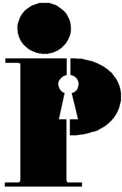

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-2348

Appeal PA-030172-2

Ministry of Natural Resources

NATURE OF THE APPEAL:

This appeal concerns a decision of the Ministry of Natural Resources (the Ministry) made pursuant to the provisions of the *Freedom of Information and Protection of Privacy Act* (the *Act*). The requester (now the appellant) made a request under the *Act* for "… the number of times [the appellant] has contacted [Ministry] District Offices requesting information on the Wild Turkey [Release] Program [(the Program)] since December 2002".

By way of background, the Program involves the trap, transfer and introduction of wild turkeys by the Ministry to various sites throughout Ontario.

The appellant identifies herself as a dedicated environmental activist. For a number of years, she has been regularly requesting information under the *Act* from the Ministry and other government institutions as a means of understanding the government's wildlife and forestry programs and their effectiveness.

The Ministry denied access to the records responsive to the request pursuant to section 10(1)(b) of the *Act* (request for access is frivolous or vexatious).

The appellant appealed the Ministry's decision.

Mediation was unsuccessful in resolving the appeal and the file was transferred to the adjudication stage.

I first sent a Notice of Inquiry to the Ministry seeking representations on its claim that the appellant's request was frivolous or vexatious. The Ministry submitted representations and the non-confidential portions of its representations were shared with the appellant.

I then sent a Notice of Inquiry to the appellant, who submitted representations in response.

I then gave the Ministry an opportunity to respond to a summarized version of the appellant's representations. The Ministry submitted reply representations.

The sole issue before me is whether the appellant's request is frivolous or vexatious within the meaning of section 10(1)(b) of the *Act*.

DISCUSSION:

FRIVOLOUS OR VEXATIOUS REQUEST

General principles

Section 10(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 460 reads:

> 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 10(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 that a request is frivolous or vexatious (Order M-850).

In this case, the Ministry relies on the criteria under section 5.1(b) of the Regulation in support of its assertion that the appellant's request is frivolous or vexatious. The Ministry's principal argument is that the appellant's request is frivolous or vexatious on the basis that there are reasonable grounds to believe that the appellant's request was made for a purpose other than to obtain access. The Ministry also argues that the appellant's request was made in bad faith. I will first consider whether there is sufficient evidence before me to conclude that the appellant has made her request for a purpose other than to obtain access.

Grounds for a frivolous or vexatious claim

Purpose other than to obtain access

Once an institution is "satisfied on reasonable grounds that the request is made … for a purpose other than to obtain access", the definition in section 5.1(b) is met and the request would therefore be "frivolous or vexatious". The institution need not demonstrate a "pattern of conduct" although, again, such a pattern could be a relevant factor in a determination of whether the request was "for a purpose other than to obtain access". (see Order M-850)

The meaning of this phrase is relatively straightforward. There are no terms of art, nor terms which have particular meaning in a legal context. If the appellant was motivated not by a desire to obtain access pursuant to a request, but by some other objective, then the definition in section 5.1(b) would be met, and the request would be found to be "frivolous" or "vexatious". (see Order M-850)

Turning to the evidence in this case, the Ministry states that the appellant has, in the past, had a "habit of making numerous requests for the same information from a number of staff at the same time." The Ministry also asserts that the appellant often makes formal access requests for information that she has already received. The Ministry indicates that in making her requests, it was not unusual for the appellant to take a combative approach, including the use of "abusive language, making false or inflammatory statements/accusations, yelling, and being generally rude." The Ministry suggests that the appellant has contacted staff and managers at home outside of business hours and that on one occasion she paged a manager on Christmas Eve. Where the Ministry has failed to immediately comply with the appellant's wishes, the Ministry indicates that the appellant has barraged the Ministry staff person handling her file with telephone calls over a very short period of time.

The Ministry states that in order to provide the appellant with information, while "attempting to minimize the adverse impact of her behaviour on operations and staff", Ministry managers and directors have "generally adopted a one point of contact approach". This approach involves directing the appellant to one staff contact to answer her inquiries and who are directed to provide information on particular subject areas of interest to her. The Ministry states that the selected staff person is usually the person who is most knowledgeable about the subject area. If the information being sought falls within an exemption under the *Act*, the Ministry states that the appellant is directed to make a request under the *Act*. In the event that the appellant has questions regarding the request, she is asked to contact the designated contact for that matter.

The Ministry suggests that the appellant expressed dissatisfaction with the one point of contact approach and continued to make multiple requests for information and exhibit harassing and abusive behaviour towards Ministry staff.

In response, the Director of the Fish and Wildlife Section for the Ministry wrote to the appellant to confirm the continued use of the one contact approach and to identify the appellant's contact for the Program.

The Ministry states that shortly after sending this letter, the appellant contacted the Manager of the Ministry's Wildlife Section who is responsible for the Program and demanded that the Ministry change its one contact approach or the appellant threatened to "pound you guys with [access to information requests] and […] get all my friends to call all your people". A few days after this telephone call the Ministry states that the appellant submitted the request that is the subject of this appeal.

The Ministry suggests that the appellant's request appears to be trivial in nature. In the

Ministry's view the appellant has repeatedly complained about her treatment by Ministry staff and indicated that she was keeping records. Accordingly, the Ministry believes that the appellant would be aware of the number of times she had contacted staff. In addition, the Ministry states that the appellant has been a critic of the Program and has demonstrated considerable knowledge about the details of the Program. In light of this, the Ministry indicates that the appellant knows that the Program is concentrated in selected areas of the province, mostly southern and central Ontario. As a result, the Ministry would have expected the appellant to direct her request to offices in those areas rather than for all districts of Ontario.

The Ministry feels that the appellant's request is designed to needlessly engage Ministry staff in a large number of its offices across Ontario. The Ministry sees no reason why the appellant has made her request other than as a way of pressuring the Ministry to abandon its one point of contact approach.

The appellant responded to the Ministry's representations with a detailed submission. I then summarized the appellant's submission and shared it with the Ministry. The appellant's representations were summarized as follows:

> The appellant submits that her interest in probing the government for information regarding environmental issues that interest her is her democratic right, yet she feels that more often than not she is met with evasive and mocking replies from Ministry staff. She finds this behaviour rude and provoking.
>
> The appellant's interest in obtaining the information at issue in this appeal relates to her desire to gather documentary evidence in support of a claim of harassment against Ministry staff in regard to the manner in which she has been treated during the processing of her requests for access to information.
>
> The appellant states that her request is not frivolous or vexatious. She believes that the information she is seeking is readily available electronically in the Ministry's records.
>
> With respect to some of the Ministry's specific allegations as set out in its representations, the appellant states:
>
> 1. She denies contacting a Ministry staff person on Christmas Eve. She says that she contacted this person on the morning of December 24th, a regular workday for the Ministry. The appellant states that this employee's voicemail provided a forwarding number, which she called.
>
> 2. The appellant denies the Ministry's allegations that she threatened to "pound" the Ministry with access

> to information requests. She recalls speaking with the Manager of the Ministry's Wildlife Section and that she indicated that she did not feel comfortable speaking with the Ministry's choice for a contact person because he had testified against her in court regarding an application for an injunction for the further release of wild turkeys, and he was directly responsible for challenging her application for an environmental assessment.

The Ministry was given an opportunity to reply to the appellant's representations. The Ministry submitted reply representations, which it has asked I maintain in confidence. Without revealing the substance of these representations, the Ministry reiterates its initial position and argues that the appellant is using the *Act* to harass the Ministry.

There is clearly a difference in perception between the Ministry and the appellant regarding the appellant's motivation for making this request. The Ministry views the appellant's request as an attempt to harass the Ministry and tie up its resources to circumvent its one point of contact approach. In addition, the Ministry feels that the appellant's sophistication and knowledge of the Program should enable her to already have this information at her disposal. On the other hand, the appellant's view is that her genuine efforts to obtain information from the Ministry regarding environmental issues have often been met with mocking and evasive replies from Ministry staff, which she describes as rude and provoking. As a result of these experiences she is now pursuing a harassment claim against the Ministry and she is seeking the information requested to bolster her claim.

On my review of the evidence, I am prepared to accept that the appellant may have exhibited aggressive and threatening behaviour and used inappropriate language in telephone communication with Ministry staff as a means of venting and expressing frustration in dealings with Ministry staff. In my view, the appellant has not necessarily used the most felicitous approach in her communication with Ministry staff. This may be something for her to consider for the future in light of her ongoing work as an environmental activist and the likelihood that she will have ongoing contact with the Ministry.

In my view, however, the Ministry has not provided reasonable grounds for me to conclude that the appellant's request is for a purpose other than to obtain access. I am prepared to accept, on the evidence before me, that the appellant has a legitimate and genuine interest in the information at issue, that is, the pursuit of a harassment complaint against the Ministry. This office has established in past decisions that if a requester's purpose in making a request under the *Act* is to obtain information to assist him/her in subsequently substantiating a complaint against an institution, this does not mean that the request is for a purpose other than to obtain access; on the contrary, the purpose would be to obtain access and use the information in connection with the complaint (Orders M-860, M-906).

Bad faith

As referenced above, once an institution is "satisfied on reasonable grounds that the request is made … in bad faith", the definition in section 5.1(b) is met and the request would therefore be "frivolous or vexatious". The institution need not demonstrate a "pattern of conduct" 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". (see Order M-850)

"Bad faith" has been defined as:

> 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 (Order M-850).

The Ministry states that the appellant's request is trivial in nature since the information she seeks should be in her possession. Based on this conclusion, the Ministry suggests that the appellant's request is designed to harass the Ministry and disrupt its activities. The Ministry states that in order to process the appellant's request it must undertake time consuming searches of individual notebooks and message slips. The Ministry feels that the appellant is aware of this and is pursuing her request just to make life difficult for the Ministry. The Ministry forecasts that the minimum search time required to process the request is forty-two hours at an approximate cost of $1,260.00. The Ministry submits that the appellant would not ultimately pursue this request based on its trivial nature, the expense in processing it and the appellant's own assertion that she has limited resources. For these reasons, the Ministry concludes that the appellant's request was made in bad faith.

The appellant submits that while she was previously "clumsy" or "bad" at requesting information under the *Act*, she has never used the *Act* to make requests in bad faith. She states that all of her requests have been "up front".

In my view, the Ministry has not provided reasonable evidence to support a finding that the appellant's request was made in bad faith. As stated above, I am satisfied that the appellant has a genuine interest in acquiring the information at issue to support a claim of harassment against the Ministry. I am not satisfied that the appellant's interest in this information is driven by a sinister motive or for a dishonest purpose.

In conclusion, the criteria in section 5.1(b) of the Regulation have not been satisfied. Accordingly, a reasonable basis for concluding that the request was "frivolous or vexatious" under section 10(1)(b) of the *Act* has not been established.

ORDER:

1. I do not uphold the Ministry's decision that the appellant's request is frivolous or vexatious.

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

Original signed by: November 26, 2004
Bernard Morrow
Adjudicator