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

ORDER MO-1427

Appeal MA_010034_1

District Municipality of Muskoka

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NATURE OF THE APPEAL:

This is an appeal from a decision of the District Municipality of Muskoka (the District), in response to a request made under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*).

The request was for all records "in any way referring to, relating to, or possibly relating or referring to" the requester, that the requester had not already received, for the period between January 1, 1996 to date. The requester (now the appellant) described some of the records that would be included in its request, as well as naming certain individuals who would have the records sought.

In its decision, the District refused to process the request, relying on sections 4(1)(b) and 20.1 of the *Act* and stating that "the head believes that since the [appellant] has an ongoing dispute with Muskoka and a variety of others, and that all records related to any such dispute are not privileged but are already in the possession of [the appellant], the request is therefore frivolous and vexatious".

The appellant has clarified that it is not seeking access to any letters sent by it.

The appellant appealed the decision. I sent a Notice of Inquiry to the District, initially, summarizing the facts and issues in the appeal and inviting its representations, which have been received and reviewed by me. I have determined that it is unnecessary to seek representations from the appellant, given my conclusions on the issues.

The only issue raised by this appeal and addressed by this order is whether the request is frivolous or vexatious under section 4(1)(b) of the *Act*.

CONCLUSION:

I do not uphold the District's decision and order it to provide an access decision.

DISCUSSION:

FRIVOLOUS OR VEXATIOUS REQUEST

The *Act* and Regulations provide institutions with a summary mechanism to deal with requests which an institution views as frivolous or vexatious. It has been said in previous orders 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*", and that this power should not be exercised lightly: see Order M-850.

Several provisions of the *Act* and Regulations are relevant to the issue of whether the request is frivolous or vexatious. These provisions read as follows:

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

An institution invoking section 4(1)(b) of the *Act* has the burden of establishing that the request is either frivolous and/or vexatious: see Order M-850.

The District submits that:

- the appellant is engaging in a pattern of conduct that amounts to an abuse of the right of access;

- its request is part of a pattern of conduct that would interfere with the operations of the District;
- its request is made in bad faith; and
- its request is made for a purpose other than to obtain access.

It submits that all the activities of the appellant are designed for one purpose only, that is, to pressure the District into acceding to its position on a construction dispute matter.

As background, the District describes how it advertised for tenders for the construction of a water treatment plant in Port Carling and modifications to a water treatment plant in Bala in 1999. The appellant's tender was accepted. The construction work commenced, but shortly thereafter, the District and the appellant began having disagreements over the project, culminating in or about November of 2000, when the appellant appears to have stopped work on the project. The appellant alleges that the District is in breach of the contract; it is the District's position that the appellant is in default. At the time of this order, there is, according to the District, extensive litigation outstanding in relation to the project.

In its representations, the District has addressed the different components of section 5.1, but to a degree, the representations and evidence on one component overlap with that on another component. Although, below, I treat sections 5.1(a) and 5.1(b) separately, as well as different elements within those subsections, I have considered the applicability of all of the representations and evidence offered to all of the issues raised by these sections.

Section 5.1(a)

Pattern of conduct amounting to abuse of right of access

In Order M-850, Assistant Commissioner Tom Mitchinson commented on the meaning of section 5.1(a) 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)...
>
> 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.

As is apparent from Order M-850, and confirmed in subsequent orders (see also Orders M-1066 and M-1071), 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 District 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.

In this case, the pattern of conduct alleged by the District is based on the appellant's actions in general in advancing its disputes with the District. Some of these actions described in the

District's representations include litigation initiated by the appellant against the District, correspondence from the appellant casting aspersions against District officials, correspondence from the appellant threatening litigation against subcontractors and correspondence from the appellant to the Minister of Municipal Affairs.

Although it is not referred to specifically in the representations, the District has stated to the mediator from this office that the request by the appellant is "his third in as many months".

I find that the evidence from the District about various actions taken by the appellant against it is insufficient to establish a pattern of conduct which may be characterized as an abuse of the right of access within the meaning of section 5.1(a) of the *Act*. Much of the evidence is about actions taken in *other* forums, which do not constitute abuse of the right of access under the *Act*. There is no evidence that the prior requests made under the *Act* by the appellant are related or similar, and by itself, the fact that three requests have been made in three months does not justify a conclusion that the appellant is engaged in a pattern of conduct of recurring requests.

Interference with the operations of an institution

Since I have found no "pattern of conduct" within the meaning of section 5.1(a), this would dispose of the District's assertion that the request is part of a "pattern of conduct which would interfere with the operations of the institution". I will, however, for the benefit of the parties, and since it has been raised by the District, address this issue nonetheless.

The District states that this request is a "major interference" with its operations. It states that it is a relatively small municipality engaged in the provision of a variety of services, and that its resources are stretched to the limit. It is concerned about the resources which will be required to deal with this request. The District asserts that the appellant already has "all of the documentation", and further, that it will be produced a second time as part of the litigation between the parties. It should be noted that in other portions of its representations, the District takes the position that the appellant has "virtually all" of the documentation, except for those "protected by privilege or other exemptions" under the *Act*.

With respect to the allegation that the appellant already has most of the documentation covered by the request, I find that the request specifically *excludes* records "already received" by the appellant, which therefore excludes any records provided to the appellant in response to other requests under the *Act*, as well as any records otherwise covered by the request which have been previously sent to the appellant. This should considerably narrow the breadth of documentation the District believes it will have to deal with in responding to this request.

With respect to the assertion that any other responsive records would be protected by privilege or other exemptions, I conclude that this is not a basis for finding the request frivolous or vexatious. I concur with the comments of Assistant Commissioner Tom Mitchinson on a similar issue in Order P-1534, in which he stated that he had "a great deal of difficulty in accepting the [Ontario Municipal Board's] position that the appellant is abusing the access process when he has not yet had the benefit of a determination through all phases of the statutory access scheme." It may well be that the District will be vindicated in its view that many of the records will be exempt

from access because of privilege, but this is not a basis for refusing to respond to a request in the usual manner prescribed under the *Act*.

Further, with respect to the District's contention that the processing of this request would be an interference with its operations, it should be noted that the *Act* provides for certain measures which relieve the burden on an institution faced with an apparently onerous request. These are found in section 45 of the *Act* (fees) and the related provisions in the Regulations, and the interim access decision and fee estimate scheme described in Order 81 (which permit, in certain cases, the postponement of the majority of the work required to respond to a request until a deposit has been received). In some circumstances, a time extension under section 20(1) may also provide relief, although where the process described in Order 81 is adopted, such a time extension may only be claimed once the appellant pays any deposit which may be required: see Order M-906.

In this case, I conclude that the District cannot rely on "interference with operations" as a ground for finding the request "frivolous or vexatious". The request is in reality much narrower than the District asserts and, in any event, I am satisfied that the *Act* would provide meaningful relief from the burden of responding to the request. I also find that even if it is true that many of the documents will eventually be produced as part of the litigation between the parties, this is no bar to having a request dealt with in the usual manner under the *Act*, and is not a basis for finding the request "frivolous or vexatious". The scheme under the *Act* for obtaining access to records in the hands of government institutions exists separately from discovery processes associated with civil actions: see, for example, Order PO-1688.

In sum, I conclude that the representations and evidence provided by the District do not establish the requirements of section 5.1(a) of the Regulation.

Section 5.1(b)

This section is comprised of two components and where either applies, a finding that a request is frivolous or 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".

Bad faith

In Order M-850, Assistant Commissioner Mitchinson commented on the meaning of the term "bad faith". 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.

Guided by the above, I cannot find bad faith on the part of the appellant in making the request which is at issue in this appeal. Even if the District's representations and supporting evidence demonstrate, as is essentially alleged by the District, the use of questionable tactics in other forums by the appellant in pursuing its disagreements with the District, I cannot conclude that this request was made for a dishonest purpose.

I am supported in my views by the comments made by Adjudicator Laurel Cropley in Order MO-1168-I, in which similar facts were at issue:

> In my view, the fact that there is some history between the Board and the appellant, or that records may, after examination, be found to fall outside the ambit of the *Act*, or that the appellant may have obtained access to some confidential information outside of the access process, in and of itself is an insufficient basis for a finding that the appellant's request was made in bad faith. The question to ask is whether the appellant had some illegitimate objective in seeking access under the *Act*. I am not persuaded that because the appellant may not have "clean hands" in its dealings with the Board, that its reasons for requesting access to the records are not genuine.

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".

This portion of section 5.1 is at the heart of the District's contention that this request is frivolous or vexatious. As I have indicated, the District asserts that the appellant's real purpose in making this request is to pressure the District into acceding to its position on a construction dispute matter.

The District submits that other actions taken by the appellant in other forums illustrate the use of "collateral methods" by the appellant against the District. Among other things, the District provides examples of correspondence from the appellant casting aspersions on the District or its officials. The District states that

> [t]he request is being made for an inappropriate purpose, namely to single out key individuals and potentially threaten them. As part of their duties, the individuals in question must look at matters critically and undoubtedly there will be statements made that are adverse to [the appellant]. [The appellant] will seize upon any such statements, focus on and possibly institute litigation against the individual involved.

Further in its representations, it states:

> [the request] is a fishing expedition to attempt to find documents to disparage the reputation of Muskoka's staff and thereby advance its unmeritorious claims for extra payment.

It is apparent that the appellant is liberal in its use of any avenue available to advance its disputes with the District, and that there is now considerable animosity between the two parties. I can appreciate the District's concern that the provision of its records may serve to fuel this animosity, and the appellant's campaign against it.

However, I cannot find that the appellant was "motivated not by a desire to obtain access pursuant to a request, but by some other objective" [Order M-850]. It is entirely possible that, if it obtains access to the records sought, or part of them, it will use that to its benefit in its ongoing disputes with the District, but initially at least, the motive behind the request is to obtain that access. In Order M-860, on a related issue, Inquiry Officer John Higgins stated:

> 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.

Similarly, I am satisfied that this request was made for the purpose of obtaining access, and that this purpose is not contradicted by the possibility that the appellant may also intend to use the documents against the District in their ongoing disputes.

I find therefore that the District has not satisfied the requirements of section 5.1(b) of the Regulation.

In conclusion, it has been said in previous orders that to find that a request is "for a purpose other than to obtain access" and thus "frivolous or vexatious" on the basis that the requester may use the information to oppose actions taken by an institution would be contrary to the spirit of the *Act*, which exists in part as an accountability mechanism in relation to government organizations (Order M-906). I agree with these views, and further comment that these principles remain strong only insofar as they are applied even to those requesters viewed by institutions as unsympathetic or undeserving. It is apparent that the District is of the view that the appellant's position in the disputes between them is entirely unmeritorious; the merit or lack of merit of the appellant's position, however, does not determine whether the requirements of section 5.1(a) or (b) have been established.

ORDER:

I. I do not uphold the District's decision that the request is frivolous and vexatious.

II. I order the District 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*, treating the date of this order as the date of the request.

Original signed by: May 1, 2001
Sherry Liang
Adjudicator