

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3278

Appeal MA14-500

Regional Municipality of Waterloo

January 13, 2016

Summary: The appellant made a request under the *Municipal Freedom of Information and Protection of Privacy Act* to the region for records about the housing co-operative where she resides. The region responded by declining to process the request on the basis that it was frivolous and vexatious under section 4(1)(b). This order finds that there is insufficient evidence to establish that the request was made in bad faith or for a purpose other than to obtain access. As a result of this finding, the region is ordered to provide an access decision to the appellant.

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

OVERVIEW:

[1] Under the authority of the *Housing Services Act*, the region removed the board of directors of a housing co-operative and replaced them with a new independent board.

[2] The appellant made the following request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Regional Municipality of Waterloo (the region):

Any and all records related to [above-referenced housing co-operative]
from 2001 to present.

Including any and all versions of electronic documents from document control authority.

[3] The region issued a decision letter to the appellant claiming that the request was frivolous or vexatious under section 4(1)(b) and Section 5.1 of *Ontario Regulation 823*.

[4] The appellant appealed the region's decision to this office and a mediator was assigned to the appeal. The mediator explored settlement with the parties but the parties were unable to reach a resolution.

[5] This file was then transferred to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry under the *Act*. During the inquiry stage, the parties provided voluminous representations to this office which included copies of court documents relating to an Application for Judicial Review and small claims court matters. The appellant was provided with a copy of the region's complete representations. The appellant requested that a copy of her representations not be shared with the region for confidentiality reasons.

[6] In this order, I find that there is insufficient evidence to establish that the request was made in bad faith or for a purpose other than to obtain access. As a result of this finding, the region is ordered to provide an access decision to the appellant.

DISCUSSION:

[7] The sole issue in this appeal is whether the appellant's request for access is frivolous and vexatious.

[8] The region takes the position that the appellant's request was made in bad faith and for a purpose other than to obtain access under section 4(1)(b) and *Regulation 823*, section 5.1(b)

[9] 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.

[10] Section 5.1(b) 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,

(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.

[11] 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.¹

[12] An institution has the burden of proof to substantiate its decision to declare a request to be frivolous or vexatious.²

Grounds for a frivolous or vexatious claim

Representations of the parties

[13] The region submits that the appellants' access request was made to "frustrate and overburden staff". The region advises that it reached the conclusion that the appellant's request was frivolous or vexatious after considering the following circumstances surrounding the request, including:

- the appellant already filed a request, prior to filing the request which gives rise to this appeal, for all records relating to herself and the housing co-operative and appealed the region's decision to withhold some of the records to this office;
- the appellant did not wait for her first request to be resolved by this office before filing the present request (second request) for similar records and then ignored the region's request to narrow the scope of responsive records;
- The second request seeks access to electronic records which significantly expands the scope of request. In addition, the request is "overly broad without any nexus to [the appellant] or any purpose other than to cause work for the Region";
- The region was advised by a former property manager that the appellant "seeks to make [its] staff do a lot of extra work".
- the appellant, along with a group of individuals commenced an Application for Judicial Review against the region, which was subsequently abandoned;

¹ Order M-850.

² Order M-850.

- the appellant also commenced a small claims court action against the region, which was subsequently summarily dismissed;³
- it has been alleged that the appellant has disrupted board meetings, was part of a group of individuals who entered the new board's office illegally and has sent correspondence to the region threatening further litigation.

[14] The region also submits that the appellant, along with a former board of director, devised an overall strategy to fight and frustrate the region and the new board of directors. As a result, the appellant and this other individual filed 3 access requests in addition to commencing 2 small claims court actions and an Application for Judicial Review in the course of two years.

[15] The region concludes its submissions with the following statement:

... there are reasonable grounds, based on both the requester's statements as well as inferences from her actions, that the request was made in bad faith and/or for a purpose other than to obtain access.

[16] The appellant submits that her two access requests seek to obtain 3 categories of records:

1. Records which contain information about herself (first request);
2. Records containing information about herself and housing co-operative (first request); and
3. Records which relate solely to the housing co-operative (second request).

[17] The appellant also states that she submitted the requests to seek access to "records about her home". The appellant states that she has a right to "... learn what matters are affecting her home, life and community". The appellant also concedes that the records may be useful in potential future claims against the region.

[18] The appellant submits that she has a number of concerns about the manner the former board was removed, in addition to having questions about the decisions the new board has made to date.

³ The region provided a copy of the court's endorsement with its representations, which states that the appellant's small claims court matter was dismissed under sections 12.02(1)(a) and (c) of the *Rules of the Small Claims Court*, Ontario Regulation 258/98 which provide:

The court may, on motion, strike out or amend all or part of any document that,
(a) discloses no reasonable cause of action or defence;
(c) is inflammatory, a waste of time, a nuisance or an abuse of the court's process.

Bad faith

[19] In my view, there is insufficient evidence before me to conclude that the request was made in bad faith.

[20] Where a request is made in bad faith, the institution need not demonstrate a "pattern of conduct".⁴ "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.⁵

[21] Based on the submissions of the parties, it is clear that the parties have been involved in litigation in recent years. The parties agree that prior to the region's removal of the former board, the appellant volunteered at the board's offices. There is also no dispute that the appellant disagrees with the manner in which the region handled the removal of the housing co-operative's board and has ongoing questions about the new board's management of her residence.

[22] However, taking into consideration the circumstances of this appeal along with the submissions of the parties, I find that there is insufficient evidence to conclude that the appellant filed her access request in bad faith. In my view, the region's evidence that the appellant has been vocal about future litigation against the region does not demonstrate bad faith. The appellant is entitled to exhaust and explore her legal rights in seeking legal remedies to oppose the region. Accordingly, evidence that the appellant has pursued past court actions against the region, possibly disrupted board meetings or continues to have questions about the leadership of the new board falls short of demonstrating that this specific access request made under the *Act* was made in bad faith and/or wilfully mislead or deceived the region. In arriving at this decision, I also took into consideration that the appellant is a resident and former volunteer of the housing co-operative in question. Having regard to above, I find that the region's evidence falls short of demonstrating that the appellant filed her request under the *Act* in bad faith.

⁴ Order M-850.

⁵ Order M-850.

Purpose other than to obtain access

[23] Based on the submissions of the region, it appears that one of its main concerns is that the appellant filed a request to create additional work for its staff. The region also raised a concern that the appellant filed the request in anticipation of further litigation against the region in the future.

[24] For the same reasons I found that there was insufficient evidence to conclude that the appellant filed her request in bad faith, I find that there is no reasonable basis to believe that the appellant made her access request for a 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.⁶ Where a request is made for a purpose other than to obtain access, the institution need not demonstrate a "pattern of conduct".⁷

[26] As stated above, the appellant is entitled to pursue legal remedies against the region. Previous orders have found that an intention by a requester to take issue with a decision made by an institution, or to take legal action against an institution, is not sufficient to support a finding that the request is "frivolous or vexatious".⁸

[27] In addition, in order to qualify as a "purpose other than to obtain access", the region would have to demonstrate there was an improper objective above and beyond a collateral intention to use the information in some legitimate manner.⁹ Accordingly, even if a connection between the appellant's access request could be directly linked with her plans to pursue future litigation against the region, there is nothing improper about the appellant's request to access records she may find helpful in a future litigation matter against the region.

[28] As a final matter, I note that the fee provisions in the *Act* establish a user-pay principle which is founded on the premise that requesters are expected to carry at least a portion of the cost of processing a request unless it is fair and equitable that they not do so. As a result, broad requests for information will typically result in higher fees which the requester is expected to pay. This may result in requesters working with institutions to narrow the scope of the request.

Summary

[29] I find that there is insufficient evidence to support a finding that the appellant's

⁶ Order M-850.

⁷ Order M-850.

⁸ Orders MO-1168-I and MO-2390.

⁹ Order MO-1924.

request under the *Act* was made in bad faith or for a purpose other than to obtain access.

[30] As a result of my finding, I order the region to provide an access decision in response to the appellant's freedom of information request.

ORDER:

I order the region to provide a decision to the appellant regarding access to the records responsive to her request, in accordance with the requirements of the *Act*, and using the date of this order as the date of the request.

Original Signed by: _____
Jennifer James
Adjudicator

_____ January 13, 2016