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

ORDER M-906

Appeal M_9600293

City of Elliot Lake

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NATURE OF THE APPEAL:

The appellant submitted a 56-part request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) to the City of Elliot Lake (the City). The request pertained to several land transactions involving the City.

The City responded by letter, and indicated that the "head" (in this case, the City Council) had decided to refuse to grant access. The City explained that this was done because, in Council's opinion:

> ... the request is frivolous and vexatious given [the appellant's] pattern of conduct, specifically, unsuccessful appeals under the Rental Housing Protection Act, the submission of complaints to and subsequent investigation by the Ministry of Municipal Affairs and Housing, the submission of complaints to and subsequent investigation by local Police, a recent unsuccessful court action to quash certain resolutions and by-laws of the Municipality, and for other reasons.

The appellant wrote to this office to appeal the City's decision.

After receiving the appeal, this office sent a Confirmation of Appeal/Notice of Inquiry to the City. This notice indicated that the City has the preliminary onus of establishing that the request in question is either frivolous and/or vexatious, and that the rules of procedural fairness require that the appellant be able to adequately respond to the case put forward by the institution.

The City submitted representations. I reviewed the City's representations, including a supplementary submission relating to the police investigation, to determine whether procedural fairness would require that the appellant be given an opportunity to provide representations. In view of my assessment of the City's claim that the request is frivolous or vexatious, as reflected in this order, I decided that it would not be necessary to invite the appellant to submit representations.

DISCUSSION:

FRIVOLOUS OR VEXATIOUS REQUEST

Several provisions of the Act and of Regulation 823, made under the Act (the Regulation), are relevant to this issue. The provisions of the Act relating to "frivolous or vexatious" requests were added by the Savings and Restructuring Act, 1996. At the same time, the Regulation was amended to add sections 5.1(a) and (b), reproduced below.

Section 4(1)(b) of the Act specifies that every person has a right of access to a record or part of a record in the custody or under the control of an institution unless the head of an institution is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

Sections 20.1(1)(a) and (b) of the Act indicate that a head who refuses to provide access to a record because the request is frivolous or vexatious, must state this position in his or her decision letter and provide reasons to support the opinion.

Sections 5.1(a) and (b) of the Regulation provide some guidelines for defining "frivolous or vexatious". They indicate that a head shall conclude that a request for a record or personal information 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.

In Order M-850, in his preliminary discussion of these provisions, former Assistant Commissioner Tom Mitchinson made the following observations, with which I agree:

> 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.

On appeal, the ultimate burden of demonstrating that there are reasonable grounds for concluding that the request was frivolous or vexatious rests with the institution, in this case the City (Orders M-850 and M-860).

The City's representations refer to three grounds, which derive from the language of sections 5.1(a) and (b) of the Regulation, as the basis for its view that the request is frivolous or vexatious. The thrust of these submissions may be summarized as follows:

(1) the request is part of a pattern of conduct that amounts to an abuse of the right of access (section 5.1(a));

(2) the processing of the request to date and the time required to clarify the request and locate the documents would interfere with the operations of the institution (section 5.1(a));

(3) the request was not made for the purpose of obtaining access, but for the purpose of finding documentation to reinforce the appellant's course of action against the City (section 5.1(b)).

I will deal with each of these grounds separately.

Pattern of Conduct that Amounts to an Abuse of the Right of Access

In this regard, the City's representations refer to a number of activities undertaken by the appellant as a result of his belief that the City behaved improperly in relation to a series of land

transactions. These activities are essentially the ones outlined in the quotation from the City's response to the request which appears at the beginning of this order -- i.e. making complaints to the Ministry of Municipal Affairs and Housing and the police, and undertaking litigation. In a supplementary submission, the City indicates that the police will not be proceeding with any prosecutions as a result of their investigation of the land transactions, and encloses a press release by the police confirming this to be the case.

In addition, the City points to two previous requests that the appellant submitted under the Act.

In Order M-850, former Assistant Commissioner Mitchinson defined the term "pattern of conduct". He stated that, for such a pattern to exist, one must find "recurring incidents of related or similar **requests** on the part of the requester (or with which the requester is connected in some material way)" [emphasis added]. I agree with this approach and adopt it for the purposes of this order.

In my view, the appellant's complaints and litigation are not part of a "pattern of conduct" as defined in Order M-850 because they are unrelated to access under the Act, and are not "recurring incidents of related or similar requests". They may be relevant to whether a request is submitted "for a purpose other than to obtain access" under section 5.1(b) of the Regulation and I will refer to them again in that context, below.

In this case, the evidence before me discloses only two previous requests by the appellant. These requests relate to some of the land transactions referred to in the present request. However, in my view, it is not the intent of the "frivolous or vexatious" provisions of the Act and Regulation to prohibit an individual from submitting several requests about a matter. Moreover, it is apparent from the materials submitted to me that the appellant had legitimate business reasons to request information about these transactions. In the circumstances of this appeal, I am not persuaded that the existence of two previous requests provides a reasonable basis for concluding that the request is part of a "pattern of conduct amounting to an abuse of the right of access" as interpreted in Order M-850.

Nor, in my view, can the inclusion of 56 items in the present request letter support a finding that there have been recurring requests of a similar nature, since there is little overlap or repetition amongst these items.

Therefore, I find that a reasonable basis for concluding that the request is part of a pattern of conduct that amounts to an abuse of the right of access has not been established.

Pattern of Conduct that would Interfere with the Operations of the Institution

In Order M-850, former Assistant Commissioner Mitchinson took the approach that a request which would interfere with the operations of an institution, as mentioned in section 5.1(b), would have to be part of a "pattern of conduct".

He stated:

> ... 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.

The City submits that it is a small institution with limited staff available to identify the documents requested. The City indicates that it has calculated search time for the present request at 27.99 hours, and that 10.5 hours have been spent clarifying the request and estimating the search time. The City also states that "given the fees that can be charged, it is not possible for this institution to carry out this request without interfering with the other duties of the staff". The City also refers to the possibility of further requests by the appellant once he has reviewed any documents which may be released.

I have found, above, that the appellant's complaints and litigation are not part of a "pattern of conduct" because they are not part of a pattern of recurring requests. I also found that the existence of two previous requests is not sufficient to amount to a "pattern of conduct" in the circumstances of this case.

In my view, these findings are equally applicable in the context of whether the request is part of a "pattern of conduct which would interfere with the operations of the institution." Since a pattern of conduct is a requirement under section 5.1(a), I could dispose of the matter on this basis. However, given the approach which the City has taken in responding to this request, I believe it would be appropriate to comment further on the issue of interference with operations as a basis for finding a request to be frivolous or vexatious.

In particular, I would like to refer to the alternative measures available to relieve an institution faced with a request which may, on the surface, appear likely to interfere with its operations. Specifically, these are the fee provisions in section 45 of the Act and the related provisions in the Regulation, and the interim access decision and fee estimate scheme described in Order 81. In some circumstances, a time extension under section 20(1) may also provide relief.

Although the City claims that charging fees under section 45 would not prevent interference with its operations, the fee provisions are intended to support a "user pay" principle, and in my view, fees could be used to greatly diminish any possible interference. Given that the Regulation provides a rate of $30 per hour for search time, the City would be able to achieve significant cost recovery, assuming that its estimate of search time is accurate. Moreover, in this situation, it would be open to the City to avail itself of the interim access decision and fee estimate scheme outlined in Order 81 (intended for situations where it would be "unduly expensive" to produce the records for an access decision), thus allowing the City to postpone the majority of the work required to respond to the request until it has received a deposit.

The City could also consider requesting a time extension under section 20(1)(a) of the Act, to give it more time to make a final access decision. Section 20(1)(a) states:

> A head may extend the time limit set out in section 19 for a period of time that is reasonable in the circumstances, if,
>
> > the request is for a large number of records or necessitates a search through a large number of records and meeting the time limit would unreasonably interfere with the operations of the institution.

The issue of whether the appellant's request letter sets out one request, or more than one, was not before me in this appeal and I am not in a position to make a finding in that regard. However, this can have an effect on time extension claims, since previous orders (e.g. Orders 27, 93 and P_1287) indicate that numerous requests, even in the same letter, cannot be "pooled" for this purpose. In Order P-1267, which dealt with the question of request fees, former Inquiry Officer Holly Big Canoe found that 51 requests set out in three separate letters actually comprised four requests, based on linkages in subject matter. A similar approach could likely be employed here for the purpose of assessing a time extension claim, should the City wish to make one.

In addition, the City should bear in mind that, if it wishes to utilize the fee estimate and interim access decision scheme set out in Order 81, a time extension may only be claimed once the appellant pays any deposit which may be required. In that situation, it is the payment of the deposit which triggers the City's obligation to complete its processing of the request, which may in turn necessitate a time extension.

As an alternative to a time extension, the City may wish to approach the appellant to prioritize the requested items and agree on a schedule for responding. I understand that the appellant has previously made a proposal in this regard, which was not accepted by the City.

Returning to the question of interference with operations, I am of the view that, where the other mechanisms I have just referred to would provide meaningful relief, an institution should not be permitted to rely on such interference as the basis for a claim that a request is frivolous or vexatious. I believe this is the case here.

In summary, in order to rely on this ground for finding a request "frivolous or vexatious", both a pattern of conduct and interference with operations must be established. Above, I concluded that a pattern of conduct had not been established. I have also concluded that the City cannot rely on "interference with operations" in the circumstances. Therefore, I find that the City has not established a reasonable basis for concluding that the request is part of a pattern of conduct which would interfere with its operations.

Request for a Purpose other than to Obtain Access

In its submissions addressing this aspect of the matter, the City indicates (as noted above) that the appellant seeks access to assist him in taking action against it with respect to a number of land transactions. In the City's view, this means that the request was "for a purpose other than to

obtain access". To support its position, the City relies on the appellant's complaints and litigation against it, as outlined above under "Pattern of Conduct that Amounts to an Abuse of the Right of Access". The City also refers to media reports that the appellant intends to "fight City Hall".

In my view, the fact that once access is obtained, a requester intends to use the document for a particular purpose, for example, to substantiate a complaint against an institution, does not mean that the request is "for a purpose other than to obtain access" within the meaning of section 5.1(b) of the Regulation.

As I noted in Order M-860:

> ... if the appellant's purpose in making requests under the Act is to obtain information to assist him in subsequently filing a complaint against members of the Police, in my view this does not indicate that the request was for a purpose other than to obtain access; rather, the purpose would be to obtain access **and** use the information in connection with a complaint.

Similarly, in this case, I am satisfied that the request was made for the purpose of obtaining access. This purpose is not contradicted by the possibility that the appellant may also intend to use the documents in his dispute with the City once access is granted.

Moreover, in my view, to find that a request is "for a purpose other than to obtain access" and thus "frivolous or vexatious" on the basis that the requester may use the information to oppose actions taken by an institution would be completely contrary to the spirit of the Act, which exists in part as an accountability mechanism in relation to government organizations.
The City has not explicitly argued the second ground for finding a request to be "frivolous or vexatious" under section 5.1(b), namely, that the request was made in "bad faith", nor in my view would such a conclusion be warranted on the basis of the evidence before me.

Conclusion

In the result, the criteria in sections 5.1(a) and (b) of the Regulation have not been satisfied and in my view, a reasonable basis for concluding that the request was "frivolous or vexatious" has not been established.

ORDER:

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

2. I order the City to make an access decision under the Act in accordance with sections 19, 21 and 22 of the Act, treating the date of this order as the date of the request, and to send a copy of this decision to my attention, c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.

3. The provisions of this order do not preclude the City from charging fees under section 45, nor from issuing an interim access decision and fee estimate as provided for in Order 81,

nor from requesting a time extension under section 20, if the circumstances warrant, nor do they preclude the appellant from appealing any fee, fee estimate or time extension which the City may claim.

Original signed by: March 7, 1997
John Higgins
Inquiry Officer