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

ORDER MO-1575

Appeal MA-020076-2, MA-020081-1, MA-020095-1, MA-020096-1 and MA-020129-1

The Regional Municipality of Niagara

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NATURE OF THE APPEAL:

The Regional Municipality of Niagara (the Region) received a number of requests under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a variety of records. The requester in each case was an unsuccessful bidder on a construction project tendered by the Region. Specifically, the five requests were for access to:

Request A.07.0002.2002.02 – (Appeal Number MA-020076-1)

Records relating to purchases or expenditures made on behalf of the Region made by a named engineer on behalf of the Region without an open advertised tender competition process with a value of over $500,000.

Request A.07.0002.2002.03 – (Appeal Number MA-020081-1)

Records which identify any special exclusivity arrangements between the Region and a named company

Request A.07.0002.2002.08 – (Appeal Number MA-020095-1)

Copies of all purchase orders issued to a named vendor for the years 1997 to 2002 or any related companies or other entities.

Request A.07.0002.2002.07 – (Appeal Number MA-020096-1)

Records which identify when certain documents referred to in an attached schedule were made available to the Region and its solicitors by a named individual and a department within the Region, as well as whether any additional records exist beyond those identified in the schedule.

Request A.07.0002.2002.12 – (Appeal Number MA-020129-1)

Copies of any notes taken by a named employee of the Region at a meeting held on June 1, 1998 relating to the tendering process involving the appellant.

In each case, the Region responded to the requests by advising the requester that it takes the position that the requests were frivolous and vexatious within the meaning of section 4(1)(b) of the *Act* as these requests are:

> part of a pattern of conduct that amounts to an abuse of the right of access, that these requests are part of a pattern of conduct that would interfere with the operations of the institution and that these requests were made in bad faith or for a purpose other than to obtain access.

The requester, now the appellant, appealed the Region's decision in each of the requests.

As each of these appeals reached the Inquiry stage of the appeal process, I provided a total of three Notices of Inquiry to the appellant and the Region simultaneously and have received representations from the Region in response to two of them. In addition to the representations

submitted by the Region in response to the Notices, it requests that I also refer to certain submissions which it made to me by way of representations in a number of earlier appeals which gave rise to my decision in Order MO-1548, issued on June 11, 2002. Order MO-1548 addressed the application of the frivolous and vexatious provisions in the *Act* to a number of other requests and subsequent appeals involving the same parties in the present appeals. In that decision, I did not uphold the Region's decision to deny access on the basis that the requests fit within the ambit of section 4(1)(b) and ordered the Region to provide the appellant with decision letters addressing each of the requests at issue in those cases.

Essentially, I am again being asked to decide whether the Region is entitled to rely on the frivolous and vexatious provisions in the *Act* with respect to the present appeals, notwithstanding my findings in Order MO-1548 that it was not so entitled. The Region has provided me with submissions describing in detail why it takes the position that, despite my findings in Order MO-1548, the provisions of section 4(1)(b) now apply to preclude the appellant from exercising a right of access under the *Act* to the requested information. The Region submits that it intends to rely on the representations provided to me in Order MO-1548 as well as "new points which must be addressed in light of the continued requests made by [the appellant]".

DISCUSSION:

ARE THE REQUESTS FRIVOLOUS OR VEXATIOUS WITHIN THE MEANING OF SECTION 4(1)(b)?

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, Assistant Commissioner Mitchinson 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.
>
> …
>
> 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

Representations of the Region

The Region has provided me with a chronology of the requests which have given rise to the present appeals and several additional requests made subsequently by the appellant in the period between the date of its submissions in Order MO-1548, February 15, 2002, and the date of its

latest representations, July 15, 2002, in the present appeals. It argues that the appellant made a total of six additional requests over an eight-week period and that the requests are "related, and cover the same subject matter, namely [the appellant's] litigation with the Region regarding its award of two tender contracts to companies other than [those operated by the appellant]." It describes in detail the nature of each of these requests and the responses given to them by the Region. It goes on to note that, as a result of certain amendments which were made to the appellant's Statement of Claim in the litigation with the Region, additional records relating to the tendering process became relevant to the action and were disclosed to the appellant in accordance with the Region's disclosure obligations. As a result, the records at issue in several of the appellant's appeals were released to him and he withdrew these appeals with the Commissioner's office.

The Region goes on to point out that the requests which are the subject matter of these appeals, as well as the later requests made by the appellant, relate directly to the litigation and address issues raised in either the original or the amended Statement of Claim. It also submits that several of the requests address records which have already been disclosed to him through an initial request made in 1999 in which he sought access to a wide range of records relating to the construction firm which he operates.

Findings

In Order MO-1548, I addressed similar arguments put forward by the Region with respect to this question of whether the appellant's actions represented a "pattern of conduct" that amounts to an abuse of the right of access. Specifically, I found that:

> Included with the Region's representations was a detailed review of the status of each of the appellant's requests and, in several cases, the subsequent appeals which resulted from the decisions which it issued. In my view, the appellant's actions in filing requests for information do not constitute a "pattern of conduct" within the meaning of section 5.1 of Regulation 823. While the records responsive to several of the requests may be overlapping, the requests seek discrete information relating to various construction projects undertaken by the Region, including those in which the appellant tendered a bid, legal proceedings in which the Region was involved and its legal expenses, the process by which it retained outside counsel, complaints made by counsel to the Law Society of Upper Canada about the appellant's solicitor and the Region's agreement with a named supplier. The requests are varied and cover a wide range of subject matters relating to matters of interest to the appellant.
>
> In Order M-850, 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.
>
> Specifically, I find that the Region has failed to establish that in the present situation there exists the requisite "recurring incidents of related or similar requests". While there exists some relation between the requests submitted by the appellant, I find that they are sufficiently distinct and are not closely related or duplicative as was the case in Order MO-1872. As the Region has not satisfied me that there exists the requisite pattern of conduct under section 5.1(a), it is not necessary for me to determine whether the appellant's conduct amounts to an abuse of process or that it would interfere with the operations of the Region.

In keeping with my findings in Order MO-1548, while some overlap may exist between the responsive records in these requests and those made earlier by the appellant, the subject matter of each addresses a particular issue in the litigation or an allegation made by the appellant as a result of information which has been made available to him. Again, I find that the requests which form the basis for the appeals at issue in this case, as well as the subsequent requests made between February and July of 2002, are for discrete categories of information and are not sufficiently related or duplicative as to fall within the ambit of section 5(1)(a). I again find that the Region has not provided me with sufficient evidence to establish that there exists the requisite "pattern of conduct" required to meet the requirements of section 5(1)(a). As was the case in my decision in Order MO-1548, as a result of this finding, it is not necessary for me to determine whether the appellant's conduct amounts to an abuse of the right of access or that it would interfere with the operations of the Region.

Section 5.1(b)

Bad Faith/For a Purpose Other Than to Obtain Access

Representations of the Region

The Region relies on its submissions made to me in Order MO-1548 in seeking to establish that the requests which have given rise to the appeals before me were made in bad faith or for a purpose other than to obtain access. In addition, the Region relies on certain correspondence which it has received from the appellant to support its argument that the appellant's motives for making requests and appeals are less than legitimate. It argues that "[the appellant] has used the MFIPPA process to threaten the Region and to impugn the conduct of many of its employees." In support of this position, the Region relies on a letter dated June 17, 2002 from the appellant in which he states, in part, that:

> MFIPPA exists principally to allow the public to be informed on how institutions operate and to help bring about position changes. Only people with an interest, (like myself) to disclose improprieties, take the time and make the effort to bring matters to the public's attention. This is a purpose and proper use of the Municipal Freedom of Information and Protection of Privacy Act.

. . .

> I have an interest in making bad apples of Niagara personally accountable, when it is right and proper to do so. This is not only in the public interest, it will also be personally gratifying for me, after all I have gone through, to make a difference.

In response to these statements, the Region submits that:

> [The appellant] has changed his stated reason for his requests from a need to use the documents in litigation to the public's interest in exposing "bad apples" at Niagara. It is noteworthy, however, that each of the purported improprieties described by [the appellant] involve him personally, not the public. He has provided no examples of how the release of this information can benefit the public. It is submitted that his purported crusade in favour of the public against the Region is disingenuous.

The Region goes on to rely on certain findings made by former Adjudicator Anita Fineberg in Order M-947 in which she stated:

> In my view, when the appellant initially began requesting information from the City, particularly concerning the Cawthra Woodlot and the Woodlot Management Program, he could very well have been said to have had a legitimate interest in the records being requested. I would note however, that, despite the fact that he has suggested that there is a public interest element to his requests, he has never provided any evidence of the legitimate uses to which he has put the information to which he has received access. Nor has he provided any evidence of the community and/or environmental groups which he maintains are interested in the information he receives. It is my view that very shortly after these requests began, the appellant's conduct with respect to the City became "an abuse of the right of access" for the following reasons.
>
> The apparent purpose of the requests changed their focus from reasonable or legitimate grounds to one which may be characterized as seeking to accomplish some objective unrelated to the access process. For example, the requester became focused on seeking information related to how the City dealt with his requests and the amount of time and money the City had spent dealing with him. Because the appellant did not feel he was receiving the "service" from the City's Freedom of Information branch to which he felt he was entitled, he began using the *Act* and the freedom of information process as a means to express his personal attacks on the personnel involved in the process. To this end, his requests became a "springboard" for launching attacks on City council members and the City legal department.

The Region concludes by arguing that the present appellant's requests:

> . . . are only tenuously connected to the purposes of the *Act*. Instead they have been used solely to harass, cast aspersions on and create a nuisance for the Region. The Region should be entitled to use the "frivolous and vexatious" provisions of the *Act* to protect itself and its employees against such requests.

Findings

Under section 5.1(b), a request will be defined as "frivolous" or "vexatious" where the head of an institution is of the opinion, on reasonable grounds, that the request is made in bad faith or that it was made for a purpose other than to obtain access. There are no further requirements to be met. In particular, no "pattern of conduct" is required.

In Order MO-1168-I, Adjudicator Laurel Cropley made the following findings with respect to a determination of whether a request was made in bad faith. She found that:

> In Order M-864, former Assistant Commissioner Glasberg found that, in the situation where the appellant used information to assist his wife with her legal proceeding against the institution, the access request was filed for legitimate reasons. Having found that the objects of the appellant's requests were genuine and that they were not designed to harass the Board, he concluded:
>
> > 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.
>
> With these comments in mind, I have considered the Board's representations. I will begin by saying that I am not persuaded that the Board has demonstrated that the appellant's request was made in "bad faith". The *Act* provides a legislated scheme for the public to seek access to government held information. In doing so, the *Act* establishes the procedures by which a party may submit a request for access and the manner in which a party may seek review of a decision of the head. It is the responsibility of the head and then the Commissioner's office to apply the provisions of the *Act* in responding to issues relating to an access request. 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.

> In a similar vein, there is nothing in the *Act* which delineates what a requester can and cannot do with information once access has been granted to it (see: Order M-1154). In fact, there are a number of exemptions (such as section 10(1), for example) which recognize that disclosure to the public could reasonably be expected to result in some kind of harm. In orders dealing with section 14(1) of the *Act*, this office has acknowledged that disclosure of personal information to individuals other than the individual to whom the information relates under the *Act* is, effectively, disclosure to the world, and this is a consideration to be taken into account in determining whether the exemption applies. 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.
>
> It appears from the nature of the request and the history between the Board and the appellant, that the appellant was not satisfied with the explanation for non-renewal of its contract with the newly amalgamated Board, and that it is seeking access to records relating to the Board's decision. I am satisfied that the appellant is seeking the information for genuine reasons, even though those reasons may be against the Board's interests. Therefore, I find that the Board has not provided me with sufficient evidence to establish that it had reasonable ground for believing that the appellant's access request was made in bad faith. Therefore, the Board cannot rely on this part of section 5.1(b) of the regulation to decline to process the appellant's access request.

As I found in Order MO-1548, the language used by the appellant in his correspondence with the Region is "often intemperate". As was the case in that order, however, I have carefully examined the actual requests which gave rise to the appeals before me and find that they have been made for a legitimate purpose. In each case, the requests seek information relating to the issues that constitute part of the subject matter of the appellant's litigation with the Region or with some matter directly connected to that litigation. Accordingly, I find that the Region has not provided me with sufficient evidence to warrant a finding that the appellant's requests were made in bad faith within the meaning of section 5.1(b).

In Order MO-1548 I reviewed several previous orders of this office regarding whether requests for records made to pursue remedies in other forums bring them within the ambit of section 5.1(b). I found that:

> In Order MO-1168-I, Adjudicator Cropley found that:
>
> > In my view, the fact that once access is obtained, the appellant intends to use the document for a particular purpose, for example to take issue with the Board's decision-making or to bring action against the Board, does not mean that the request is "for a purpose other than to obtain access" within the meaning of section 5.1(b) of the Regulation.

In Order M-860, former Inquiry Officer John Higgins noted:

> ... 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.

In Order M-906, former Inquiry Officer Higgins observed 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 completely contrary to the spirit of the *Act*, which exists in part as an accountability mechanism in relation to government organizations.

I agree completely with these comments. I am satisfied that the request was made for the purpose of obtaining access. Moreover, I find that this purpose is not contradicted by the possibility that the appellant may also intend to use the documents against the Board once access is granted. Therefore, I find that the Board cannot rely on this part of section 5.1(b) of the regulation to decline to process the appellant's access request.

In Order MO-1488, Adjudicator Cropley was faced with a very similar situation to that in the present case. The appellant in that appeal was seeking access to records which, in his view, would further a legal action which he had commenced against the institution. Adjudicator Cropley found that:

> I am satisfied that the requests were made for the purpose of obtaining access. Moreover, I find that this purpose is not contradicted by the possibility that the appellant may also intend to use the documents against the City once access is granted. Similarly, this purpose is not contradicted by the fact that he may not be able to tender the information as evidence in his Small Claims Court action.

I adopt this reasoning for the purpose of the present appeal. I find that the fact that the appellant in this matter may choose to make use of the documents which he obtains as a result of his requests under the *Act* to further his litigation against the Region is not determinative in demonstrating that the request was made for a purpose other than to obtain access.

For similar reasons to those articulated in my discussion of "bad faith", I find that the appellant's motives for making the requests were legitimate and directly related to obtaining what he considered to be relevant information to further his litigation with the Region. While his description of his future motivations with respect to other requests may demonstrate an intention which is not legitimate, I make no finding in this regard. I further find that the requests which have given rise to these appeals were made for the legitimate purpose of obtaining access to records relating to issues extant in the appellant's litigation with the Region. In my view, the requests were not made for a purpose other than to obtain access and the Region is not entitled to rely on the provisions of section 5.1(b) to refuse to process the requests on the basis that they are frivolous and vexatious.

Conclusion

I find that the criteria in sections 5.1(a) and (b) of Regulation 823 have not been satisfied and that there exists a reasonable basis for finding that the requests made by the appellant were not "frivolous or vexatious" within the meaning of section 4(1)(b) of the *Act*.

ORDER:

1. I do not uphold the Region's decisions that the requests in Appeals MA-020076-2, MA-020081-1, MA-020095-1, MA-020096-1 and MA-020129-1 are frivolous or vexatious.

2. I order the Region to provide the appellant with decision letters for each of these appeals in accordance with the requirements of 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*.

Original signed by: September 30, 2002
Donald Hale
Adjudicator