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

ORDER M-1066

Appeal M-9700295

Bruce-Grey Roman Catholic Separate School Board

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NATURE OF THE APPEAL:

The Bruce-Grey Roman Catholic Separate School Board (the Board) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act). After some clarification with the requester, counsel for the Board determined that the request was for access to records relating to the legal expenses incurred by the Board with respect to a named construction project. The requester also advised that he was seeking only the dollar values of any legal accounts rendered in connection with the project, and not any detailed descriptions of the legal services provided by the Board's lawyers which might also be indicated on the responsive records.

The Board responded to the request by advising the requester that the request for access to responsive records was denied because the request is frivolous and vexatious, as contemplated by section 4(1)(b) of the Act. The Board also denied the requester access to the responsive records on the basis of the following exemptions contained in the Act:

- economic and other interests - sections 11(c), (d) and (f)
- solicitor-client privilege - section 12

The requester, now the appellant, appealed the Board's decision.

After receiving the appeal, this office sent a Confirmation of Appeal/Notice of Inquiry to the Board. This notice indicated that the Board 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 Board.

In the present case, once the representations of the Board were received, this office provided the appellant with information about the Board's case, and the opportunity to make submissions. The appellant responded with lengthy representations of his own. Again, in the interests of procedural fairness, the appellant's complete submissions were shared with the Board. The Board advised this office that it declined the opportunity to make any further representations in response to those of the appellant.

DISCUSSION:

FRIVOLOUS OR VEXATIOUS

Several provisions of the Act and Regulations 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.

Section 5.1(a)

The Board submits that the appellant's request is an abuse of the right of access and that the request was made in bad faith and for a purpose other than to obtain access. It argues that the request is part of a pattern of conduct that amounts to an abuse of the process by requiring the Board to incur excessively high legal fees in responding to the appellant's initiatives.

In the materials provided to me by the Board and by the appellant, I am able to determine that there are presently a number of legal actions in the form of construction liens and other proceedings involving the Board, the appellant and others who participated in the Board's construction of a school building. In addition, the appellant has made a number of requests under the Act for information which he thinks will be of assistance to him in his legal proceedings. I also note that the appellant, through its counsel, has pursued each of these proceedings with what I would describe as an unusual degree of enthusiasm. The appellant's counsel and that of the Board have developed a mutual distrust and animosity which may have poisoned efforts towards a possible compromise or even more reasonable behaviour.

Essentially, the Board takes the position that the present request, taken together with the earlier requests under the Act and the other Court proceedings already commenced or contemplated involving these parties demonstrates a course of conduct on the part of the appellant which can only be described as an abuse of process. It argues that the appellant has undertaken this course of conduct for the purpose of having the Board incur excessive legal fees, forcing it to settle the legal proceedings with the appellant for a less than advantageous amount, merely to avoid any further legal expenses.

I note that the appellant's request relates to the actual dollar values of the legal fees incurred by the Board so far in all of these proceedings. If I accept the position taken by the Board, and the appellant is able to obtain access to the records which he has requested under the Act, the appellant will be put in a position where he will be entitled to determine exactly how successful this strategy has been.

The appellant indicates that the number of requests which he has made under the Act is not excessive in number or complexity. He states that he has corresponded with counsel for the Board on an excessive number of occasions with respect to a number of different proceedings. He submits that this has been necessary due to the fact that the Board's counsel will no longer return his telephone calls. The appellant argues that his present request is for a legitimate purpose and that the Board has introduced the frivolous and vexatious issue as a means of delaying its processing. The appellant also suggests that his actions are of a different nature from those of the appellant in Order M-947 and that case is, therefore, distinguishable on this basis.

In Order M-850, 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 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).

I adopt the analysis put forward by the Assistant Commissioner in Order M-850 for the purposes of the present appeal.

In my view, the abuse of the right of access described by section 5.1(a) refers only to the access process under the Act, and is not intended to include proceedings in other forums. I find, therefore, that in order for the Board to meet the requirements of section 5.1(a), it is required to demonstrate a reasonable basis for concluding that this **request** is part of a pattern of conduct that amounts to an abuse of the right of access **under the Act**, but not considering the appellant's parallel activities in other forums.

I find that the Board has not provided me with sufficient evidence as to the nature of the appellant's previous access requests and appeals which would allow me to determine that they form a pattern of conduct which may be characterized as an abuse of the right of access for the purposes of section 5.1(a). Further, I have not been provided with any evidence that these requests and appeals were illegitimate or improper in nature, nor have I been provided with any evidence by the Board as to the real motivations behind the appellant's requests, other than those of a speculative nature. In my view, based on the evidence before me, it cannot be said that the appellant's requests form the basis of a pattern of conduct that amounts to an abuse of the right of access. I find, therefore, that the request is not frivolous and vexatious under the criteria set out in section 5.1(a).

Section 5.1(b)

This section is comprised of two components and where either applies, a finding that a request is frivolous and vexatious may follow. The first mandates a finding that the request was made in "bad faith" while the second requires that the request be made "for a purpose other than to obtain access".

The Board relies on the decision in Order M-947 in which former Inquiry Officer Anita Fineberg found that a request seeking information pertaining to the amount of time and money spent by an institution in responding to a requester's earlier access inquiries could reasonably be characterized as being "for a purpose other than to obtain access" within the meaning of section 5.1(b). It argues that requests of this type, which seek to accomplish some objective unrelated to the access process, fall within the purview of section 5.1(b).

Bad Faith

Again, in Order M-850 Assistant Commissioner Mitchinson addressed the question of what constitutes "bad faith" for the purpose of section 5.1(b) as follows:

> Section 5.1(b) provides that a request meets the definition of "frivolous" or "vexatious" if it is made in bad faith; there are no further requirements to find the request "frivolous" or "vexatious" where bad faith has been established. No "pattern of conduct" is required, although such a pattern might be relevant to the question of whether a particular request was, in fact, made in bad faith.

Black's Law Dictionary (6th ed.) offers the following definition of "bad faith":

> 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]

I cannot impute such motives to the appellant in the present circumstances. While perhaps his actions are inappropriate, I find that the appellant cannot reasonably be described as dishonest in making this and the previous requests under the Act. Again, the animosity between the parties appears to have tainted all of the appellant's activities, however legitimate, in the eyes of the Board. Accordingly, I find that the request is not frivolous and vexatious under the bad faith component of section 5.1(b).

For a purpose other than to obtain access

In Order M-850, Assistant Commissioner Mitchinson made the following remarks with respect to this component of section 5.1(b):

> Like "bad faith", once an institution is "satisfied on reasonable grounds that the request is made "for a purpose other than to obtain access", the definition in section 5.1(b) is met and the request would therefore be "frivolous or vexatious". Again, no "pattern of conduct" is required although, as stated previously, such a pattern could be a relevant factor in a determination of whether the request was "for a purpose other than to obtain access".
>
> In my view, this is a phrase whose meaning is relatively straightforward. There are no terms of art, nor terms which have particular meaning in a legal context. If the requester was motivated not by a desire to obtain access pursuant to a request, but by some other

objective, then the definition in section 5.1(b) would be met, and the request would be "frivolous" or "vexatious".

In my view, the Board's characterization of the appellant's motives for filing the request are speculative at best and cannot reasonably be construed as having been made for some purpose other than to obtain access. The appellant's next step after obtaining access may be to attempt to use the information in some way "against" the Board in some other forum. This factor is not, however, relevant to a determination of whether the request in the present appeal is frivolous and vexatious under section 5.1(b).

Conclusion

In summary, I find that the request which is the subject of this appeal does not meet the requirements of either sections 5.1(a) or (b) of Regulation 823. Therefore, I do not uphold the Board's decision that the appellant's request is frivolous and/or vexatious. As such, pursuant to section 19 of the Act, the Board is required to process the appellant's request.

ORDER:

1. I order the Board to provide the appellant with a decision letter in accordance with the time frames set forth in 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.

2. I further order the Board to provide me with a copy of the letter referred to in Provision 1 by forwarding a copy to my attention c/o the Office of the Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario M5S 2V1.

Original signed by: January 19, 1998
Donald Hale
Inquiry Officer