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

ORDER MO-1608

Appeals MA-020150-1 & MA-020173-1

Le Conseil scolaire public de district du Centre-Sud-Ouest

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NATURE OF THE APPEAL:

These matters, which I have decided to deal with together, are appeals from decisions of Le Conseil scolaire de district du Centre-Sud-Ouest (the Conseil), made under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*).

In Appeal MA-020150-1, the requester, now the appellant, sought access to:

> Records which address and identify the capital costs of constructing Ecole LaSource Barrie at various times:
>
> 1. Prior to tendering the job
> 2. After tendering the job
> 3. After award of the contract but prior to construction
> 4. During construction
> 5. Following construction
>
> The records of interest are those between:
>
> 1. CSDCSO and financial institutions
> 2. CSDCSO and the Ministry of Education and other governing authorities
> 3. CSDCSO and its administrators and elected representatives and employees
> 4. CSDCSO and any other party involved in the budgeting and review of the construction costs of the project at various times.
>
> The records would include but not be limited to:
>
> 1. budgets and cost summaries at various times
> 2. review of budgets vs. actual costs at various times
> 3. calculations used for obtaining funding and/or loans
> 4. calculations used to account and reconcile expenditures vs. funds obtained.

The Board issued a decision in which it refused the request as it was in its opinion frivolous and vexatious.

In Appeal MA-020173-1, the appellant sought access to a copy of "the accounting report showing details of all transactions to the account referenced as 'CSDS 459' from January 1, 1998 to May 13, 2002". For clarification the appellant attached a page from a printout of a ledger showing payments made to [a named entity], obtained in an earlier request.

With respect to this request, the Board also issued a decision in which it refused the request on the basis that it was in its opinion frivolous and vexatious.

Immediately upon receiving the decision letter on this latter request, the appellant submitted an amended request dated June 13, 2002, stating:

> We request an accounting report, in Excel File Format, from the accounting system showing all of the transactions charged to this account, referenced as "CSDS 459" from January 1, 1998 to date June 13, 2002. Furthermore, if this report is not the Detailed Job Cost report showing all disbursement[s] charged against the Capital costs of Ecole LaSource, we request that the Detailed Job Cost report be provided for the Capital Costs of Ecole LaSource for the same period of time. This report is also requested in Excel File Format. Finally, we request that these reports be sent by e-mail to [the appellant].

The Board did not issue a decision in response to the amended request. The appellant filed appeals with respect to these requests, which are now before me.

During mediation, the Board confirmed that it accepted the amended request dated June 13, 2002 as the request for the purposes of this appeal; however, its decision remained the same.

As the two appeals described above involve the same parties and raise the same issues, I have decided to deal with them together.

The sole issue in these appeals is whether the appellant's requests for records are frivolous or vexatious pursuant to sections 4(1)(b) and 20.1(1) of the *Act*.

I provided the Conseil with a Notice of Inquiry seeking its representations on the issues identified in the appeals, initially. The Conseil submitted representations, to which I decided it was unnecessary to invite the appellant's representations in response.

DISCUSSION:

Introduction

On October 17, 2001, Assistant Commissioner Tom Mitchinson issued Order MO-1477, involving the same appellant and the Conseil, which addressed the issue of the application of sections 4(1)(b) and 20.1(1) of the *Act* and section 5.1 of Regulation 823 to another request. On January 31, 2002, Adjudicator Laurel Cropley issued Order MO-1505 which again examined the application of sections 4(1)(b) and 20.1(1) to a further request involving the same parties. Finally, on February 14, 2002, Adjudicator Donald Hale issued Order MO-1509, which again dealt with similar issues. The Conseil has referred me to and relies on its representations in those appeals, among others. I will rely on the findings and conclusions reached in those decisions in my determination of the issues in the present appeal.

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.

In its representations, the Conseil 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 that amounts to an abuse of the right of access or would interfere with the operations of an institution

The Conseil states that for the preceding year and half, the appellant has "flooded" the Conseil with new or modified requests for information. It is said that after an initial request in October 2000, he has averaged almost one new request a month since that time. The Conseil submits that the intent of the appellant is not to obtain information to which he is entitled, but to deplete the Conseil's resources, both financial and human, in an effort to ensure a positive outcome in his litigation.

The Conseil refers to other institutions with which, it asserts, the appellant has adopted an identical strategy.

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, 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:
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> 1. the varied nature and broad scope of the requests;
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> 2. the appearance that they were submitted for their "nuisance" value;
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> 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).

In Order MO-1477, issued on October 17, 2001, the Assistant Commissioner found that the six requests submitted by the appellant over a 12-month period leading up to its decision was not, in itself, sufficient to establish a pattern of conduct as the term is used in section 5.1(a) of the Regulation. Further, he found no evidence to support the allegation that the requests were part of a strategy of harassment, and to gain an advantage in litigation. His conclusion was that the request by the appellant was not part of a pattern of conduct that amounted to an abuse of the right of access. The Assistant Commissioner did not find it necessary to consider whether the request was a "pattern of conduct that would interfere with the operations of the institution."

In Order MO-1477, the Assistant Commissioner also found that the Conseil had not established "bad faith", or that the request was made "for a purpose other than to obtain access".

Essentially the same facts were relied on in the appeal before Adjudicator Laurel Cropley, which led to Order MO-1505. Adjudicator Cropley agreed with the conclusions of the Assistant Commissioner, finding them equally applicable to the circumstances of the appeal before her. She also found that the Conseil had not established that the request constituted a pattern of conduct that would interfere with its operations.

In Order MO-1509, issued shortly after Order MO-1505, Adjudicator Donald Hale also found the conclusions in Order MO-1477, as well as those in Order MO-1501, equally applicable to the circumstances of the appeal before him.

In the case before me, the Conseil relies on further requests submitted by the appellant after the requests considered in the orders above. The appellant has made, according to the representations of the Conseil, up to four further requests in the space of approximately four months, along with what appear to be clarifications or amendments to existing requests.

Having regard to the findings and conclusions in the above orders, I am not convinced that the requests made by the appellant after the ones considered in those orders are of such a volume or nature that the whole series now amounts to a "pattern of conduct" within the meaning of section 5(1)(a) of the Regulation. Put another way, the additional requests made by the appellant are not sufficient to alter the findings in the above orders that no "pattern of conduct" had been established.

Abuse of the right of access

Also having regard to the findings and conclusions in the above orders, I am not convinced that the representations of the Conseil establish that the appellant's conduct amounts to an "abuse of the right of access" within the meaning of section 5(1)(a). Firstly, the additional requests, added to the prior requests, do not establish an "excessive volume" of requests and appeals, even accepting the Conseil's representations on this volume, and when viewed against the circumstances of other cases where requests have been found "frivolous and vexatious". The Conseil relies on the number of appeals, and it appears that about half of the approximately 15 different requests have resulted in appeals. It should be noted, however, that several of the appellant's appeals have resulted in orders overturning decisions of the Conseil; in these circumstances, the volume of appeals can hardly be a factor weighing against the appellant's position here.

The Conseil relies on what it characterizes as the "varied nature and broad scope of the requests", indicating that they are broad in nature, frequently involve the word "all", and can span up to five years. Further, it is said that the appellant requests the documents in both languages where possible. On my review of the requests, I agree that they are occasionally quite broad in scope. He has sought, for instance, access to reports showing "all accounts paid or payable in each fiscal year, shown in ledger type report forms with all invoices received and

payments made to every vendor during the year" since the inception of the Conseil. On the other hand, he has also narrowed some of his requests, and made other requests which are more focused, so that they include references to correspondence between specific parties, information about specific individuals, or other limiting factors.

The Conseil also refers to the appearance that the appellant's requests were submitted for their "nuisance" value. In the order in which this factor was identified, Order M-618, there was considerable evidence before the former Commissioner supporting a finding that the requester had no genuine interest in the information for its own sake, but was submitting requests for the nuisance value they generated for both the institutions and this office. In its representations, the Conseil states that the appellant has appealed its actions before the Board's deadline to respond has expired, and that some of his requests have been modified slightly, requiring a duplication of efforts to respond to him. I have reviewed the Conseil's representations in this area and, accepting their accuracy, the appellant's conduct does give rise to some measure of concern. On balance, however, I am unable to clearly conclude from the examples given that the requests were submitted for their nuisance value only and without genuine interest in the information for its own sake.

The Conseil has also referred to the fact that there has been an increase in submitting requests for information on the part of the appellant, following the date on which he initiated suit against the Conseil. In Order M-618, in which this factor was found significant, the former Commissioner found a dramatic increase of requests following the initiation of proceedings by the *institution* against the *requester*, and drew from this an inference that the requester was attempting to demonstrate how burdensome he could be. In this case, it is the appellant that has initiated suit, and although that would not in itself render this factor irrelevant, the circumstances are generally not as compelling as those before the former Commissioner in Order M-618.

I conclude therefore, on balance, that the circumstances described by the Conseil in its representations do not establish a "pattern of conduct" that amounts to an "abuse of the right of access". However, I am compelled to caution the appellant that my finding should not be seen as a "green light" to escalate his activities. Although I am not convinced of the Conseil's position on balance, certain aspects of the appellant's conduct as described by the Conseil suggest something less than the type of constructive approach to seeking access under the *Act* that might be expected from a requester who is genuinely interested in having access to information for its own sake.

Interference with the operation of the institution

The Conseil submits that it has only one staff member to respond to Freedom of Information requests, who also has other duties. In general, it is an institution with a modest number of employees. It is said that devoting staff and other resources to the requests made by the appellant interferes with the operations of the institution because it mobilizes them for different and varied topics, none of which are connected to serving the Charter-protected rights of learners who attend schools operated by the institution.

This argument was considered and rejected in Orders MO-1505 and MO-1509, as follows:

> Le Conseil takes the position that it exists and operates to serve the needs of French-language children. Noting that it has limited staff and resources allocated to deal with matters pertaining to the *Act*, that it serves "a jurisdiction twice the size of Belgium", and that the appellant's requests do not relate to its primary mandate, Le Conseil submits that to respond to the appellant's requests would unreasonably interfere with its operation.
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> In Order M-850, Assistant Commissioner Mitchinson stated:
>
> > ... in my view, a pattern of conduct that would interfere with the operations of an institution is one that would obstruct or hinder the range of effectiveness of the institution's activities.
> >
> > It is not possible to establish a finite set of criteria that will demonstrate "interference with the operations" as used in section 5.1(a). It is important to bear in mind that interference is a relative concept which must be judged on the basis of the circumstances a particular institution faces. For example, it may take less of a pattern of conduct to interfere with the operations of a small municipality than with the operations of a large provincial government Ministry, and the evidentiary onus on the institution would vary accordingly.
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> Recently, Adjudicator Liang had occasion to comment on an institution's assertions that responding to the appellant's request would interfere with its operations (Order MO-1427):
>
> > 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.
> >
> > …
> >
> > [I]t 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.

In Order M-1071, former Adjudicator Marianne Miller, also referring to comments made by former Adjudicator Higgins in Order M-906 relating to alternative measures that are available under the *Act* to relieve an institution faced with a request which may, on the surface, appear likely to interfere with its operations noted that:

> Denying a requester his right of access under the *Act* is a serious matter. In my view, the interference complained of must not be of a nature for which the *Act* or the jurisprudence (Order 81) provides relief.

With respect to the "massive" nature of the appellant's request, Le Conseil states that "the requester, seeks, in effect, records of every financial and payment record of [Le Conseil] since its start-up".

In my view, the comments from previous orders referred to above are equally applicable in the circumstances of this appeal. I am not persuaded that the relief provided by the *Act* would not be sufficient to address Le Conseil's concerns in this regard, and I conclude that Le Conseil has not established that this request constitutes a pattern of conduct that would interfere with its operations.

[Order MO-1505]

I am satisfied that the reasoning in the above cases applies with equal force to the appeals before me. I find that it has not been established that these requests are part of a pattern of conduct that would interfere with the operations of the Conseil.

I am not unsympathetic to the position of the Conseil. The use of resources in responding to a frequent requester necessarily diverts those resources from other work, including, potentially, responding to other requesters. In a given circumstance, it may be that an institution with modest resources will be able to demonstrate with clear and convincing evidence that the measures under the *Act* for relieving the burden on institutions responding to onerous requests are not sufficient,

and that this burden should be given greater consideration than a requester's ability to gain access under the *Act*. I am not convinced that it has been shown in this case.

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.
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> *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 fulfil 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 requests at issue in these appeals were made in "bad faith".

The Conseil submits that the requests are part of a pattern of requests made for a purpose wholly collateral to access. It is said that:

> [t]he oblique collateral motive is to engage the institution's resources while a dispute is ongoing and, incidentally, to dig up all manner of information regarding the individual defendants. In turn, after depleting the institution's resources on a wide variety of searches, any records shared may be advanced in an attempt to embarrass or to pester the effected [sic] senior staff with respect to perceived insufficient qualifications, experience or character. Ultimately, the information may be used to apply collateral, unwarranted pressure to senior staff to make an inappropriate compromise with [the appellant]. We suggest he is seeking, through the *Act*, to gain what he perceives to be "ammunition" for the lawsuit he launched against le Conseil and, by raising personal details about staff, and to gain the upper hand on the institution. It is ironic that a statute put in place

> ostensibly to encourage better functioning of institutions by allowing access to information by those served by them, has permitted a non-user of this institution's services to distract it from the central program it offers: education to serve the Charter-protected rights of minority language students in South, Central and Southwestern Ontario.

The Conseil also submits that the requests are made for a purpose other than to obtain access:

> We submit that [the appellant] intends to harass and embarrass le Conseil and its senior staff and to damage the institution. Access to information under the *Act* is a right enjoyed by the public. However, the exercise of that right must be interpreted in the context of both the statute and the requester's relationship to the institution. It serves neither the object nor the spirit of the statute to empower a requester with a vindictive interest in obtaining access only as an aid to advance a monetary and punitive claim and to injure the institution's interests. Rather, [the appellant] is employing the access afforded by the Act as a tool to advance an unfair and expanded, although irrelevant "discovery process", which would be unavailable to a litigant involved in a dispute with a private entity. Neither of the matters of openness or protection of privacy which are the underpinnings of the statue is served by situation such a "right" in this requester.

In response to similar submissions, Assistant Commissioner Tom Mitchinson stated, in Order MO-1477:

> 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.

I agree with these comments, and find them applicable in the current appeals. I find insufficient evidence to establish that the appellant's motive in these requests is to "engage the institution's resources while a dispute is ongoing". Further, although it is possible that the requester will seek to use the records to which he gains access under the *Act* to his benefit, in other disputes with the Conseil, that is not, by itself, the determinant of bad faith. It does not establish that the appellant is not motivated by a desire to obtain access pursuant to his requests, but by some other objective.

I find therefore that the Conseil has not established the applicability of section 5.1(b) of the Regulation.

Before concluding, I wish to address a submission made by the Conseil, to the effect that the appellant is abusing the process by requesting information that is already available to him as part of the discovery process inherent in the action commenced by him against the Conseil. In Order MO-1488, Adjudicator Laurel Cropley discussed similar issues:

> On a related note, previous orders of this office have found that the *Act* establishes a regime and process for obtaining access to records which is separate and distinct from the discovery or disclosure mechanisms related to court actions (Orders 48, P-609, PO-1688, M-982, M-1109, MO-1192 and MO-1477), as noted by Adjudicator Liang in Order MO-1427:
>
> > 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.
> > …
> > [E]ven 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 my view, this separation exists with respect to issues relating to the admissibility of evidence in a court action generally. On this basis, the appellant is entirely within his rights to request information from the City, regardless of whether it is subject to disclosure, or ultimately determined to be inadmissible in the court action.
>
> Moreover, it is important to point out that Section 1 of the *Act* provides a general right of access to records under the control of institutions, including the City. 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 (see: Order MO-1477).

I agree with the above. The fact that some of the information the appellant seeks is available through a discovery process does not lead me to conclude that the appellant is abusing the process by seeking access under the *Act*.

ORDER:

1. I do not uphold the Conseil decision that the requests are frivolous and vexatious.

2. I order the Conseil to make access decisions in response to the appellant's requests, in accordance with the requirements of sections 19, 21 and 22 of the *Act*, treating the date of this order as the date of one request, and one month beyond the date of this order as the date of the second request.

Original signed by: January 31, 2003
Sherry Liang
Adjudicator