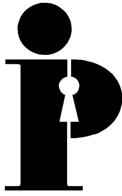

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-1872

Appeal PA-000231-2

Ministry of Consumer and Business Services

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NATURE OF THE APPEAL:

The Ministry of Consumer and Business Services formerly The Ministry of Consumer and Commercial Relations (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for information concerning the relationship, if any, between the Ministry and/or the Government of Ontario and a named credit reporting agency, including, but not limited to, documents concerning the sale, exchange or trade of any information between these organizations and the number of complaints about the credit reporting agency received by the Ministry.

In his letter to the Ministry, the appellant further described his request as follows:

> 1. so called permanent record/profile from MCCR/government Ontario described above
>
> 2. any documents concerning official status and status of cooperation between [the credit reporting agency] and MCCR
>
> 3. any documents showing official status in respect exchanging, selling, trading information between [the credit reporting agency] and MCCR or MCCR and other parties concerning private information collected by the MCCR or Government of Ontario
>
> 4. all documents concerning [a named individual] investigation - there is huge gap in documents and nothing conclusive - if documents not released I would like to ask for the index as in every case
>
> 5. I would like to request the number (only) of the complaints made against [the credit reporting agency] in 1999 - price and clear comment if item to be not released for whatever reason
>
> 6. I would like to request the document (10 page report from the raid/inspection on [the credit reporting agency] in late 1999 by MCCR), the document was permitted to be released by the head of investigations in December 1999.

The Ministry failed to respond to the request within 30 days and as a result, the appellant filed an appeal on the basis of the "deemed refusal". The Ministry subsequently issued a decision letter to the appellant which stated that:

> these requests are frivolous and vexatious as defined under Regulation 5.1 for the following reasons. These requests are part of a pattern of conduct that amounts to an abuse of the right of access, they interfere with the operations of the institution, the requests are made in bad faith and are made for a purpose other than to gain access.

The appellant appealed the Ministry's decision that his requests are frivolous and vexatious.

A Notice of Inquiry was sent initially to the Ministry, which submitted representations in response. An amended Notice was then provided to the appellant, along with a copy of the Ministry's representations. Portions of the Ministry's representations, consisting of correspondence exchanged between the appellant and the Ministry, was not provided to the appellant however as this information was, presumably, already in the appellant's possession. The appellant also made submissions in response to the Notice of Inquiry provided to him.

DISCUSSION:

FRIVOLOUS OR VEXATIOUS

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 Regulation 460 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, in his preliminary discussion of these provisions, Assistant Commissioner Tom Mitchinson made the following observations, with which I agree:

> 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*. In my view, this power should not be exercised lightly.

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).

Pattern of Conduct and Abuse of the Right of Access

In Order M-850, Assistant Commissioner Tom Mitchinson commented on the meaning of "pattern of conduct" in section 5.1(a) of the Regulation, 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" in section 5.1(a) was also discussed 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).

The appellant has not made any specific submissions with respect to the issue of whether his requests may properly be characterized as Afrivolous or vexatious" within the meaning of section 10(1)(b). Rather, he points out that the Ministry did not object to the Apattern" of his requests or their form or frequency until its receipt of his latest requests in April 2000. The appellant's representations focus on what he perceives to be the shortcomings of the Ministry and the Commissioner's office in the processing of his requests and subsequent appeal, including an appeal which was disposed of by the Assistant Commissioner in 1998. As this office indicated in correspondence to the appellant on February 5 and 14, 2001, only the application of section10(1)(b) to the circumstances of this appeal is to be addressed in this order.

The Ministry has set out in chronological order each of the 23 requests made by the appellant between July 1998 and April 2000, along with the disposition of each. It points out that all of the requests are related and are of a similar nature in that they arise out of a complaint made by the appellant to the Ministry about his treatment by a credit reporting agency. The Ministry submits that many of the requests are identically worded (Requests 088/99, 106/99, 172/99 and 189/99) while others are identical in substance. The present requests, to which the Ministry have applied section 10(1)(b), deal with issues which are either restatements or reformulations of earlier requests made by the appellant, according to the Ministry.

In response to the 20 earlier requests, the Ministry has provided to the appellant over 1400 pages of responsive records, denying access to relatively few documents pursuant to certain enumerated exemptions in the *Act*. In each case where access to records, or parts of records was denied, the Ministry advised the appellant of the exemptions claimed for the information and of his right to appeal these decisions to the Commissioner's office. With two exceptions, the appellant did not choose to avail himself of this opportunity.

In support of its argument that the pattern of conduct exemplified by the appellant's requests amounts to an abuse of the right of access under section 5.1(a), the Ministry submits that the:

> volume of requests is excessive in relation to the subject matter at issue, they are often excessively broad in scope, they revisit issues already addressed and are submitted for the purpose of harassing the Ministry for wrongs which the appellant believes he has suffered from Ministry personnel.

and goes on to argue that the requests are excessive in view of their repetitive nature, particularly "in view of the appellant's own refusal, in the most recent requests, to provide clarification when asked, and his practice of simply re-submitting requests".

The Ministry provided me specific examples of several of the broadly-worded requests which it had received from the appellant, including a request for Aall documents with no exceptions in all departments including [the Minister's] office [relating to his complaints about the credit reporting agency]" (Request 024/00) and a request for AALL documents of any kind concerning in anyway to the matters of my complaints in all levels and sectors of the MCCR" (Requests 088/99, 106/99, 172/99 and 189/99).

The Ministry has also provided me with submissions relating to its position that the appellant's requests may be characterized as Arevisiting issues previously addressed". It suggests that, when faced with a denial of access to information on the basis of one of the exemptions in the *Act*, the appellant chooses to simply re-submit the request rather than proceed with the appeal process as advised in the Ministry's decision letters to him. The appellant's requests also often make reference to his seeking access to what he describes as the Asecret, hidden or excluded files", according to the Ministry.

The Ministry takes the position that the appellant's requests are designed to harass and be a nuisance to the Ministry and its employees. To support this argument, the Ministry refers to several quotations contained in the appellant's requests which it suggests are disparaging and groundless attacks of a personal nature.

I have reviewed the summary of the appellant's requests which was provided to me by the Ministry along with its representations. In my view, submitting a large number of very similar requests for very similar information since July 1998 represents Arecurring incidents of related or similar requests on the part of the requester", as described by Assistant Commissioner Mitchinson in Order M-850.

Although the number of requests which exactly repeat the wording of an earlier request is small, it is clear that the requests all focus on the same basic subject or theme, and I am satisfied that there is a significant overlap between the subjects of many of them. Bearing this in mind, I have concluded that the number of requests submitted between July 1998 and April 2000 is excessive.

I also find that the repeated requests for similar information indicate that the appellant is seeking to use the access procedures available to him under the *Act* for the purpose of obtaining access to records which have already been made available to him or which have been denied under one of the exemptions contained in the *Act*. Despite being advised by the Ministry of his right to appeal its decisions to the Commissioner's office, the appellant has chosen not to do so, with the exception of two requests. In my view, the continued use of the *Act* by the appellant to attempt to obtain access to the same information again and again also represents a Apattern of conduct" within the meaning of section 5.1(a) of Regulation 460.

I must now decide whether this pattern of conduct Aamounts to an abuse of the right of access". In this case, the evidence, particularly in relation to the volume of requests, and the recurring and/or continuing pattern of the requests, is in my view sufficient to demonstrate that the requests represent an abuse of the access process within the meaning of section 5.1(a) of the Regulation. I also find that the appellant has clearly made use of the access provisions of the *Act* more than once, for the purpose of revisiting an issue which has been previously addressed by the Ministry through its decisions on his earlier requests for the identical information. This activity is another of the examples from the abuse of process cases in a legal context which are cited in Order M-850. I find that this revisiting of previously-resolved issues also represents a pattern of conduct that amounts to an abuse of the right of access as contemplated by section 10(1)(b) of the *Act* and section 5.1(a) of Regulation 460.

In the circumstances of this appeal, therefore, I find that the Ministry has demonstrated that the appellant's pattern of conduct, which includes the requests at issue in this appeal, is an abuse of the right of access. For this reason, I find that the requests at issue in this appeal are frivolous or vexatious.

ORDER:

I uphold the Ministry's decision.

Original Signed By: February 26, 2001
Donald Hale
Adjudicator