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

ORDER MO-1477

Appeal MA-010137-2

Le Conseil scolaire public de district Centre-Sud-Ouest

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NATURE OF THE APPEAL:

Le Conseil scolaire public de district du Centre-Sud-Ouest (the Conseil) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for all records dealing with the hiring or appointment of three named individuals. The requester provided examples of the types of information he considered to be responsive to the request.

The Conseil refused to respond to the request on the basis that it was frivolous and vexatious, and advised the requester accordingly. The requester (now the appellant) appealed the decision.

Mediation was unsuccessful in resolving the appeal, so it was transferred to the Adjudication stage. I sent a Notice of Inquiry to the Conseil setting out the issues in the appeal and received representations in response. I determined that it was not necessary for me to seek representations from the appellant.

DISCUSSION:

Introduction

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.

In Order M-850, I stated:

> In January 1996, the Legislature amended section 4 of the *Act*, thereby providing institutions with a summary mechanism to deal with requests which the institution views as frivolous or vexatious. 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.
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> …
>
> Section 42 of the *Act* places a burden on institutions to demonstrate the application of exemptions. It does not offer specific guidance on the burden of proof regarding decisions that a request is frivolous or vexatious. However, the general law is that the burden of proving an assertion falls on the party making the assertion. On this basis, I find that an institution invoking section 4(1)(b) of the *Act* has the burden of proof.

Section 5(1)(a) - Pattern of conduct that amounts to an abuse of the right of access or would interfere with the operations of an institution

The Conseil submits that the request is part of a pattern of conduct by the appellant to use the *Act* and the processes of this Office to harass, bother and batter a party adverse in interest in civil litigation, and is not in keeping with the spirit and purpose of the legislation. The Conseil also submits that the appellant has engaged in similar conduct with other institutions. The Conseil asserts that:

> As soon as [the requester] becomes involved in a dispute under a contract with a public institution covered by [the *Act*], that institution starts to receive several access requests, of a varied nature for the purpose of harassing the [institution],

> expending the institution's resources to respond to the requests and deal with appeals from the requests, and widen the discovery process in litigation.

In Order M-850, I 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 Conseil argues that the appellant's request for the records relating to the three individuals, though contained in one paragraph, is actually seven separate "batched" requests. The Conseil refers to the wording of the request, which identifies that the appellant is seeking access to "all records dealing with the hiring or appointment of [the three named individuals]. Including without limitation…". The request then lists the information that would be included in these records, specifically such items as the job descriptions, the advertisements for positions, the list of those considered for the jobs, evaluation criteria and results, the members of the selection panel, and any declared conflict of interest made by those members. The Conseil also refers to a number of other "batched" requests received from the appellant. Although acknowledging that it has received only a total of six request letters from the appellant, in the Conseil's view, these six letters constitute 27 separate requests.

I do not accept the Conseil's characterization of the request in this appeal. The appellant's letter represents a single request for records concerning the hiring and appointment of three identified individuals. The appellant goes on to specify the type of information that would be covered by this request which, although helpful in bringing a level of specificity to the request, simply consists of examples of the types of records that would otherwise be covered by the general wording of the request.

In Order P-1267, Adjudicator Holly Big Canoe reviewed this issue in the context of a request that specified 51 separate items. She found that, with the exception of four items which were distinct from the nature of the general information requested, all the other items were covered in the main request. The relevant portion of that Order reads as follows:

> Finally, in the circumstances of this appeal, I am satisfied that the requester could have submitted a broadly worded request which would have encompassed everything responsive to his request, with the exception of the last four items. Such a broadly worded request would have been, in my opinion, much more onerous for the Ministry to process, and would have resulted in the appellant being provided access to more records than he was interested in. In my view, the appellant has actually aided the Ministry's processing of his request by being specific about particular records he is interested in and the location of the information he is seeking. While the Ministry has indicated that the information will have to be collected from a number of different locations, these locations are, with one exception, all offices within the appellant's former work location (the

> only exception is noted as an alternate location to one within the appellant's former work location) or its storage facility.

Similarly, as far as the request in this appeal is concerned, I am satisfied that the types of specific information identified by the requester are directly related to the general request made by the appellant, and that it is properly considered a single request for information.

As the Conseil notes, it has received a total of six request letters from the appellant over the course of the past 12 months. One of the six is a duplicate request, submitted by the appellant in order to exercise a right of appeal that had expired in the first instance. Without making a specific finding on the nature of these other requests (all of which were included with the Conseil's representations), as a general observation, each of them appears to follow the same approach as the request that led to the present appeal - a single request for a category of records, together with specific types of information that would fit the category.

In determining whether a requester has established a "pattern of conduct", the number of requests submitted to a particular institution is a relevant consideration. In my view, six requests over a 12-month period is not, in itself, sufficient to establish a pattern of conduct as the term is used in section 5.1(a) of the regulation. Another relevant consideration is whether the requests are similar in nature or related to each other. Having reviewed the six request letters submitted by the appellant, I find that they are not. Each of them deals with what appears to be different subject matters with little or no overlap.

Having reviewed the various requests and considered the Conseil's representations, I find that that the Conseil has not established that the appellant has engaged in a "pattern of conduct" for the purpose of section 5.1(a) of the *Act*. Had the Conseil been faced with 27 requests over this same time period my conclusion might have been different, but, as outlined earlier, the characterization of the six letters from the appellant as representing 27 separate requests under the *Act* is not supportable.

The meaning of "abuse of the right of access" in section 5.1(a) was also discussed in Order M-850. I stated:

> 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:
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> - 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 Conseil identifies that it is engaged in commercial litigation with the appellant arising from disputes over a building contract. One of the arguments put forward by the Conseil is that this request is made by the appellant to "widen the discovery process available to it under the court process, for reasons unconnected to the spirit and purpose of [the *Act*]".

The Conseil submits:

> As stated in the Notice of Inquiry, these requests do not spring from an exercise of a legitimate right of access, but are designed to harass the opponent in litigation, target and occupy the resources the institution may use in responding to litigation (including its lawyers) to accomplish an objective unrelated to the [*Act*'s] process: to advance claims in litigation (particularly spurious claims against individual senior staff of the institution) and/or to pressure and harass an opponent in a dispute into settlement.

> There are more than reasonable grounds to conclude that this is a pattern of conduct that amounts to an abuse of process.

In Order MO-1472-F, Adjudicator Laurel Cropley recently addressed the issue of whether the use to which requested records might be put had an impact on the issue of whether a request is frivolous or vexatious. She made the following statements in finding that it did not:

> … the use to which a requester wishes to put records once access is granted does not, nor should it, factor into the question of whether the use of the *Act* is frivolous or vexatious. This factor is more appropriately dealt with under the "harms" provisions of various exemptions set out in the *Act*. In my view, it is the activities or conduct on the part of a requester in using the "process" of the *Act* that engages the application of these provisions.

She made her finding after quoting from Order MO-1168-I, where she had previously stated:

> In my view, the fact that the appellant may decide to use the information obtained in a manner which is disadvantageous to the Board does not mean that its reasons in using the access scheme were not legitimate.

I agree with these findings. In my view, the arguments submitted by the Conseil that deal with the possible use to which the records, if accessed, might be put has no bearing on the issue before me.

It should also be noted that the Conseil has provided no evidence to support its allegations concerning harassment by the appellant. The request in this appeal appears on its face to be a legitimate request on the part of a member of the public to access records under the custody and control of the Conseil and, absent evidence to the contrary, which has not been provided, I find that the actions by the appellant in submitting the request do not amount to an abuse of the right of access in the circumstances.

Accordingly, I find that the request by the appellant is not part of a pattern of conduct that amounts to an abuse of the right of access, and therefore does not fall within the scope of section 5.1(a) of Regulation 823. Because of this finding, it is not necessary for me to consider whether the request is a "pattern of conduct that would interfere with the operations of the institution".

Section 5.1(b) - Request is made in bad faith or for a purpose other than to obtain access

In order MO-1377, Senior Adjudicator David Goodis made the following statements with respect to the term "bad faith":

> Section 5.1(b) of the Regulation 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 accept this position and adopt it for the purpose of determining whether the request at issue in this appeal was made in "bad faith".

The Conseil's submissions on the issue of whether the appellant's request amounts to bad faith on the part of the appellant are based on its position that the purpose of the request is wholly collateral to access to the records. The Conseil submits:

> … [The appellant] seeks, through the instrumentality of [the *Act*], to gain what it thinks is ammunition for a lawsuit, but more particularly in an attempt to raise personal details about the effected senior staff to gain what it perceives, to be an upper hand on the individuals and the institution. What is ironic is that a statute put in place ostensibly to encourage better functioning for institutions by allowing access to the institution by those served by it, is available as a tool to a non-user of its services as a means of derogating from, and distracting from, the central programs it offers: education to minority language students in South, Central and Southwestern Ontario.

I do not accept the Conseil's position. It provides no evidence to support its allegations regarding the appellant's intended use of the information received in response to the access request and, more importantly, the Conseil is mistaken in its description of the operation of the *Act* and the purposes for which a request can be made. Section 1 of the *Act* provides a general right of access to records under the control of institutions, including the Conseil. It does not limit that right to a specific purpose, nor does it require a requester to justify or even identify the reason for making a request. The Conseil, like all public institutions, must respond to requests for access to records that relate to its operational or administrative dealings with contractors and others; there is nothing unusual or inappropriate about this, and it clearly does not constitute "bad faith" on the part of a requester to exercise its statutory access rights in this regard.

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 be "frivolous or vexatious". Again, no "pattern of conduct" is required although such a pattern could be a relevant factor in a determination of whether the request was for a purpose other than to obtain access. The words "for a purpose other than to obtain access" apply if the requester is motivated not by a desire to obtain access pursuant to a request, but by some other objective (Order M-850).

For essentially the same reasons outlined above regarding the "bad faith" component of section 5.1(b), the Conseil has not persuaded me that the appellant is seeking access to the record for any purpose other than to obtain access. In fact, the Conseil's own representations focus on the purpose for which the request for access is made, and the specific uses the appellant may make of the records in the event that access is granted.

Accordingly, I find that the request by the appellant was not made in bad faith or for a purpose other than to obtain access, and therefore does not fall within the scope of section 5.1(b) of Regulation 823.

ORDER:

1. I do not uphold the Conseil's decision that the appellant's request for access is either frivolous or vexatious.

2. I order the Conseil to issue an access decision to the appellant in accordance with Part I of the *Act*, treating the date of this order as the date of the request.

Original Signed By: October 17, 2001
Tom Mitchinson
Assistant Commissioner