

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3674

Appeal MA17-169

Simcoe Muskoka Catholic District School Board

October 17, 2018

Summary: The board received a request, pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), for records relating to the appellant's complaint about the location of her children's school bus stop. The board issued a decision denying access to the records on the basis that the request was "frivolous or vexatious" as described in sections 4(1)(b) and 20.1 of the *Act* and section 5.1 of the Regulation 823 made under the *Act*. In this order, the adjudicator finds that the request at issue is not frivolous or vexatious, and orders the board to issue an access decision.

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

Orders and Investigation Reports Considered: Orders M-850, M-906, MO-1924, MO-2488, PO-3775 and MO-3621.

BACKGROUND:

[1] The Simcoe Muskoka Catholic District School Board (the board) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to the requester's complaint about the location of her children's school bus stop.

[2] The board issued a decision stating that it is refusing to proceed with the request on the grounds that it is frivolous or vexatious.

[3] The requester, now the appellant, appealed the board's decision to this office.

[4] During mediation, the board advised that it was not prepared to revise their decision.

[5] As no further mediation was possible, the appeal was moved to the adjudication stage, where an adjudicator conducts an inquiry under the *Act*.

[6] During the inquiry stage, I sought and received representations from the parties.¹ Pursuant to this office's *Code of Procedure* and *Practice Direction Number 7*, non-confidential copies of the representations were shared.

[7] In this order, I find that the request at issue is not frivolous or vexatious, and order the board to issue an access decision.

DISCUSSION:

[8] The sole issue to be determined in this appeal is whether the appellant's request for access is frivolous or vexatious.

[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 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

¹ The appellant's representations referenced a letter of February 23, 2017. This letter was submitted at the time of her appeal. Although the letter and its attachments have not been shared with the board, in my view, the submissions made in the letter are reiterated in the appellant's representations. As well, copies of the attachments are in the possession of the board or its counsel.

(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.²

[12] An institution has the burden of proof to substantiate its decision to declare a request to be frivolous or vexatious.³

Grounds for a frivolous or vexatious claim

[13] The board alleges that the appellant's request is frivolous or vexatious based on one specific ground set out in Regulation 823: the request was made in bad faith or for a purpose other than to obtain access.

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

[15] "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

[16] 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 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".⁷ Where a request is made for a

² Order M-850.

³ Order M-850.

⁴ Order M-850.

⁵ Order M-850.

⁶ Order M-850.

⁷ Orders MO-1168-I and MO-2390.

purpose other than to obtain access, the institution need not demonstrate a “pattern of conduct”.⁸

Representations

[17] The board submits the appellant’s request was made in bad faith or for a purpose other than to obtain access. It points out that it has spent the past 18 months attempting unsuccessfully to resolve the issue of her children’s bus stop change request. It states:

... Despite these efforts, the appellant has remained steadfast in her refusal to accept the Board’s decision not to relocate her children’s bus stop and has repeatedly sought to challenge the issue through numerous proceedings, including:

- an unsuccessful appeal of the decision to the Simcoe County Transportation Consortium;
- an unsuccessful appeal of the Transportation Consortium’s Review decision to the Board of Trustees;
- a complaint to the Ombudsman of Ontario who found no grounds to investigate;
- a complaint of Professional Misconduct brought against the Director of Education to the Ontario College of Teachers which was found to be without merit;
- accusations of conspiracy to conceal violations of the *Highway Traffic Act* which the Provincial Police declined to investigate;
- numerous letters of complaint to the Board of Trustees which were found to be without merit.

[18] The board also states:

As well, throughout the various complaint processes, the appellant was provided with information and additional clarification regarding her bus stop change request and the reasonable grounds for the Board’s decision, including:

- a decision letter from the Consortium to the appellant outlined the reasons for the denial of the stop change request;

⁸ Order M-850.

- a decision letter from the Consortium to the appellant outlined the reasons for the denial of her appeal
- a decision letter from the Associate Director of Education (Business and Finance) to the appellant upholding the appeal decision;
- information from the Coordinator of Trustee Services on the procedure for delegating an appeal to the Board of Trustees;
- notification that the Board of Trustees granted her leave to present a delegation on appeal during one of its regularly scheduled meetings;
- multiple reviews by the Board's Associate Director of Education (Business and Finance) of the appellant's case;
- a personal meeting between the Director of Education and the appellant to review her concerns wherein the Director of Education explained the rationale for the Consortium's decision;
- a follow-up letter from the Director of Education upholding the appeal decision;
- a letter from the Director of Education which reviewed and affirmed the procedures for delegating an appeal to the Board of Trustees;
- a further letter from the Director of Education dated September 26, 2016, in response to questions by the Appellant about a decision by Canada Post to change its delivery routes, and Consortium procedures regarding cul-de-sac streets;
- a letter from the Chair of the Board of Trustees dated November 10, 2016 (in response to the Appellant's letter of September 27, 2016) which outlined again that decisions involving bus routes are in the purview of the Consortium, not the Director of Education.

[19] The board submits that the appellant's conduct in all of the complaint processes highlights her efforts to act in bad faith and further supports that this access request is made for a purpose other than obtaining access. It also submits that the appellant's prior conduct amounts to a pattern of conduct that is a relevant factor in determining that the request is for a purpose other than to obtain access and rather to continue efforts against the board, Consortium staff, Trustees, and the Director of Education.

[20] In addition, the board submits that it has reasonable grounds, based on the appellant's prior conduct, to conclude that the request is not a bona fide request but rather another mechanism by which the appellant seeks to continue her dispute with it over the bus stop decision. Thus, the board submits the appellant's request is a conscious doing of wrong for a dishonest purpose such that the test of "bad faith" has been met.

[21] Furthermore, it submits that the appellant seeks information that she believes will prove the professional misconduct, unethical actions, personal agendas, bias, conspiracies, lies and incompetence that she has consistently alleged against it and Consortium staff, which have all been determined to be unfounded and unsubstantiated in various complaint processes.

[22] In response, the appellant submits that her access request was not made in bad faith. She submits that the board is not transparent, and has provided inaccurate, unclear and ambiguous information to her. She states:

From the outset, the board has refused to cooperate and claims that the main reason for denying my request to pull into my court and pick up my children in a safe traffic calmed area is because they, in FACT, do not do pick ups and drop offs in courts such as mine.

This was the first instant of being provided inaccurate information from the board. I have obtained my children's bus route and I have sat in another court listed on the bus route and watched my children's own bus pull in and out of the court. Something the BOARD said they DO NOT DO.

... I have a copy of the bus route and video footage to prove it.

[23] The appellant also submits that the board claims to have completed a full review on this matter and her complaint, but to date she has received no confirmation that this review has taken place at all.

[24] In addition, she submits that she has a right to examine how the board handled her concerns internally. She states:

At this point, it's not about changing the bus route because they will never do it. It's about having clarity and ensuring that [the] board has been accountable on this matter.

... I want access to the information I have requested so I can know concretely one way or the other what this board did or didn't do regarding my complaint. And if I felt there was wrongdoing, I would be taking it up to the board through their delegation option.

[25] Furthermore, the appellant submits that she has a right to freedom of speech and to advocate for the safety of her children. She states:

If I chose to publicize the information this FOI then I would have to burden any impact that results and I am perfectly well aware of that, however, the board does not have the right as a public body to withhold information from me that pertains to my complaint and how it was handled.

[26] In response to the appellant's representations, the board points out that the appellant has raised a novel argument with respect to whether the Consortium and/or the board conducted any review of the bus stop location. It submits that the question of whether the reviews occurred has previously never been at issue. The board further submits that this indicates that the true purpose of the appellant's request is to use it as a mechanism to further her dispute with it, which is inconsistent with the intent of the *Act*.

[27] In support of its statement that the appellant was aware of the reviews and reports related to her complaint and their implication, the board provided the following examples of communications between the appellant and senior board staff or Consortium staff. For example, the Operations Manager of the Consortium communicated to the appellant about his finding that the bus stop is a safe stop location in or around August 18, 2015. The Associate Director of Education (Business and Finance) also communicated to the appellant after he visited the stop site on September 14, 2015, and affirmed the Consortium's decision that the stop is safe.

[28] The board also submits that the appellant was well aware of the reviews as she undertook the appropriate appeal process. After the Operations Manager's finding, she appealed to the Associate Director (Education and Finance). After the Associate Director's finding, she appealed to the Director of Education, besides accusing the Associate Director of conducting the review with bias and a lack of impartiality. After the Director of Education's finding, she sought leave to delegate to the Board of Trustees. Thus, the board submits that the appellant's actions constitute acknowledgement and awareness that such reviews occurred since she could not seek to argue reviews that she did not know existed.

[29] In addition, the board submits that the appellant submitted her access request after she cancelled her delegation to the Board of Trustees as a way to continue her dispute with the board. It states:

Had the appellant submitted her [access] request prior to her delegation to the Board, she might have a more credible argument that the records were needed for a legitimate purpose, i.e. the prosecution of her

delegation to the Board of Trustees. However, the request only came after the Board of Trustees closed the matter permanently...

[30] The board submits that this clearly shows that the appellant intends to use the requested information to continue her dispute with the board as she inadvertently closed the door on her complaint. Thus, the board submits that the access request was made for a purpose other than to obtain access in keeping with the criteria in Order M-850.

Analysis and findings

[31] On my review of the circumstances of this appeal, I am not satisfied that the request was made in bad faith or for a purpose other than to obtain access.

[32] Applying the definition of bad faith set out above, in my opinion, the evidence provided by the board in support of bad faith on the part of the appellant does not establish that the appellant consciously exercised her access rights for a dishonest purpose or with a sinister motive based on furtive design or ill will. The appellant has a right to exhaust all of the complaint processes available, which are unrelated to access under the *Act*. In my view, the appellant wishes to exercise her right of access for the purpose of obtaining the responsive records.

[33] For a request to be made for a purpose other than to obtain access, it must be found that the requester is motivated not by a desire to obtain access, but by some other objective.⁹

[34] In Order MO-1924, former Senior Adjudicator John Higgins provided extensive comments on when a request may be found to have a purpose other than to obtain access. He states:

This argument necessitates a discussion of whether access requests may be for some collateral purpose over and above and abstract desire to obtain information. Clearly, such purposes are permissible. Access to information legislation exists to ensure government accountability and to facilitate democracy (see *Dagg v. Canada (Minister of Finance)*, 1997 CanLII 358 (SCC)). This could lead to request for information that would assist a journalist in writing an article or a student in writing an essay. The *Act* itself, by providing a right of access to one's own personal information (section 36(1)) and a right to request correction of inaccuracy is a legitimate purpose. Similarly, requesters may also seek information to assist them in a dispute with the institution, or to publicize what they

⁹ Order M-850.

consider to be inappropriate or problematic decisions or processes undertaken by institutions.

To find that these reasons for making a request are “a purpose other than to obtain access” would contradict the fundamental principles underlying the *Act*, stated in section 1, that “information should be available to the public” and that individuals should have a “right of access to information about themselves.” In order to qualify as a “purpose other than to obtain access,” in my view, the request would need to have an improper objective above and beyond a collateral intention to use the information in some legitimate manner.

[35] I adopt the approach set out by former Senior Adjudicator Higgins for the purpose of this appeal.

[36] I am prepared to accept, on the evidence before me, that the appellant has a legitimate and genuine interest in the responsive records. Unlike the appellant in Order M-850, there is no evidence that the appellant here filed her access request for the purposes of “having fun” or to test or examine the boundaries of the Act. I acknowledge the board’s argument that the appellant’s access request was filed for the purpose of continuing her dispute with it over the bus stop decision. Even if the appellant intends to use the records for a future proceeding or dispute, that is a permissible purpose for seeking the information, and not evidence of bad faith. The appellant states (and I accept) that her access request was made for the purpose of holding the board accountable. As such, I am not satisfied on reasonable grounds that the appellant filed the request for a purpose other than to obtain access to the requested records and I find that the threshold has not been established.

ORDER:

1. I do not uphold the board’s decision that the request is frivolous or vexatious.
2. I order the board to issue an access decision in accordance with the *Act*. For the purposes of section 19, 22 and 23 of the *Act*, the date of this order shall be deemed to be the date of the request.

Original Signed by: _____

Lan An
Adjudicator

October 17, 2018 _____