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

ORDER P-1434

Appeal P_9700084

Ministry of Transportation

80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

BACKGROUND:

The appellant resides in an area which may be affected by a proposed highway project. He is also one of the directors of a citizens group formed to deal with this issue. Between June 1994 and February 1997 the appellant submitted 74 requests to the Ministry of Transportation (the Ministry) under the Freedom of Information and Protection of Privacy Act (the Act). The requests were for information relating to the highway project.

The Ministry responded to many of these requests and granted substantial access to the appellant. However, with respect to 25 requests submitted between November 23, 1996 and February 27, 1997, the Ministry has taken the position that the requests are frivolous or vexatious, and refused access to the requested information on that basis. Previously, the Ministry had charged fees for some of these requests, which the appellant paid. These fees have now been refunded.

NATURE OF THE APPEAL:

The appellant appealed the Ministry's decision that the 25 requests are frivolous or vexatious.

After receiving the appeal, this office sent a Confirmation of Appeal/Notice of Inquiry to the Ministry. This notice indicated that the Ministry 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 Ministry.

In this case, once the representations of the Ministry were received, this office provided the appellant with information about the Ministry's case, and the opportunity to make representations. After receiving this information, the appellant submitted representations to this office. I have considered all materials submitted by the parties in reaching my decision in this appeal.

DISCUSSION:

FRIVOLOUS OR VEXATIOUS REQUESTS

Several provisions of the Act and Regulation are relevant to the issue of whether the request is frivolous or vexatious. The provisions of the Act relating to "frivolous or vexatious" requests were added by the Savings and Restructuring Act, 1996. Regulation 460 (the Regulation), made under the Act, was amended shortly thereafter to add the provision reproduced below.

Section 10(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 27.1(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 the terms frivolous and vexatious. They prescribe 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 Ministry (Orders M-850 and M-860).

Pattern of Conduct and Abuse of the Right of Access

As noted previously, the appellant submitted 74 requests between June 1994 and February 1997. This includes the 25 requests which are at issue in this appeal, made between November 23, 1996 and February 27, 1997. All of the requests pertain to various aspects of the highway project. Many of them are very broad in nature, while others focus on very specific aspects of the project.

In Order M-850, former Assistant Commissioner Tom Mitchinson commented on the meaning of "pattern of conduct" in section 5.1(a) of the Regulation, as follows:

> [I]n 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).

The meaning of "abuse of the right of access" in section 5.1(a) was also discussed by former Assistant Commissioner Mitchinson in Order M-850. He commented on this as follows:

> 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 [decided

before the "frivolous or vexatious" amendments were added to the Act by the Savings and Restructuring Act, 1996] 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".
...

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).

The appellant submits that the requests are not repetitious, and that his right of access to the requested information should not be curtailed simply because the requests focus on one project. He indicates that the broad scope of the requests was necessary in order to ensure that all relevant and responsive information is identified as such.

I have reviewed the subject matters and dates of the 74 requests submitted between June 1994 and February 1997. I find that there have been recurring incidents of related or similar requests on the part of the appellant, and a "pattern of conduct" has therefore been established.

I must now decide whether this pattern of conduct "amounts to an abuse of the right of access". Although the number of requests which exactly repeat the wording of an earlier request is small, it is clear that the requests all focus on the same basic subject or theme, and I am satisfied that there is a significant overlap between the subjects of many of them. Bearing this in mind, I have concluded that the number of requests submitted between June 1994 and February 1997 is excessive.

Moreover, in my view, the 25 requests submitted between November 23, 1996 and February 27, 1997 which are the subject of this appeal (which are the only requests the Ministry has deemed to be frivolous or vexatious) represent an escalation both in number of requests submitted by the appellant during a particular period of time, and in complexity. In the circumstances of this case, this escalation tends to support the Ministry's view that this particular group of requests is frivolous or vexatious.

In addition, I note that many of the requests are of a broad nature, while others are highly detailed and varied in subject, although all of them relate to the highway project. In my view, this is the type of situation referred to in the "varied nature and broad scope" factor identified by former Assistant Commissioner Mitchinson, as mentioned above.

Because of the recurring subject or theme of these requests and the explicitly repetitious nature of some of them, I have also concluded that the access process has been used more than once, in some cases to revisit issues previously addressed.

The appellant has referred me to Order M-906, in which I found that a 56-part request to the City of Elliot Lake, relating to a series of land transactions, was not frivolous or vexatious. On the surface, the two cases appear similar, since the appellants in both had quite understandable reasons for seeking information about the subjects of the requests. However, in Order M-906, no pattern of conduct was demonstrated. Here, I have found that one has been established.

Moreover, in Order M-906, I was not persuaded that the facts demonstrated an appropriate basis for concluding that the requests were frivolous or vexatious, bearing in mind the comment in Order M-850 that this power should not be exercised "lightly". In this case, the evidence, particularly in relation to the volume of requests, the combination of very broad and very detailed requests and the recurring and/or continuing pattern of the requests, is in my view sufficient to demonstrate that the requests represent an abuse of the access process within the meaning of section 5.1(a) of the Regulation.

In the circumstances of this appeal, therefore, I find that the Ministry has demonstrated that the appellant's pattern of conduct, which includes the requests at issue in this appeal, is an abuse of the right of access. For this reason, I find that the requests at issue in this appeal are frivolous or vexatious.

Before leaving the matter, I would like to mention several factors which I have **not** relied on in deciding this case. As part of its submissions on "abuse of the right of access" under section 5.1(a) of the Regulation, the Ministry alleges that the appellant is making these requests for their nuisance value. In a related submission, the Ministry alleges that the requests are in bad faith or for a purpose other than to obtain access under section 5.1(b) of the Regulation. These allegations are disputed by the appellant. I have not relied on these allegations as a basis for concluding that the requests are frivolous or vexatious.

The Ministry has also argued that the appellant's pattern of conduct would interfere with the Ministry's operations under section 5.1(a) of the Regulation. The appellant counters this by reference to Order M-906, in which I found that this ground could not be relied upon if fees and time extensions could provide meaningful relief. In this case, the appellant states that he has paid fees when requested, and cites instances where he has not insisted on strict adherence to the response time frames set out in the Act. Again, I have not relied on alleged interference with the Ministry's operations as a basis for my conclusion that the requests are frivolous or vexatious.

I would like to emphasize that my finding in this order only relates to the 25 requests which are at issue. As former Assistant Commissioner Mitchinson observed in Order M-850 (as mentioned above), deciding that a request is frivolous or vexatious can have serious implications on the ability of a requester to obtain information under the Act, and this power should not be exercised lightly. My finding in this case is an indication that the appellant's recent use of the Act, as represented by these 25 requests, is excessive, but the appellant's representations indicate that he has legitimate reasons to seek access to information about the highway project. Therefore, if the appellant wishes to make further access requests to the Ministry on this subject, I would encourage the appellant and the Ministry to discuss possible ways of providing the appellant with the information he seeks (subject to any exemptions which may be applied), in ways that will not result in abuses of the access process.

ORDER:

I uphold the Ministry's decision.

Original signed by: July 30, 1997
John Higgins
Inquiry Officer