



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER MO-1841

Appeal MA-030249-1

Regional Municipality of Peel



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NATURE OF THE APPEAL:

This is an appeal from a decision of the Regional Municipality of Peel (the Region), made under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). In its decision, the Region refused to process a request for access to records on the basis that it was frivolous or vexatious under section 4(1)(b) of the *Act*.

The request was for access to records which disclose:

“the participation and input of, and by, each of Peel Staff in the selection and decision process to specify or select the [named company’s] product over other products available to perform the function of this equipment.

Comparison performed with other products available from other sources to perform the function of this product, including tenders and/or requests for proposals.

Any cost or price comparisons of the product dealing with competitors or with past projects where the [named company’s] products were used in a similar solution or function.

Any cost or price comparisons of the product dealing with competitors or with past projects where the [named company’s] products were used in a similar solution or function.

Any cost or price comparisons of the [named company’s] product compared with other similar installations for other municipalities or similar projects.”

The company named in the request was a subcontractor to the requester in a construction project for the Region.

The requester (now the appellant) appealed the decision of the Region. As mediation did not result in a resolution of the appeal, it was referred to me for adjudication.

The named appellant is a construction company, represented in this and other proceedings by its president. As neither party distinguished in any way between the interests of the company and of its president throughout the request and appeal, and the president describes himself in correspondence as the “requester”, I will refer to the president as the “appellant”.

I sent a Notice of Inquiry to the Region, initially, inviting it to provide representations on the facts and issues raised by the appeal. The Region’s representations, with the exception of certain confidential portions, were then sent to the appellant along with the Notice, and he was also invited to submit representations. After receiving the appellant’s representations, I invited him to submit supplementary representations on a particular aspect of the issues, which I subsequently received.

The issue before me is whether the appellant’s request is frivolous or vexatious within the meaning of section 4(1)(b).

FRIVOLOUS OR VEXATIOUS REQUEST

General Principles

Section 4(1)(b) reads:

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 5.1 of Regulation 823 under the *Act* elaborates on the meaning of the terms “frivolous” and “vexatious”:

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.

Section 4(1)(b) provides institutions with a summary mechanism to deal with frivolous or vexatious requests. This discretionary power can have serious implications on the ability of a requester to obtain information under the *Act*, and therefore it should not be exercised lightly [Order M-850].

An institution has the burden of proof to substantiate its decision to declare a request to be frivolous or vexatious [Order M-850].

The Region takes the position that the request is part of a pattern of conduct that amounts to an abuse of the right of access or would interfere with its operations, and that the request is made in bad faith or for a purpose other than to obtain access.

Background to the request

In the Region’s representations, it describes the history of its relationship with the appellant. Over the past some four years, the appellant’s company entered into contracts with the Region to

perform at least three construction projects. The Region states that this company's participation on two of these projects was terminated prematurely due to its failure to complete. Court actions have been commenced by several subcontractors including the one named in the request.

According to the Region, the appellant has advanced several monetary claims against the Region arising out of these projects, which have been reviewed and rejected by the Region's staff. It states that the appellant has threatened the Region with legal action should these claims not be satisfied to his satisfaction. The Region states that it has been in contemplation of litigation with respect to the appellant's company since at least January, 2002.

The appellant objects to the Region's characterization of the background facts, describing them as "generally false and misstated half-truths in order to deliver misinformation to the Commission or other readers." He provided evidence which he submits prove the falsity of the Region's assertions. It is not necessary for me to review the appellant's objections in detail. I am satisfied that the appellant's descriptions of the Region's representations are not borne out. On certain matters, there appear to be genuine differences of opinion which the appellant has chosen to portray as examples of malicious misrepresentations on the part of the Region. On other matters, I am not persuaded that the appellant's view of the facts is supported by the evidence. I am persuaded that the Region's description of the background facts is substantially correct.

Whatever the differences between the Region and the appellant, it is not contested that there is an ongoing dispute between them over payment for certain construction projects, which pre-dates this request. The Region has outlined the basis for its position in correspondence submitted with its representations. For his part, the appellant accuses the Region, among other things, of "pilferage" of his holdback money.

It is evident from the representations that the relationship between the Region and the appellant is highly adversarial. The appellant has been very aggressive in pursuing his claims against the Region. Although it does not appear that he has commenced litigation, the representations are replete with instances where he accuses the Region's staff of "tricking" him, stonewalling, misleading Council, unethical and improper conduct, and illicit conduct.

The correspondence submitted with the Region's representations indicates that the appellant was asked on a number of occasions to cease and desist from any direct contact with its staff both at their workplaces and at their homes. The Region describes voluminous correspondence including "near daily" email messages from the appellant to its staff.

The appellant does not deny that he has recorded telephone conversations with the Region's staff without their permission. He states that such a practice is legitimate and lawful and that there is no requirement, legal, ethical or otherwise, to advise a person that a telephone conversation is being recorded.

On May 20, 2003, a few weeks before this request was submitted, the appellant sent an email message to a member of the Region's staff, which stated:

Subject: You are destroying my family

I will do likewise.

Even after the above email prompted the Region's Senior Legal Counsel to repeat the request to cease communications to the Region's staff, the appellant sent the same individual a further message indicating that he would call the individual at home to discuss matters further and, "if necessary...drop by and speak to you in person." He also asked, if this individual had been advised not to deal with him, to be provided with the home address and telephone number of the Region's Chief Administrative Officer.

Other requests made by the appellant

In addition to the above background are a number of requests under the *Act* made by the appellant. The Region states that between October, 2002 and February, 2004, after the monetary disputes with the appellant began, the appellant submitted eleven requests for access to records (the appellant states that there are only 10). These requests are described in the Region's representations. The appellant takes issue with the descriptions provided by the Region, alleging that they are "miswritten and do not record accurately the substance of each request." He also asks that if the description is relevant to my inquiry, the actual request be referred to, and submits some documentation to support his position. As most of these requests resulted in appeals to this office, which in turn were described in Mediator's Reports, I was able to review the descriptions of the requests contained in these Reports. I am satisfied that the Region has accurately described the requests submitted by the appellant. Based on the Region's representations and these Mediator's Reports, the requests submitted by the appellant between October, 2002 and February, 2004 can be described as follows:

October 2, 2002

1. copies of all correspondence for contract WPCP Primary Treatment Expansion, Project number 91-2929 excluding records which the appellant had already received (previously address or copied to him) during its performance of the contract, between the Region of Peel and [named firm] and [named individual], his superiors and subordinates;
2. records regarding the installation of uni-flanges, including communications with OCWA;
3. records regarding the late start of the job and issuance of the letter to commence;

4. records regarding the labour and material payment bond premiums;
5. records regarding the winter shut down;
6. records regarding the maintenance holdback;
7. records regarding the extension of the contract time;
8. copies of the [named firm] daily job diaries;
9. copies of the original engineering agreement including the portions which show the original engineering and supervision contract amounts for the:
 - a. Clarkson WPCP Primary Treatment Expansion – Project 91-2920;
 - b. South Peel Water Supply System Emergency Stand-by Power Facilities, Project 99-1980; contracts 1-4; and
 - c. East Brampton Reservoir Expansion Project 99-1910.
10. Records regarding additional engineering fees which includes approval, explanations and justifications for each additional fee for the
 - a. Clarkson WPCP Primary Treatment Expansion – Project 91-2920;
 - b. South Peel Water Supply System Emergency Stand-by Power Facilities, Project 99-1980; contracts 1-4; and
 - c. East Brampton Reservoir Expansion Project 99-1910.

November 1, 2002

All records dealing with the health and safety matter relating to the East Brampton Reservoir Expansion leak, and how it had been addressed by the Region to date. Shortly thereafter, he amended his request to include the following:

1. records which initially determined the potential problem
2. records of the reviews and additional inspections and monitoring that occurred
3. records of notification to the MOE of the problem, and any exchanges with MOE

4. records of the retaining of the contractor to replace existing membranes, i.e., quotes, tenders, evaluations, etc.
5. all records touching upon [the appellant's] proposal for doing this work.

January 21, 2003

East Brampton Reservoir: Records that disclose the financial details for the particular repair work in question, including consultations, inspections, water testing and analysis, and costs of the work undertaken.

June 4, 2003

Search: to perform a software search of the Region's email accounts, both past and present, including deleted and archived directories and file areas for all email containing the text [appellant's name].

Records #1: to provide the list of emails generated by the above search. The list is to be generated to identifying the sender, received, copied parties and (sic) well as the date and subject of each email. I would like this list to be exported as a digital file and emailed to [appellant's email address] or delivered on magnetic media, CD or Floppy disk.

Records #2: the emails themselves are requested as records exported to magnetic media, CD or Floppy disks.

June 4, 2003

This is the current request.

July 23, 2003

All records (which includes emails, hand written notes, memos, letters, diary entries, schedule entries, meeting minutes, voicemail transcripts, and reports) relating to the meeting regarding changes in staffing and organizational structure for the administration of construction contracts involving the Director of Water and Wastewater Treatment or designates.

August 8, 2003

1. Criminal complaints made by the following individuals (mentioned below) to Peel Regional Police regarding [appellant] or [appellant's company]. This

includes any complaints between the named individuals and any other individual or company over the past 20 years or prior.

2. Any and all records including hand written notes, drafts and mark-up versions of formal documents, message pads, formally written correspondence or records maintained by the following individuals (mentioned below) pertaining to any complaints made against [appellant], and [appellant's company] and any other individual or any company over the past 20 years or prior regarding the following individuals:

- [six named individuals]

All records regarding complaints made by any individual or company regarding [appellant] or [appellant's company] or any complaints made by or to the following individuals and to Peel Regional Police over the past 20 years regarding the following individuals: [six named individuals].

August 11, 2003

Records in any way relating to a submission to council on March 20, 2003 concerning [appellant's company] as identified in the Minutes of Council Meeting dated March 27, 2003.

The records are to include but not be limited to:

Notes, drafts, memos and draft reports, email and records of any type including those referred to, or were a basis for the report or parts of the report, including a copy of the report itself, and including any draft versions of the report together with copies that contain any mark-up and editing notations applied thereon.

The persons that may have responsive records and which I direct be searched would include [a named individual] and those copies retained by his assistants and/or stenographers, as well as those versions that were reviewed by his subordinates, peers (sic) and superiors, including those within the Legal Department and [a second named individual] specifically, as well as any other departments that may have had an interest in reviewing the report before it went to council.

September 24, 2003

Item a) 2002-251T (00-1935) – Meadowvale North Pumping Station, Mississauga – Awarded Oct. 21, 2002 to [named company] for \$7,601,960

Item b) 2002-253-T (00-1950) – Expansion North Brampton Pumping Station and Reservoir – Awarded Oct. 21, 2002 to [named company] for \$7,375,307

1. record of the original pre-tender budget for these projects with the adjustments made to the budget as a result of the tender.
2. records concerning the manipulation of the contract awards and how the manipulation was addressed by Regional staff
3. records of the recommendations made to Peel Council on this issue.
4. records with details of legal action taken to recover the over \$2.0 million in damages.
5. records with details of any criminal or competition complaints filed with respect to this event.
6. any other records and reports investigating and/or dealing with the withdrawal of the low bids to allow the contracts to be awarded for more than the low bids and the steps taken to recover the significant damages Peel suffered.
7. records that would disclose the moneys or securities held by Peel on [three named companies] as of October 21, 2002 from all sources (i.e., maintenance securities, payment certificates, tender deposits or any other, funds or securities outstanding to them with Peel)
8. Payment Ledger reports from Peel's accounting records identifying all payments made to [three named companies] for the period of time September 1, 2002 to December 31, 2002 with related Accounting Journal and Accounting Transaction reference numbers.
9. Transcripts of council meetings dealing with these on these matters.

November 12, 2003

1. A copy of the report made to Council resulting from the [appellant's] delegation to General Committee on September 11, 2003; and
2. A copy of the recording of the closed session in-camera meeting regarding the [appellant's] delegation to General Committee on September 11, 2003.

December 12, 2003

East Brampton Reservoir – Tender/bid results, price comparisons or documents used to decide on the “Pre-Purchase” of each piece of equipment, pertaining to Proposal No. 2003-634P.

Is the request part of a pattern of conduct that amounts to an abuse of the right of access?

As indicated above, section 5.1 of Regulation 823 provides that a request is frivolous or vexatious if, among other things, it is part of a “pattern of conduct that amounts to an abuse of the right of access”.

Numerous orders of this office have explored the meaning of this phrase. Generally, the following factors have been seen as relevant in deciding whether a pattern of conduct exists that amounts to an abuse of the right of access (see, for example, Order MO-1810):

- *Number of requests*

Is the number excessive by reasonable standards?

- *Nature and scope of the requests*

Are they excessively broad and varied in scope or unusually detailed? Are they identical to or similar to previous requests?

- *Timing of the requests*

Is the timing of the requests connected to court proceedings or the occurrence of some other related event?

- *Purpose of the requests*

Are the requests intended to accomplish some objective other than to gain access? For example, are they made for “nuisance” value, or is the requester’s aim to harass government or to break or burden the system?

Particular cases may also raise other relevant factors. In Order MO-1810, Adjudicator Rosemary Muzzi found the conduct of the institution and the conduct of the appellant toward the institution subsequent to the filing of the request to be relevant factors in assessing the application of section 4(1)(b). In addition, Adjudicator Muzzi stated:

It is clear from past orders that, in examining whether a pattern of conduct exists, the focus should be on the cumulative nature and effect of a requester’s

behaviour. (See for example Order MO-1782.) It is also clear that in many cases, ascertaining the purpose of requesters requires the drawing of inferences from their behaviour because it is seldom the case that requesters admit to a purpose other than access.

On the material before me, the appellant has made a total of eleven requests under the *Act* to the Region within a fourteen month period. By itself, this is not an extraordinary number. However, it is not insignificant, and I accept the Region's assertion (in its decision letter) that these requests have dominated the time of the Region's staff. Another measure of the volume of the appellant's requests compared to other requesters is that well over half of all appeals involving the Region since 1999, and every appeal since December, 2002, comes from the appellant.

With respect to the nature and scope of the requests, many of them are broad, asking for "all" records covering a number of transactions or issues. One covers records over a period of twenty years. One covers the email accounts for the entire staff of the Region, to include not only current directories, but also past ones, and archived and deleted messages. In nature, several are similar, requesting an exhaustive array of records in relation to all aspects of certain construction projects. Others are similar in the sense that they seek to uncover the contents of all manner of communications between or from Regional staff about the appellant or his company.

As to the timing of the requests, it is not in contention that they were all made after the onset of disputes over payment to the appellant for work on construction projects.

The appellant's stated purpose in making the requests is "for use in making delegations to the Elected Council for the Region of Peel so as to augment the selective and limited briefings delivered to the Council by Peel's Administrative non-elected representatives during recommendations for the expenditure of parts of Peel's billion dollar annual procurement budget." The Region submits that the requests are prompted solely by his unsatisfied monetary claims against it, and that the appellant is using the *Act* as a mechanism to significantly increase the workload of the Region's staff and stretch limited municipal resources in a deliberate effort to improve his leverage towards obtaining a satisfactory monetary settlement.

On my review of the material before me, I accept that the appellant intends to use the information to make deputations to Council. However, I am also persuaded that he is also using the access process to gain leverage in his monetary disputes with the Region in the manner described above. In reaching this conclusion, I have considered the nature and timing of the requests. I have also considered the appellant's conduct in pursuing his monetary claims, which can be described as at the very least provocative, including the tape recording of telephone conversations, the email message of May 20, 2003, and liberal accusations of illegal and unethical conduct. From all of these facts, I infer that a substantial part of the appellant's purpose in making the requests is unrelated to access, but arises out of a desire to "make life difficult" for the Region's staff. Whether they yield him with leverage in his monetary claims or simply provide some satisfaction in dealing with an adversary, I agree with the Region that the appellant is using the *Act* as a "mechanism" to advance other aims.

The appellant objects to the Region's reliance on documents created after this request was made, to provide a basis for inferences about his motives. Adjudicator Muzzi considered a similar objection in Order MO-1810:

Insofar as the events subsequent to the decision in this matter are considered, I have decided to consider them in reaching my conclusions about this appeal. My reasons for this are two. First, the inquiry before an adjudicator is a de novo hearing where I can consider anew all that has occurred. I am not restricted to the information that was before the institution when it came to its conclusion on the same issue that is now before me. At the time I commenced my inquiry into this case, the appellant's conduct with respect to the more recent requests was raised before me and the appellant had an opportunity to know the Conseil's case and respond to it. Furthermore, as has become evident, while each of the requests filed by the appellant is a snapshot in time, the picture does not substantially change, if at all, from one incident to another.

Likewise, I see no reason why I am restricted in my review of the facts to those that occurred prior to this request, in assessing the Region's claims as to the appellant's motives.

In conclusion, I find that the factors listed above are all relevant to determining whether the appellant is engaged in a "pattern of conduct that amounts to an abuse of the right of access". Further, they all, to a greater or lesser degree, support a conclusion that he is. On balance, I am satisfied that there were reasonable grounds for the Region to decide that the appellant's request is frivolous or vexatious as part of a pattern of conduct amounting to an abuse of the right of access. In light of this conclusion, it is not necessary for me to consider whether the appellant's request would unreasonably interfere with the Region's operations or whether it was made in bad faith.

I would not reach this conclusion on a consideration of each of the appellant's requests alone, including the one before me, or each element of the background facts in isolation. However, the cumulative effect of the facts leads me to view the appellant as engaging in a "pattern of conduct that amounts to an abuse of the right of access."

REMEDY

In Order MO-1810, Adjudicator Muzzi discussed the issue of remedy in an appeal that raised very similar facts to the one before me:

In the circumstances, I have decided that the appropriate remedy is to uphold the Conseil's decision that the appellant does not have a right of access to the information he requested in this appeal.

In addition, in order to deal with the broader issues of the appellant's conduct, I have decided to limit the number of his active access to information matters with the Conseil to one at any given time. The decision to limit the appellant's active matters to one at a time does not preclude a finding, where appropriate, that any current or future request is frivolous or vexatious. The appellant may apply to this office for an order varying the terms of this order after one year has passed from the date of this order.

Based on my conclusions in this appeal, I am also satisfied that the appropriate remedy is to limit the number of the appellant's active access to information matters with the Region to one at any given time. This does not preclude a finding that any current or future request is frivolous or vexatious. The appellant may apply to this office for an order varying the terms of this order after one year has passed from the date of this order.

Further, in deciding which of his requests or appeals he wishes to have proceed, the appellant is not precluded from selecting the request at issue in this appeal.

ORDER:

1. I uphold the Region's decision under section 4(1)(b) of the *Act* that the appellant does not have a right of access to the records he requested because the request is frivolous or vexatious, and I dismiss this appeal. However, the appellant may choose to re-activate this request in accordance with the terms of my order below.
2. I impose the following conditions on the processing of any requests and appeals from the appellant with respect to the Region now and for a specified time in the future:
 - (a) For a period of one year following the date of this order, I am imposing a one-transaction limit on the number of requests and/or appeals under the *Act* that may proceed at any given point in time, including any requests or appeals that are outstanding as of the date of this order.
 - (b) Subject to the one-transaction limit described in provision 2(a) above, if the appellant wishes any of his requests and/or appeals that exist at any given time to proceed to completion, the appellant shall notify both this office and the Region and advise as to which matter he wishes to proceed.
 - (c) If the appellant fails to pursue any of his appeals that are with this office on the date of this order within two years of the date of this order, this office may declare those appeals to have been abandoned.

3. The terms of this order shall apply to any requests and appeals made by the appellant or by any individual, organization or entity found to be acting on his behalf or under his direction.
4. At the conclusion of one year from the date of this order, the appellant, the Region and/or any person or organization affected by this order, may apply to this office to seek to vary the terms of provision 2 of this order, failing which its terms shall continue in effect until such time as a variance is sought and ordered.
5. This office remains seized of this matter for whatever period is necessary to ensure implementation of, and compliance with, the terms of this order.

Original signed by: _____

Sherry Liang
Adjudicator

September 30, 2004