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

ORDER M-850

Appeal M_9600149

Town of Midland

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NATURE OF THE APPEAL:

The appellant made a request to the Town of Midland (the Town) under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to the names of all members of the Town Council, their secretaries, and all office staff including the Chief Administrative Officer. The appellant also requested the names of all employees of the Town who are related to past or present Council members. The appellant indicated in his request that he was not seeking any information other than the individuals' names, nor did he want access to the names of any individuals under the age of 16.

The Town informed the appellant that, in its opinion, the request was frivolous and vexatious as defined under section 5.1 of Ontario Regulation 823 made under the Act. Accordingly, there was no right of access under section 4(1)(b) of the Act and the appellant's request was denied. In its decision letter to the appellant, the Town stated:

> ... [W]e refuse to respond to your request as it is deemed to be frivolous and vexatious.
>
> It is evident that your request is part of a pattern of conduct that amounts to an abuse of the right of access as has been our past experience with you.
>
> In addition, given the nature of your request in view of recent past experience with you, we regard this request as made in bad faith and entirely for vexatious reasons.

The appellant appealed the Town's decision.

The relevant provisions of the Act and regulations read as follows:

Section 4(1) of the Act:

> 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,
>
> (a) the record or the part of the record falls within one of the exemptions under sections 6 to 15; or
>
> (b) the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

Section 5.1 of Regulation 823:

> 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.

PROCEDURE:

In January 1996, the Legislature amended section 4 of the Act, thereby providing institutions with a summary mechanism to deal with requests which the institution views as frivolous or vexatious. These legislative provisions confer a significant discretionary power on institutions which can have serious implications on the ability of a requester to obtain information under the Act. In my view, this power should not be exercised lightly.

It is important to ensure, in these circumstances, that an institution adequately substantiates its decision to declare a request to be frivolous or vexatious. In addition, because such a determination will often turn on an evaluation of the requester's activities or conduct, the requester must have the opportunity to understand and to address the case which an institution is advancing.

On receipt of the appeal, this office sent a combined Confirmation of Appeal/Notice of Inquiry to the Town. This notice stated, in part:

(a) The institution has the preliminary onus of establishing that the request in question is either frivolous and/or vexatious.

(b) The institution must indicate whether it is claiming that the request is frivolous, vexatious or both and must establish its case based on the definitions contained in the regulations.

(c) The rules of procedural fairness require that the appellant be able to adequately respond to the case put forward by the institution.

Section 42 of the Act places a burden on institutions to demonstrate the application of exemptions. It does not offer specific guidance on the burden of proof regarding decisions that a request is frivolous or vexatious. However, the general law is that the burden of proving an assertion falls on the party making the assertion. On this basis, I find that an institution invoking section 4(1)(b) of the Act has the burden of proof.

Once the Confirmation of Appeal/Notice of Inquiry has been sent to the institution and the institution's representations are received, a decision maker from this office has two options. If he or she feels that the institution has not provided evidence of a reasonable basis for concluding that the request is frivolous and/or vexatious, and therefore has not discharged its "preliminary" onus, then the institution will be ordered to provide the requester with a decision based on the

substantive provisions of the Act. If, on the other hand, the decision maker feels that the institution has provided some evidence of a reasonable basis for concluding that the request is frivolous and/or vexatious, then it is necessary to contact the appellant and provide him or her with an opportunity to respond to this evidence and to submit representations.

After both parties have provided their representations, the decision maker is then in a position to determine, on the balance of probabilities, whether the institution has discharged its ultimate burden of proving that there are reasonable grounds for concluding that the request is frivolous and/or vexatious. If this burden is discharged, then the appeal must be dismissed; if not, then the appellant is entitled to a substantive decision under the Act.

In this case, the Town's representations satisfied me that they had discharged their "preliminary" onus. Accordingly, the appellant was provided with information about the Town's case, and the opportunity to make representations, which he did.

DISCUSSION:

In my view, the Town has directly or indirectly referred to the criteria set out in both of sections 5.1(a) and (b) of Regulation 823 in its decision letter and its representations.

SECTION 5.1(a)

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

I have reviewed both standard and legal dictionaries to seek some assistance in the definition of the phrase "pattern of conduct".

The Concise Oxford Dictionary (8th ed.) offers the following definitions:

> **pattern:** a regular or logical form, order or arrangement of parts (behaviour pattern, the pattern of one's daily life)
>
> **conduct:** behaviour, esp. in its moral aspect. ... the action or manner of directing or managing (business, war, etc.)

Consolidating these two definitions, a "pattern of conduct" means a regular form of behaviour.

The same dictionary defines "regular" as:

> acting or done or recurring uniformly or calculably in time or manner; habitual, constant, orderly

No legal dictionary I consulted offered a definition of "pattern of conduct". However, Black's Law Dictionary (6th ed.) has a definition of "pattern of racketeering activity". This definition, which derives from several American cases, reads, in part, as follows:

> As used in the racketeering statute ..., a "pattern of racketeering activity" includes two or more related criminal acts that amount to, or threaten the likelihood of, continued criminal activity. ... A combination of factors, such as the number of unlawful acts, the time over which the acts were committed, the similarity of the acts, the number of victims, the number of perpetrators, and the character of the unlawful activity can be considered in determining whether a pattern existed.

Taking all of these definitions into consideration, in my view, a "pattern of conduct" requires recurring incidents of related or similar requests on the part of the requester (or with which the requester is connected in some material way). As the definitions of both "pattern of racketeering activity" and "regular" would suggest, the time over which the behaviour is committed is also a factor.

In determining what constitutes "an abuse of the right of access", I feel that the criteria established by Commissioner Tom Wright in Order M-618 are a valuable starting point. Commissioner Wright found that the appellant in that case (who is not the same person as the appellant in this case) was abusing processes established under the Act.

The Commissioner described in detail the factual basis for the finding that the appellant had engaged in a course of conduct which constituted an abuse of process. The Commissioner found that an excessive volume of requests and appeals, combined with four other factors, justified a conclusion that the appellant in that case had abused the access process. The four other factors were:

1. the varied nature and broad scope of the requests;

2. the appearance that they were submitted for their "nuisance" value;

3. increased requests and appeals following the initiation of court proceedings by the institution;

4. the requester's working in concert with another requester whose publicly stated aim is to harass government and to break or burden the system.

Another source of assistance for interpreting the words "abuse of the right of access" is the case law dealing with the term "abuse of process". In Foy v. Foy (No. 2) (1979), 26 O.R. (2d) 220, 102 D.L.R. (3d) 342 (C.A.), Howland C.J.O. makes the following comments on the Vexatious Proceedings Act (now incorporated into the Courts of Justice Act):

> The word "vexatious" has not been clearly defined. Under the Act the legal proceedings must be vexatious and must have been instituted without reasonable ground. In many of the reported decisions legal proceedings have been held to be vexatious because they were instituted without any reasonable ground. As a result the proceedings were found to constitute an abuse of the process of the Court. An example of such proceedings is the bringing of one or more actions to determine an issue which has already been determined by a Court of competent jurisdiction.

The court appears to be saying that proceedings instituted without any reasonable grounds are an abuse of process. In the context of the Act, this might apply to a request for information of a trivial or contemptibility unimportant nature.

In a similar vein, the Court in Donmor Industries Ltd. v. Kremlin Canada Inc. (1991), 6 O.R. (3d) 501 (Ont. Gen. Div.) struck out a statement of claim because it involved re-litigating matters that had been the subject of a previous, unsuccessful action between the same parties. The Court decided to rely on "abuse of process" rather than the doctrine of res judicata, stating:

> I think the stronger position is to hold that these plaintiffs are abusing the court process in attempting to put forward again issues which were either raised in the first action or which were known to them and left unraised at the time of the first action. To allow them to do so is to permit a duplication of proceedings with the inherent danger of conflicting findings of fact on identical issues.

From this case, and Foy v. Foy (No. 2), above, it appears that another way of abusing the process of the court is to bring one or more actions to determine matters previously dealt with. Based on my review of the case law in this area, a number of duplicative and repetitive actions is the most common basis for courts to find that their processes have been abused.
The courts have also looked at the motives of a litigant in determining whether an action represents an abuse of process. In Foy v. Foy (1978), 2 O.R. (2d) 747, 88 D.L.R. (3d) 761 (CA) (an earlier action between the parties in Foy v. Foy (No. 2) cited above), the Court exercised its inherent jurisdiction to prevent abuse of its process by dismissing an action which it found not to be brought for a legitimate purpose, but for the oblique purpose of harassing the defendant.

Similar considerations are referred to in Unterreiner v. Wilson et al (1982), 40 O. R. (2d) 197 (H.C.J.) in a discussion of the tort of abuse of process. Gray J. quotes Fleming on Torts, as follows:

> Unlike malicious prosecution, the gist of this tort lies not in the wrongful procurement of legal process or the wrongful launching of criminal proceedings, but in the misuse of process, no matter how properly obtained, for any purpose other than that which it was designed to serve. ... It involves the notion that the proceedings were "merely a stocking-horse to coerce the defendant in some way entirely outside the ambit of the legal claim upon which the court is asked to adjudicate."

Although both of these latter cases use wording similar to that found in section 5.1(b), in my view, the requester's motive or purpose may also be a relevant factor under section 5.1(a) in characterizing a "pattern of conduct that amounts to an abuse of the right of access".

To summarize, the abuse of process cases provide several examples of the meaning of "abuse" in the legal context, including:

- proceedings instituted without any reasonable ground;

- proceedings whose purpose is not legitimate, but is rather designed to harass, or to accomplish some other objective unrelated to the process being used;
- situations where a process is used more than once, for the purpose of revisiting an issue which has been previously addressed.

In my view, although this is not intended to be an exhaustive list, these are examples of the type of conduct which would amount to "an abuse of the right of access" for the purposes of section 5.1(a).

In its representations, the Town states that the appellant has:

> For years now, ... followed a pattern of making a multitude of requests resulting in [the appellant] being a tremendous nuisance and burden to the responding institution.

The Town has provided me with information about requests submitted to it by the appellant since 1991, some of which were the subject of appeals to this agency. Included are examples of four requests received within a one-month time frame of the request which is the subject of this appeal. These requests seem to be related to Order M-664, which appears to have generated some controversy.

In determining whether the Town's decision was made on reasonable grounds, in my view, I may properly take into account the large volume of appeals which the appellant has filed with this office, involving the Town and other institutions. Appeals involving detailed requests such as the one made to the Town are not unusual for this appellant. Due in large measure to his frequent use of both the request and appeal processes under the Act and the provincial Freedom of Information and Protection of Privacy Act, this office designed a policy-based strategy to manage "bulk users" of the two statutes. The policy was implemented in order to protect access rights, make the best use of limited resources, and maintain an acceptable level of service to all appellants. The appellant fell under the terms of this internal policy from 1991 to 1993.

Since 1991, the appellant has filed a total of 1,131 appeals with this office. We do not gather statistics relating to requests on an individual requester basis. However, using the statistics included in our 1995 Annual Report as a very rough approximation, somewhere in the range of approximately 5% of requests lead to appeals. In my view, it is reasonable to conclude that the appellant had a high level of request activity over this same 5-plus year period.

The common denominator of the majority of these requests is that they either deal with extremely detailed subject matters, or identify a large number of individuals or locations which the appellant believes should be examined to locate responsive records. In addition, the appellant's requests are often very broad in nature and ask for all information about a particular topic.

As an example, the Town referred me to a request made to the Ministry of Transportation (the Ministry), part of which was subsequently transferred to the Town. The request letter has two parts. The first one asks for information regarding subsidies granted by the Ministry to 14 different townships over an 11-year time period. The second part requests access to memoranda,

council minutes, maps, surveys, consultant reports, correspondence (the appellant adds "this list is not all inclusive") regarding 15 different topics for 50 different municipalities, including the Town.

The appellant's requests also often interrelate and closely resemble each other. A clear example of this is the similarity between his request in this appeal and the one which gave rise to Order M-664, as well as the four requests received within a one-month time period of this request, which appear to relate to Order M-664.

The appellant maintains that the quantity of his requests and appeals to both provincial and municipal institutions "has decreased steadily". The appellant points out that in 1996, he has filed approximately 30 requests and 5-10 appeals. This is down, he states, "from a high of several hundred requests ... and hundreds of appeals in 1992."

In my view, despite the decreasing frequency of requests from this appellant, there are reasonable grounds for the Town to have concluded that the appellant has demonstrated a pattern of conduct. The recurring incidents of related or similar behaviour on the part of the appellant are the regular submission of sweeping requests for information of an extremely detailed nature, as well as the regular submission of interrelated requests which closely resemble each other.

The question remains whether the particular request in this appeal constitutes part of one of those patterns. The request was for the names of all members of the Town Council, their secretaries, and all office staff including the Chief Administrative Officer. The appellant also requested the names of all employees of the Town who are related to past or present Council members. In my view, this request fits within the second pattern I have outlined above.

As to whether this pattern of conduct amounts to an abuse of the right of access, the appellant states:

> It is patently unreasonable to draw a conclusion from requests over many years, many if not all unconnected to each other and show neither a pattern or an abuse.

According to the appellant, if any pattern could be drawn it is that "the substance of the requests has grown more reasonable and more relevant." The appellant states that nothing in his present or past requests indicate a frivolous or vexatious motive: "I would be willing to provide specific explanations for each request previously made if anyone wishes to request it."

The appellant also claims that his requests tend to relate to either his own personal information or information concerning public issues. The appellant states that the request which is the subject of the present appeal is also for records in which the public has shown a definite interest. The appellant referred me to a number of previous orders of this office, where he was a party, which he feels have furthered the interpretation of both the provincial and municipal Acts. Of these, the appellant identified 21 orders in which the institution's decision was either not upheld or only partially upheld on appeal. The appellant maintains that these orders demonstrate that his appeals have involved significant issues and records, and that his success in those appeals is an indication that he has not abused the right of access.

The Town claims that the subject matter of the request in this case was also the subject of Order M-664. In Order M-664, the request was for access to "the names of all temporary and part-time employees, including those hired for summer jobs, for the periods January 1, 1993 to January 1, 1994 and January 1, 1994 to November 18, 1994." According to the Town, the appellant was quoted as stating that he really did not want the names. It is important to note that the appellant withdrew his request after Order M-664 was issued.

As an example of the "vexatious" nature of the appellant's requests, the Town cites a request for information about the property of a Town Councillor. The Town states that the time frame of this request coincides with the appellant's complaint to the College of Nurses which involved the Councillor who is a member of that profession.

In my view, taking the evidence as a whole, the Town has provided me with sufficient evidence to establish that there are reasonable grounds for the Town to consider the appellant's request as part of a pattern of conduct that amounts to an abuse of the right of access. Therefore, I uphold the decision of the Town to refuse to process the appellant's request.

In reaching my decision, I find that the pattern of conduct established by this appellant involves requests which extend beyond this particular institution. Therefore, in order to enable other institutions to recognize new requests which fit this appellant's pattern of conduct, I feel it is necessary for me to identify him in this order. The appellant's name is David Rabinovitch, and his pattern of conduct applies to requests made in his personal capacity and as a representative of other requesters.

Although it is not necessary for me to comment on the other phrase which appears in section 5.1(a) in order to dispose of this appeal, I believe such a discussion would assist institutions to better understand these legislative amendments.

Interfere with the Operations of the Institution

The Concise Oxford Dictionary (8th ed.) offers the following definitions:

> **interfere:** meddle, obstruct a process etc.; be a hindrance, get in the way
>
> **operation:** the action or process or method of working; ... the scope or range of effectiveness of a thing's activity

Therefore, in my view, 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.

It is not possible to establish a finite set of criteria that will demonstrate "interference with the operations" as used in section 5.1(a). It is important to bear in mind that interference is a relative concept which 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.

SECTION 5.1(b)

Bad Faith

Section 5.1(b) provides that a request meets the definition of "frivolous" or "vexatious" if it is made in bad faith; there are no further requirements to find the request "frivolous" or "vexatious" where bad faith has been established. No "pattern of conduct" is required, although such a pattern might be relevant to the question of whether a particular request was, in fact, made in bad faith.

Black's Law Dictionary (6th ed.) offers the following definition of "bad faith":

> 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 fulfill 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.** [emphasis added]

In my view, the highlighted words from this definition are most useful in interpreting this section.

It is the appellant's position that there is "nothing wrong with testing or examining the boundaries of the Act or having fun in filing requests." He goes on to say that none of this "diminishes my reasons for seeking the records I do". I disagree.

The Town has established that the appellant submitted detailed requests on a number of occasions for purposes other than the one intended, such as to harass an individual who was the subject of another action brought by the appellant in another forum. The subject matter of this request and the subject matter of the appeal which resulted in Order M-664, appear to be very similar, the present request being somewhat broader than the request in Order M-664. The appellant withdrew his request in Order M-664 after the Town Council and a number of its citizens and employees raised strenuous objections to the disclosure of their names to the appellant. The issue was reported in the local media and was the subject of a number of editorials and letters to the editor. In my view, the appellant must reasonably have anticipated that a second request for very similar information would have the same effect.

Accordingly, I am also satisfied that there were reasonable grounds for the Town to conclude that this particular request was made in bad faith.

For a purpose other than to obtain access

Like "bad faith", 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". Again, no "pattern of conduct" is required although, as stated previously, such a pattern could be a relevant factor in a determination of whether the request was "for a purpose other than to obtain access".

In my view, this is a phrase whose meaning is relatively straightforward. There are no terms of art, nor terms which have particular meaning in a legal context. If the requester 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 "frivolous" or "vexatious".

One of the press clippings which the Town included with its representations quotes the appellant as stating that he had no interest in obtaining the records which were the subject of Order M-664. As stated earlier, that request and appeal involved records very similar to the information described in the request at issue in this appeal. The appellant states that "... the public has shown a definite interest in" the type of record he has requested. However, he has not provided any evidence of a specific interest on the part of the public, nor is one apparent to me.

As stated earlier, the appellant feels that "having fun in filing requests" is an appropriate use of the Act. In my view, "having fun" is clearly a purpose "other than to obtain access", and precisely one of the reasons why the Legislature felt it necessary to introduce section 5.1(b).

Accordingly, I find that there were reasonable grounds for the Town to conclude that the request was made for a purpose other than to obtain access.

CONCLUSION:

In summary, the request that is the subject of this appeal meets the requirements of both sections 5.1(a) and (b) of Regulation 823. Therefore, I uphold the Town's decision that the appellant's request was frivolous and/or vexatious. As such, pursuant to section 4(1)(b) of the Act, the Town is not required to process the appellant's request.

The reason for identifying the appellant in this order is to enable other institutions to recognize whether a particular future request made by the appellant fits this established pattern of conduct. To be clear, I have **not** found that all of the appellant's requests and appeals comprise part of the pattern of conduct described above. The appellant has submitted requests and launched appeals which do **not** amount to an abuse of the right of access, and which would not, in my view, fall within the scope of sections 5.1(a) or (b) of Regulation 823. For example, a number of orders referred to by the appellant relate to requests for records containing his own personal information, or made by him as agent for other individuals seeking their own personal information. In my view, some of these types of requests would not necessarily form part of the pattern of conduct I have identified in my discussion of section 5.1(a).

It is important to state that, having received "frivolous or vexatious" requests from a particular individual in the past is not in itself sufficient to conclude that a new request is automatically "frivolous or vexatious". Each request must be considered on its own merits, as measured against the relevant statutory criteria.

ORDER:

I uphold the Town's decision.

Original signed by: October 24, 1996
Tom Mitchinson
Assistant Commissioner