

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER MO-3023

Appeal MA13-295

Township of Chatsworth

March 14, 2014

Summary: The township received a request for access to information relating to an overhanging sign located in the township which was struck by the appellant's truck. The township denied access to any responsive records on the basis that the request was frivolous and vexatious within the meaning of section 4(1) of the *Act*. The appellant appealed this decision. In this order, the township's decision is not upheld and the township is ordered to issue a decision to the appellant respecting access to any responsive records.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 4(1), section 5.1 of Regulation 823 under the *Act*.

Orders Considered: Order 850 and MO-1782.

OVERVIEW:

[1] The Township of Chatsworth (the township) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following:

... a letter dealing with signage in the downtown connecting link of Chatsworth Hwy #6 that was given to the property owner of [named company] about placement of/or removal of sign overhanging Hwy #6.

[2] The township issued a decision denying access to the requested record on the basis that the request was deemed to be frivolous and vexatious. The township explained the reasons for this determination were that:

1. The record [request] is of little or no worth because the Township council permitted the sign referred to in the request to be reinstalled in the existing location by resolution March 6, 2013 as explained to the requester.
2. The request is an annoyance because the sign has been permitted by Council.

[3] The appellant appealed the township's decision to deny access to the record.

[4] During mediation, the appellant explained, through his representative, that he was driving a transport truck which struck a sign that was overhanging on a township street. The appellant was charged with an offence for driving a truck with a load that was too high. The appellant seeks access to the requested record in order to assist him in his determination of whether or not the sign he hit was hanging too low over the street, which will aid in his defense of the charge against him. The appellant disputes that his request is frivolous or vexatious.

[5] The township confirmed that it was relying on section 4(1) of the *Act* to deny access to the record. The township explained that the appellant has made other requests regarding the sign, and has essentially been given access to all of the information which it has about this matter. The township also indicated that it only has three staff members and cannot continuously entertain requests for the same information.

[6] No further mediation was possible and the appeal was moved to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*. I sought and received representations from the township initially. Because of the manner in which I have decided this appeal, it was not necessary for me to seek the representations of the appellant.

[7] In this order, I do not uphold the township's decision that the request is frivolous and vexatious within the meaning of section 4(1) and I order it to issue the appellant a decision respecting access to any responsive records.

DISCUSSION:

[8] The sole issue to be determined in this appeal is whether the request is frivolous or vexatious under section 4(1)(b), which 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.

[9] 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.

[10] 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].

[11] An institution has the burden of proof to substantiate its decision to declare a request to be frivolous or vexatious [Order M-850]. The township's representations are brief and state as follows:

. . . the appellant has been provided with all relevant information about the sign in question. Through discussions, it has been ascertained that the appellant is looking for information about the height of the sign that he hit for an ongoing legal dispute with the sign owner. There is no record dealing with the height of the sign.

[The township] is a small rural municipality with a population of 7,000 and a skeleton staff. The ongoing issue continues to consume too much staff time.

[12] The township provided me with copies of an excerpt from its Zoning By-law and an excerpt from the minutes of the township's council minutes of March 6, 2013 which address the treatment of signs by the township generally, and the particular sign which is of interest to the appellant specifically.

[13] The township has not submitted any further evidence or submissions respecting its position that the appellant's request falls within the definition of "frivolous or vexatious" as contemplated by section 4(1).

Grounds for a frivolous or vexatious claim

Pattern of conduct that amounts to an abuse of the right of access

[14] The following factors may be relevant in determining whether a pattern of conduct amounts to an "abuse of the right of access":

- *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?
- *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?
- *Timing of the requests*
Is the timing of the requests connected to the occurrence of some other related event, such as court proceedings?

[Orders M-618, M-850 and MO-1782]

[15] The institution's conduct also may be a relevant consideration weighing against a "frivolous or vexatious" finding. However, misconduct on the part of the institution does not necessarily negate a "frivolous or vexatious" finding [Order MO-1782].

[16] Other factors, particular to the case under consideration, can also be relevant in deciding whether a pattern of conduct amounts to an abuse of the right of access [Order MO-1782].

[17] The focus should be on the cumulative nature and effect of a requester's behaviour. In many cases, ascertaining a requester's purpose requires the drawing of inferences from his or her behaviour because a requester seldom admits to a purpose other than access [Order MO-1782].

[18] I find that the township has not provided me with sufficient evidence to support a finding that the appellant's pattern of conduct "amounts to an abuse of the right of access." The township has not provided me with information relating to the number, complexity or timing of the requests the appellant has made. While it is apparent from its submissions that the township is frustrated with the appellant's requests for information, I find that this does not constitute a pattern of conduct that amounts to an abuse of the right of access. In the absence of detailed evidence describing the nature of the appellant's actions, I find that these actions do not amount to an abuse of the right of access under the frivolous and vexatious provisions in the *Act*.

Pattern of conduct that would interfere with the operations of the institution

[19] 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 [Order M-850].

[20] Interference is a relative concept that 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 [Order M-850].

[21] Again, the township has not provided me with sufficient evidence of the appellant's activities to support a finding that his conduct would interfere with the operations of the institution. I recognize that the township's staff are few in number and that the appellant's requests for information may be an intrusion into their daily responsibilities; however, I find that this does not establish a pattern of conduct that would interfere with the township's operations.

Bad faith

[22] Where a request is made in bad faith, the institution need not demonstrate a "pattern of conduct" [Order M-850].

[23] "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].

[24] The township has not provided me with any evidence which would substantiate a finding that the appellant's request was made in bad faith. Accordingly, I do not uphold its decision that the request is frivolous or vexatious on that basis.

Purpose other than to obtain access

[25] A request is made for a purpose other than to obtain access if the requester is motivated not by a desire to obtain access, but by some other objective [Order M-850].

[26] Previous orders have found that an intention by the requester to take issue with a decision made by an institution, or to take action against an institution, is not sufficient to support a finding that the request is "frivolous or vexatious" [Orders MO-1168-I and MO-2390].

[27] In order to qualify as a "purpose other than to obtain access", the requester would need to have an improper objective above and beyond a collateral intention to use the information in some legitimate manner [Order MO-1924].

[28] In the circumstances, I find that the appellant may use the information in the defense of his traffic ticket and whatever other actions he may contemplate against either the township or the owner of the sign which he struck. I do not accept the township's position that the appellant's motives for seeking access to the responsive records is in some way improper or for a purpose other than to obtain access. I find that the township has failed to establish that the request was made for a purpose other than to obtain access, such as some improper objective.

[29] In conclusion, I find that the township has not established that the request is frivolous or vexatious within the meaning of the *Act*, and I will order it to issue a decision letter respecting access to any responsive records.

ORDER:

1. I do not uphold the township's decision that the request is frivolous or vexatious under the *Act*.
2. I order the township to issue a decision to the appellant respecting access to the responsive records, treating 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: _____
Donald Hale
Adjudicator

_____ March 14, 2014