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

ORDER M-864

Appeal M_9600242

Fort Frances_Rainy River Board of Education

80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

On May 10, 1996, the requester asked the Fort Frances-Rainy River Board of Education (the Board) to receive four categories of information under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The requester specifically sought access to:

(1) The name of the law firm(s) used by the Board to obtain legal advice or any other legal service and the amount paid to the firm(s) in 1995.

(2) The number of buses that the Board leased or purchased in 1995 and 1996 and a copy of the purchase or lease agreement for each bus.

(3) The duties, salary and benefits of the Board's Transportation Officer.

(4) A copy of the contract entered into with a named individual for the purchase of a bus and the worksheet used to determine the value of this contract.

While the appellant combined these requests in one letter, I find that he has sought access to four separate pieces of information. On this basis, I will treat his May 10, 1996 letter as comprising four separate access requests.

In its decision letter, the Board indicated that it considered the requests to form part of a pattern of conduct that amounted to an abuse of the right of access and that the requests were made in bad faith. On this basis, the Board informed the requester that it viewed these requests as vexatious under section 4(1) of the Act and that it would not be responding to them.

On June 20, 1996, the requester wrote to the Board indicating that he intended to appeal its decision. At the same time, he filed a fifth request for information where he sought access to:

(5) The exact route followed by a school bus driven by a named individual, the first pick up time, the time the pupils are delivered to school and the total meterage and expenses incurred for the 1995-96 time period.

The Board did not respond to this request although it later advised the Commissioner's office that it also considered the request to be vexatious. The requester (now the appellant) appealed the Board's decision.

Following receipt of this appeal, the Commissioner's office sent a Notice of Inquiry to the Board. This notice indicated that the Board has the preliminary onus of establishing that the requests in question are either frivolous and/or vexatious. The Board subsequently forwarded two sets of representations to the Commissioner's office which I have considered in reaching my decision in this appeal.

DISCUSSION:

FRIVOLOUS OR VEXATIOUS REQUESTS

The provisions which I must consider to determine whether the appellant's five requests are frivolous or vexatious are found in sections 4(1)(b) and 20.1(1) of the Act and section 5.1 of Regulation 823 made under the Act.

Section 4(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. The onus of establishing that an access request falls within these categories rests with the institution (Order M-850).

Sections 20.1(1)(a) and (b) of the Act go on to 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 regulations 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.

In Order M-850, former Assistant Commissioner Tom Mitchinson observed that 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. He went on to express the view that this power should not be exercised lightly. I agree with this position.

I will now consider whether the facts of this case fit into one or both of these definitions.

Pattern of Conduct that Amounts to an Abuse of the Right of Access - Section 5.1(a)

I will begin my analysis by reviewing the history of interaction between the appellant and the Board.

In the 18-month period between January 1995 and June 1996, the appellant filed a total of 15 requests with the Board.

The appellant's first 10 requests were submitted in the period between January and September 1995. These canvassed such topics as: the monies paid to bus drivers; the mileage travelled by the bus fleet; operating and maintenance costs for the bus fleet; monies paid to

private carrier companies; the criteria for awarding a particular bus contract; the monies recovered from servicing First Nations sites; the value of bus contracts awarded in a particular year and the details of a tender agreement to house the bus fleet.

As noted previously, the appellant filed an additional four requests on May 10, 1996 and a fifth on June 20, 1996. These are described more fully on page one of my order.

In most of the 15 requests, the appellant has sought information about the school bus contracts which the Board has awarded. While the theme is similar, each request asks for different pieces of information.

The Board indicates that, in 1995, the appellant's wife held a contract to provide school bus services to the Board on a particular route, which she subsequently chose not to renew. The appellant and his wife believe that the tendering process which the Board undertook for this contract was unfair. They contend that the successful bidder and the appellant's wife were subject to different costing formulas. The Board notes that, in September 1995, the appellant's wife initiated a legal proceeding against the Board relating to the contract.

The Board further submits that the appellant's current requests form part of a pattern of conduct that amounts to an abuse of the right of access under the Act. It believes that the number of requests that the appellant has filed over the last 18 months has been excessive and that the appellant has not used the information received for a legitimate purpose.

The Board also points out that the appellant's seven initial requests came in a pattern. They were filed every two weeks to be received on the date set for the regularly scheduled Board meeting. The Board further notes that these requests have sometimes involved large volumes of records. The Board then states that:

> During the past couple of years, this Board has reduced its administration by 2 superintendents and [1.5] support staff. Our resources are limited and we are consistently using these sources to respond to [the appellant's] requests. I do not feel this is the best use of tax dollars when [the appellant] has never put to use any of the information that has been provided to him.

The Board also submits that the facts of this case are analogous to those set out in Order M-850 where a finding was made that another appellant's conduct was frivolous or vexatious.
To determine whether the Board's submissions meet the criteria outlined in section 5.1(a), I must determine (1) whether the appellant's filing of requests forms part of a "pattern of conduct" and, if so, (2) whether this pattern amounts to an abuse of the right of access.

I would note that the Board has not claimed that the appellant's actions have interfered with its operations. On this basis, I will not consider this aspect of the section 5.1(a) definition.

In Order M-850, former 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.

In the same order, Assistant Commissioner Mitchinson then commented on the meaning to be accorded to the phrase "abuse of the access process". He went on to list a number of criteria for defining this phrase, which were originally described by Commissioner Tom Wright in Order M_618.

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.

I have carefully reviewed the contents of the five requests that form the subject matter of the present appeal. While it is true that the majority of them relate in some fashion to the subject of bus contracts, each involves a separate request for a distinct package of information. In addition, four of the requests were sent to the Board in one letter. I have concluded that, standing alone,

these five requests do not constitute "recurring incidents of related or similar requests" and, hence, a pattern of conduct for the purposes of section 5.1(a) of the regulations.

I will now consider the relationship of these later requests to the original ten that were filed in the January to September 1995 period. The first seven of these requests were submitted at two_week intervals over a three-month period. In addition, some of these requests were quite detailed in nature. The remaining three requests were filed over a four-month period, ending in September 1995.

Had the appellant continued to file requests of the same type and at similar intervals as the original seven, I might well have concluded that his actions constituted a pattern of conduct for the purposes of section 5.1(a) of the regulation. Since, however, the appellant subsequently reduced both the frequency of his requests and their complexity, I find that he has discontinued this recurring pattern of conduct.

I conclude, therefore, that the requests which the appellant has collectively filed with the Board do not, on reasonable grounds, constitute part of a pattern of conduct under section 5.1(a) of the regulations. On this basis, the Board has not established that the appellant's requests are frivolous and vexatious based on the definitions for these terms found in this section.

Although not strictly required to do so, I believe that it would be useful if I also expressed my view on whether the five requests amount to an abuse of the right of access under the legislation.

Given the evidence before me, I am satisfied that the appellant was legitimately seeking information on the criteria that the Board used to award its bus contracts. It appears that the appellant then used this information to assist his wife with her legal proceeding. On this basis, I believe that the objects of the appellant's requests were genuine and that they were not designed to harass the Board.

I would also note that, on three occasions, the requester appealed the access and fee related decisions which the Board had made under the Act. In each case, the Commissioner's office supported the appellant's position either in whole or in part. These findings lend support to my view that the concerns expressed by the appellant were legitimate.

In my view, the Board has not provided me with sufficient evidence to establish that it had reasonable grounds for believing that the appellant's access requests formed part of a pattern of conduct that amounts to an abuse of the right of access. It cannot, thus, rely on this component of section 5.1(a) of the regulations to decline to process the appellant's access requests.

Bad Faith - Section 5.1(b)

The Board also contends that the five requests that form the subject of this appeal (as well as the ten previous ones) were made for the purpose of inappropriately using taxpayer funds. On this basis, it argues that the requests were made in bad faith for the purposes of section 5.1(b) of the regulations.

In the correspondence which forms part of the appeal file, the appellant points out that he is a taxpayer who financially supports the Board and that his education taxes have increased by 350% in the past eight years.

Under section 5.1(b), a request will be defined as "frivolous" or "vexatious" where, among other things, the head of an institution is of the opinion on reasonable grounds that the request is made in bad faith. There are no further requirements to be met. In particular, no "pattern of conduct" is required. My analysis will, thus, focus on the five requests which are the subject of this appeal.

The Board has not specifically claimed that the appellant's requests were also made for a purpose other than to obtain access. On this basis, I will not consider this aspect of the section 5.1(b) definition in my discussion.

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.

I have carefully reviewed the evidence that I outlined in my discussion of section 5.1(a) of the regulations. In the context of section 5.1(b), 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.

On this basis, I find that the Board has not provided me with sufficient evidence to establish that it had reasonable grounds for believing that the appellant's access requests were made in bad faith. The result is that the Board cannot rely on section 5.1(b) of the regulations to decline to process the appellant's access requests.

CONCLUSIONS:

To conclude, the Board has not provided me with sufficient evidence to demonstrate that the five requests are frivolous or vexatious for the purposes of the Act. On this basis, the Board will be required to process the appellant's five access requests.

Because the Board has not met its preliminary onus of establishing that the five requests are either frivolous and/or vexatious, I do not need to obtain representations from the appellant.

I wish to emphasize to the parties that my decision that these five requests are *not* frivolous or vexatious does not mean that future requests filed by the appellant will necessarily produce the same result. Each case must be decided on its own merits.

I would also encourage the appellant to be mindful of the limited resources which the Board has available to process access requests. Similarly, I would ask the Board to work constructively with the appellant to develop reasonable time frames for the processing of any future requests which he may file.

In this fashion, it will hopefully be possible for both parties to meet their rights and responsibilities under the Act more easily and, thereby, avoid the time and expenses associated with appeals to this office.

ORDER:

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

2. I order the Board to make access decisions in response to the appellant's five requests, in accordance with the requirements of sections 19, 21 and 22 of the Act, treating the date of this order as the date of the request.

Original signed by: November 26, 1996
Irwin Glasberg
Assistant Commissioner