 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: December 2, 1996
John Higgins
Inquiry Officer

POSTSCRIPT:

In this case, I have found that the appellant's request was not frivolous or vexatious. However, as I noted in my analysis, it would be possible to interpret aspects of the appellant's conduct towards the Ministry as indications of a possible intention to harass. Should this conduct continue, in combination with a continued pattern of similar requests, a future appeal of this nature could produce a different result.